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RESPONSIBLE GOVERNMENT IN THE DOMINIONS

BY

ARTHUR BERRIEDALE KEITH

M.A. (EDIN.); D.C.L. (OXON.)

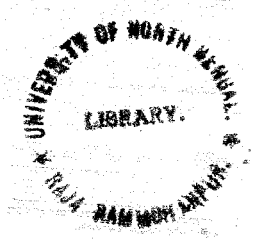
OF THE INNER TEMPLE, BARRISTER-AT-LAW, AND OF THE COLONIAL OFFICE

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PREFACE

WHEN I published in 1909 my *Responsible Government in the Dominions*, it was my intention in due course to develop at length the summary sketch contained in that book, and in particular to give in detail the evidence on which were based the conclusions there presented. The need for rewriting became more pressing after the unexpectedly swift conclusion of the discussions of South African union, and the opportunity has been afforded by the readiness of the Clarendon Press, on the recommendation of Sir Charles Lucas, K.C.M.G., C.B., Assistant Under-Secretary of State for the Colonies, to undertake the publication of the work.

My obligations to previous writers are, I trust, adequately indicated and acknowledged by the references in the notes, except in the case of the first edition of Todd's classical treatise, *Parliamentary Government in the British Colonies*. In this, the first work on the subject, Todd so ably covered the period up to about 1879 that a later writer can add but little. I have, however, endeavoured, so far as was compatible with adequate treatment of the subject, to deal with the earlier years of the history of responsible government in such a way as to supplement the information given by Todd.

I owe much also, which I cannot now acknowledge, to discussions and conversations with those responsible at home and abroad for the actual conduct of the relations of the Imperial and the Dominion Governments. There are, however, two friends whose retirement from active service in the Dominions renders appropriate a public admission of indebtedness, and it gives me great pleasure to thank Sir Thomas Gibson-Carmichael, Bart., K.C.M.G., Governor of Victoria from 1908–11, and now Governor of Madras, and the Honourable John Greeley Jenkins, Premier of South Australia from 1901–5, and Agent-General in London from 1905–8, for all that they have taught me of the real working of constitutional government in the states of the Commonwealth.

For advice, criticism, and reading of proofs, I am deeply indebted to my cousin, Mr. James Drysdale, and to my brothers, W. J. Keith, I.C.S., Secretary to the Government of Burma, and R. C. Steuart Keith, I.C.S., Registrar of the Chief Court of that province, while Mr. R. W. Chapman, of the Clarendon Press, has again laid me under great obligation by his constant interest in the progress of this book.

It should be added that the book is wholly unofficial, and that no use has been made of any material which is not already public property.

A. BERRIEDALE KEITH.

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TABLE OF CASES CITED[1]

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

B.C.	British Columbia Reports (from 1867).[2]
Cart.	Cartwright, Cases on the British North America Act.[3]
C.L.J.	Canadian Law Journal.
C.L.R.	Commonwealth Law Reports (from 1903).
C.T.R.	Cape Times Law Reports.
E.D.C.	Court of Eastern Districts of Cape Reports.
F.L.R.	Fiji Law Reports.
Grant	Chancery Reports, Upper Canada and Ontario.
H.C.G.	High Court of Griqualand Reports.
Knox	New South Wales Reports (1877).
L.C.J.	Lower Canada Jurist.
L.C.R.	Lower Canada Reports.
L.N	Legal News.
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 Provincial or Appeal Division, from 1911 onwards).

[1] All cases in which the Crown was the claimant or prosecutor will be found grouped at the end of R.

[2] Vol. i is in two parts, which are cited as 1 B.C. (Irving); 1 B.C. (Hunter); 2 B.C. (Irving); 2 B.C. (Hunter).

[3] The original reports are cited as well as Cartwright.

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 (1834).
T.S.	Transvaal Supreme Court Reports (to 1909).
T.P.	Transvaal Provincial Division Reports (1910 [1]).
Tas.L.R.	Tasmania 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).

Abbott v. *City of St. John*, 40 S.C.R. 597 : 672 n. 2, 718 n. 4, 824 n. 1.
Ackman v. *Town of Moncton*, 24 N.B. 103 : 718 n. 3, 824 n. 1.
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[1] Strictly speaking, only from the beginning of the Union, but the whole volume is cited as T.P. by the editors. From 1911 the South African Law Reports supersede it.

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Attorney-General for the Dominion of Canada v. *Attorney-General for Ontario*, [1897] A.C. 199 : 684 n. 2, 688.
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[1] This appears to be the correct spelling, but cf. *Paige* v. *Griffith*, 18 L.C.J. 119 ; 2 Cart. 324.

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[1] This, not Landry, is, Mr. Reeve Wallace informs me, according to the Privy Council Office records, the correct spelling of the name in this case.

[2] Criticized by Kennedy J. in *Dulieu* v. *White* [1901] 2 K.B. 669 ; Palles C.B. in *Bell* v. *Great Northern Railway Co. of Ireland*, 26 L.R.Ir. 428, and distinguished in *Toronto Railway Co.* v. *Toms*, 44 S.C.R. 268.

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[1] In this table precise references are given to Acts which are merely mentioned by date or short title in the text.

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[1] This is the Act referred to in the Duke of Newcastle's circular, but it hardly bears out the description; cf. however 9 & 10 Vict. c. 59.

[2] See New South Wales Act No. 32 of 1902, consolidating and repealing the Schedule. The sections referred to in this and the next Act are those of the scheduled Acts.

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[1] See *Parl. Pap.*, 1911, No. 23. The Government has decided to grant £500,000 in ten years to Tasmania.

[2] For s. 105, see *Poynter* v. *Cran*, 1910 S. A. L. R. [1910] A. D. 96; s. 116, *Fichardt, Ltd.* v. *Faustman*, ibid. 1; s. 134, *Webster* v. *Ellison*, [1911] A. D. 73. s. 132 is repealed by Act No. 21 of 1911.

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„ „ cc. 23, 24 : 311 n. 2.
„ „ c. 133 : 1243.
63 & 64 Vict. c. 25 : 1231.
„ „ c. 32 : 1079.
1 Edw. VII. c. 13 : 390.
2 Edw. VII. c. 34 : 768 n. 1.
3 Edw. VII. c. 8 : 1079.
„ „ c. 58 : 713.
4 Edw. VII. c. 23 : 1266.
4 & 5 Edw. VII. c. 3 : 6, 127 n. 1, 152 n. 2, 598, 651, 674, 758 n. 2, 772 n. 2.
4 & 5 Edw. VII. c. 42 : 6, 127 n. 1, 152 n. 2, 598, 651, 758 n. 2, 772 n. 2.
6 Edw. VII. c. 50 : 755.
6 & 7 Edw. VII. c. 50 : 689, 1088.
7 & 8 Edw. VII. c. 14 : 1079.
„ „ c. 15 : 347–9.
„ „ c. 26 : 772 n. 1.
7 & 8 Edw. VII. c. 64 : 422 n. 3, 1524 n. 2, 1622.
„ „ c. 65 : 1353 n. 1.
„ „ c. 76 : 767.
8 & 9 Edw. VII. c. 13 : 1154 n. 3.
9 & 10 Edw. VII. c. 14 : 1184, 1186.
„ „ c. 16 : 1118.
„ „ c. 18 : 680.
„ „ c. 27 [1] (amended by 1 & 2 Geo. V. c. 12) : 1089, 1453.
„ „ c. 28 : 1257.
„ „ c. 43 : 399, 400, 1156, 1295, 1296–8.
„ „ c. 57 (cf. c. 55) : 1010.
„ „ c. 61 (amended by 1 & 2 Geo. V. c. 27) : 1195 n. 2.
„ „ c. 100 : 1243.
„ „ c. 158 : 1024.
1 & 2 Geo. V. c. 7 : 1089, 1105.
„ „ c. 14 : 1057 n. 1.
„ „ c. 24 : 1057 n. 1.
„ „ c. 28 : 1124.

Revised Statutes

1886, c. 16 : 1462 n. 2.
„ c. 40 : 862.
„ c. 92 : 679.
„ c. 95 (amended by 57 & 58 Vict. c. 51 : see now *Rev. Stat.*, 1906, c. 45) : 678.
„ c. 136 : 1627
„ c. 142 : 1317.
„ c. 161 : 375.
1906, c. 3 : 1025 n. 3.
„ c. 6 : 474.
„ c. 10 : 492, 504.
„ c. 11 : 306.
„ c. 24 : 989 n. 1.
„ c. 25 : 1184.
„ c. 26 : 1186.
„ c. 28 : 758 n. 1.
„ cc. 41–3 : 1251, 1269.
„ c. 45 : 764 n. 1.
„ c. 62 : 765, 766.
„ c. 63 : 767, 768.
„ c. 77 : 994 n. 1.
„ c. 81 : 1056.
„ c. 95 : 1076.
„ c. 99 : 758 n. 1.
„ c. 111 : 400 n. 1.
„ c. 113 : 1190, 1525 n. 2, 1622.
„ c. 138 : 1330 n. 1, 1337 n. 1.
„ c. 139 : 1022 n. 2, 1337, 1360.
„ c. 141 : 1349 n. 1.
„ c. 142 : 144, 1627.
„ c. 146 : 981, n. 1, 1328 n. 1, 1358 n. 6, 1413 n. 4 (s. 1063).
„ c. 155 : 1318.

[1] The reference to an Act of 1911 on p. 1079 should be to this Act (see s. 79).

ONTARIO

Acts

32 & 33 Vict. c. 1 : 702.
„ „ c. 3 : 451, 696, 735.
34 Vict. c. 99 : 736.
36 Vict. c. 3 : 122.
„ „ c. 4 : 122.
„ „ c. 31 : 374.
37 Vict. c. 8 : 679 n. 3.
„ „ c. 32 : 675.
39 Vict. c. 9 : 452, 735.
42 Vict. c. 2 : 770.
„ „ c. 4 : 503 n. 1.
„ „ c. 19 : 702.
43 Vict. c. 2 : 769 n. 3.
44 Vict. c. 11 : 739.
45 Vict. c. 4 : 739.
46 Vict. c. 10 : 739.
48 Vict. c. 13 : 663.
51 Vict. c. 5 : 663.
53 Vict. c. 56 : 676.
54 Vict. c. 2 : 760 n. 1.
„ „ c. 3 : 687 n. 2.
55 Vict. c. 8 : 747.
„ „ c. 10 (see *Rev. Stat.*, 1897, c. 288) : 678.
56 Vict. c. 35 : 371.
63 Vict. c. 24 : 707 n. 2.
1 Edw. VII. c. 21 : 742.
6 Edw. VII. c. 12 : 743–7, 857 n. 1.
„ „ c. 15 : 747.
7 Edw. VII. c. 15 : 743–7, 857 n. 1.
„ „ c. 19 : 747.
8 Edw. VII. c. 2 : 477.
„ „ c. 3 : 477.
„ „ c. 5 : 216 n. 1, 307 n. 1, 453 n. 2, 493, 502 n. 1, 503 n. 1, 504.
„ „ c. 6 : 63 n. 1, 304 n. 1.
„ „ c. 22 : 748, 857 n. 1.
„ „ c. 42 : 708, 731, 1024, 1373.
„ „ c. 112 : 718 n. 7.
9 Edw. VII. c. 19 : 748, 857 n. 1.
„ „ c. 28 : 1373.
„ „ c. 52 : 756 n. 2, 1373 n. 1.
10 Edw. VII. c. 3 : 130 n. 4.
„ „ c. 6 : 1029 n. 2.
„ „ c. 79 : 731, 1024.
1 Geo. V. c. 3 : 504.
„ „ c. 48 : 731, 1024.

Revised Statutes

1877, c. 115 : 738.
1887, c. 24 (= 1897, c. 28) : 678.
1897, c. 12 : 503 n. 1.
„ c. 49 : 751 n. 1.
„ c. 173 : 123, 124 n. 1.

QUEBEC

Acts

32 Vict. c. 4 : 451, 735.
33 Vict. c. 5 : 451, 736.
36 Vict. c. 13 : 122.
38 Vict. c. 47 : 716.
41 & 42 Vict. c. 3 : 733 n. 2.
46 Vict. c. 27 : 1626.
48 Vict. c. 10 : 680 n. 4.
49 & 50 Vict. c. 98 : 663.
51 & 52 Vict. c. 13 : 414 n. 1, 721 n. 4, 741, 1451.
„ „ c. 30 : 701 n. 5, 702.
52 Vict. c. 12 : 663.
54 Vict. c. 4 : 760 n. 2.
61 Vict. c. 6 : 770 n. 5.
2 Edw. VII. c. 76 : 709.
4 Edw. VII. c. 84 : 709.
5 Edw. VII. c. 31 : 707 n. 1.
8 Edw. VII. c. 7 : 462 n. 2.
1 Geo. V. c. 82 : 707.

Revised Statutes

1909, c. 2 : 770 n. 5.
ss. 84–6 : 516.
s. 115 : 502.
ss 129–40 : 453 n. 2
ss. 147, 148 : 307 n. 1.
ss. 154–60 : 504.
ss. 179 seq. : 476, 493 n. 1.
ss. 572, 573 : 63 n. 1, 304 n. 1.
tit. ix : 1451.
Civil Code, ss. 237–9 : 1247 n. 4.
ss. 579–83 : 756 n. 2.
s. 1994 : 146 n. 4.
s. 2211 : 1627
s. 2615 : 462 n. 2.
Code of Civil Procedure, s. 611 : 146 n. 4.
ss. 1011–25 : 1627.

NOVA SCOTIA

Letters Patent, November 2, 1861 : 150, 156, 1424 n. 1 (xix), 1613.

Acts

1 Geo. III. c. 7 : 1245 n. 1.
32 Geo. II. c. 17 : 1245 n. 1.
11 Vict. c. 21 : 1330, 1347 n.
„ „ c. 28 : 1047.
12 Vict. c. 1 : 61, 1047.
34 Vict. c. 4 : 704.
35 Vict. c. 13 : 595 n. 1.
36 Vict. c. 22 : 452.
37 Vict. c. 20 : 122, 126.
„ „ c. 21 : 122, 126.
39 Vict. c. 22 : 452, 697.
40 Vict. cc. 1, 2 : 127.
51 Vict. c. 9 : 719.

55 Vict. c. 1 : 747 n. 2.
59 Vict. c. 17 : 750.
60 Vict. c. 2 : 701, 702.
1 Geo. V. c. 2 : 1056 n. 2.
„ „ c. 117 : 1429 n. 2.

Revised Statutes

1900, c. 2 : 307 n. 1, 493 n. 1, 502 n. 2, 517, 595.
„ c. 4 : 476, 477.
„ c. 9 : 63, 152 n. 1, 304 n. 1.
„ c. 109 : 1429 n. 2.
„ c. 127 : 680 n. 4.
„ c. 154 : 751 n. 1.
„ c. 164 : 124 n. 1.
„ c. 166 : 756 n. 2.

NEW BRUNSWICK

Letters Patent, November 2, 1861 : 150, 152 n. 1, 156, 304 n. 1, 1424 n. 1 (xix), 1613.

Acts

8 Will. IV. c. 1 : 1048 n. 1.
21 Vict. c. 9 : 690.
29 Vict. c. 2 : 1270 n. 1.
31 Vict. c. 30 : 518, 592 n. 1, 595 n. 1.
33 Vict. c. 33 : 452 n. 2.
34 Vict. c. 21 : 690, 1380.
36 Vict. c. 10 : 675 n. 2.
39 Vict. c. 5 : 701.
40 Vict. c. 9 : 680 n. 4.
52 Vict. c. 7 : 663.
53 Vict. c. 6 : 452.
54 Vict. c. 9 : 518, 591, 597, 736, 774.
59 Vict. c. 5 : 502.
4 Edw. IV. c. 18 : 504.

Revised Statutes

1903, c. 3 : 307 n. 1, 477, 493 n. 1.
„ c. 5 : 452 n. 2.
„ c. 10 : 775.
„ c. 90 : 63 n. 1, 304 n. 1, 775 n. 1.
„ c. 110 : 751 n. 1.

MANITOBA

Acts

34 Vict. c. 12 : 690.
36 Vict. c. 2 : 452, 696.
38 Vict. c 37 : 738.
39 Vict. c. 12 : 452, 696.
„ „ c. 28 : 518, 591, 597, 598, 736, 774.
44 Vict. c. 37 : 739.
„ „ c. 38 : 739.
„ „ c. 39 : 739.
45 Vict. c. 30 : 739.
47 Vict. c. 26 : 679 n. 3.
„ „ c. 68 : 739.
47 Vict. c. 70 : 739.
48 Vict. c. 2 : 662.
„ „ c. 45 : 739.
49 Vict. c. 38 : 1051 n. 1.
50 Vict. c. 1 : 740.
„ „ c. 2 : 740.
„ „ c. 4 : 740.
53 Vict. c. 14 : 461 n. 1, 691 n. 2.
„ „ c. 15 : 663.
„ „ c. 31 : 716.
„ „ c. 37 : 692–6, 741.
„ „ c. 38 : 692–6, 741.
„ „ c. 54 : 740.
55 Vict. c. 24 : 371.
58 & 59 Vict. c. 4 : 707 n. 1.
60 Vict. c. 22 : 677.
„ „ c. 27 : 695.
63 Vict. c. 22 : 677.
4 Edw. VII. c. 30 : 504.
10 Edw. VII. c. 20 : 722.
„ „ c. 82 : 707.
1 Geo. V. cc. 9, 10 : 706 n. 3.
„ „ c. 60 : 722, 1029 n. 2.

Revised Statutes

1902, c. 33 : 751 n. 1 (s. 7), 756 n. (ss. 1–6).
„ c. 59 : 63 n. 1, 304 n. 1.
„ c. 96 : 307 n. 1, 477, 493 n. 1 (as amended by 1 Geo. V. c. 24), 504.

BRITISH COLUMBIA

Order in Council, August 9, 1870 6 n. 2, 24, 598, 649 n. 1, 774 n. 2, 1431 n. 1.
Law, No. 147 of 1871 : 6 n. 2, 24, 440, 598, 649 n. 1, 774 n. 2, 1431 n. 1.

Acts

35 Vict. c. 4 : 452.
36 Vict. c. 2 : 700.
„ „ c. 35 : 452.
„ „ c. 42 : 452.
37 Vict. c. 9 : 702.
42 Vict. c. 35 : 698, 1076.
45 Vict. c. 8 : 702.
46 Vict. c. 26 : 740.
„ „ c. 27 : 740.
47 Vict. c. 2 : 1076.
„ „ c. 3 : 1076.
„ „ c. 4 : 698, 1076.
„ „ c. 14 : 682.
48 Vict. c. 13 : 1076.
54 Vict. c. 5 : 755 n. 2.
„ „ c. 14 : 717 n. 7.
61 Vict. c. 28 : 1088.
„ „ c. 44 : 1088.
62 Vict. c. 16 : 663.

62 Vict. c. 25 : 478.
„ „ c. 39 : 1088.
„ „ c. 46 : 1088.
63 Vict. c. 11 : 1088.
„ „ c. 14 : 1088.
„ „ c. 18 : 1088.
„ „ c. 31 : 124 n. 1.
„ „ c. 54 : 1088.
1 Edw. VII. c. 45 : 742.
2 Edw. VII. c. 34 : 1088.
„ „ c. 38 : 1088.
„ „ c. 48 : 1088.
3 Edw. VII. c. 12 : 1088.
„ „ c. 14 : 1088.
„ „ c. 17 : 1088.
3 & 4 Edw. VII. c. 17 : 478.
„ „ c. 26 : 1088.
„ „ c. 54 : 682.
5 Edw. VII. c. 18 : 701 n. 5.
„ „ c. 28 : 1088.
„ „ c. 30 : 1088.
„ „ c. 36 : 1088.
„ „ c. 59 : 732.
7 Edw. VII. c. 10 : 707 n. 1.
8 Edw. VII. c. 12 (amended by 1 Geo. V. c. 10, 11) : 63 n. 1, 152 n. 1, 315.
„ „ c. 23 : 731, 1089.
„ „ c. 40 : 348.
10 Edw. VII. c. 7 : 706, 1485.
1 Geo. V. c. 10 : 152 n. 1, 304, 315, 775.

Revised Statutes

1897, c. 47 : 452 (s. 76), 453, 493 n. 1 (s. 56), 502 (s. 26).
„ c. 53 : 751 n. 1.
„ c. 56 (ss. 98–103) : 756 n. 2.
„ c. 67 : 477 : 697.
„ c. 135 : 240.
„ c. 190 : 683.

PRINCE EDWARD ISLAND

Letters Patent, May 22, 1872 : 63, 152 n. 2, 304 n. 1, 775.

Acts

43 Geo. III. c. 6 : 1429 n. 2.
14 Vict. c. 3 : 63.
„ „ c. 33 (No. 814) : 1033.
15 Vict. c. 18 : 597 n. 2.
18 Vict. cc. 9, 11 (Nos. 913, 915) : 1033.
19 Vict. c. 1 : 1167 n. 1.
21 Vict. c. 12 (No. 997) : 1034.
24 Vict. c. 12 : 1035.
25 Vict. cc. 4, 12 : 1034.
„ „ c. 16 : 1035.
„ „ c. 18 : 597 n. 2.
34 Vict. c. 9 : 1034.
35 & 36 Vict. c. 10 : 1034.
36 Vict. c. 24 : 1034.
40 Vict. c. 1 : 690, 691.
42 Vict. c. 19 : 1017, 1429 n. 2.
53 Vict. c. 4 : 452.
56 Vict. c. 21 : 440, 452, 470 n. 5, 504, 591, 597 n. 2, 736, 774.
61 Vict. c. 11 : 124 n. 1.
8 Edw. VII. c. 1 (amended by 1 Geo. V. c. 1) : 307 n. 1, 440, 452, 470 n. 5, 473, 477, 493 n. 1, 502 n. 2, 518, 597 n. 2.

SASKATCHEWAN

Acts

6 Edw. VII. c. 3 (*Rev. Stat.*, 1909, c. 6), 63 n. 1.
6 Edw. VII. c. 4 (*Rev. Stat.*, 1909, c. 2) : 493 n. 1, 502 n. 2, 504.
7 Edw. VII. c. 8 (*Rev. Stat.*, 1909, c. 52) : 756 n. 2.
7 Edw. VII. c. 20 (*Rev. Stat.*, 1909, c. 105) : 124 n. 1, 681.
8 Edw. VII. c. 2 (*Rev. Stat.*, 1909, c. 3) : 477, 478, 505 n. 1.
8 Edw. VII. c. 4 (*Rev. Stat.*, 1909, c. 2) : 307 n. 1, 452, 470 n. 5, 502 n. 2.
9 Edw. VII. cc. 43–5 : 707.
1 Geo. V. c. 4 : 504.

ALBERTA

Acts

7 Edw. VII. c. 21 : 124 n. 1, 681.
8 Edw. VII. c. 9 : 756 n. 2.
9 Edw. VII. c. 2 : 64, 307 n. 1, 452, 454, 455, 470 n. 5, 477, 493 n. 1, 502 n. 2, 504, 505 n. 1.
9 Edw. VII. c. 3 : 477 n. 2, 505 n. 1.
„ „ c. 6 : 63 n. 1.
10 Edw. VII. c. 43 : 708.

NORTH-WEST TERRITORIES

1899, cc. 29, 30 : 1452.

YUKON

Ordinance No. 27 of 1902 : 769 n. 1.

FEDERAL COUNCIL OF AUSTRALASIA

Acts

49 Vict. No. 1 : 781 n. 3.
„ „ No. 2 : 781 n. 3.
„ „ Nos. 3 and 4 : 781 n. 3.
51 Vict. No. 1 : 378, 379, 781 n. 3.
52 Vict. No. 2 : 378, 379, 781 n. 3.
54 Vict. No. 1 : 781 n. 3.
56 Vict. No. 1 : 781 n. 3.
60 Vict. No. 1 : 781 n. 3.

COMMONWEALTH OF AUSTRALIA

Acts

No. 1 of 1901 : 634 n. 1.
„ 4 of 1901 : 890, 989 n. 1.
„ 5 of 1901 : 887.
„ 6 of 1901 : 359, 387, 836.
„ 12 of 1901 : 1084, 1085.
„ 13 of 1901 : 635, 796.
„ 16 of 1901 : 1098.
„ 17 of 1901 : 1083.
„ 5 of 1902 : 349.
„ 8 of 1902 : 521, 524, 638, 926, 1087.
„ 21 of 1902 : 144, 876 n. 5.
„ 4 of 1903 : 635.
„ 6 of 1903 : 144, 859, 877–87, 1360, 1366–72.
„ 8 of 1903 : 1277.
„ 11 of 1903 : 818, 994 n. 2.
„ 12 of 1903 : 816 n. 1, 1125 n. 1.
„ 20 of 1903 : 1250, 1279, 1280, 1293.
„ 21 of 1903 : 818.
„ 7 of 1904 : 915.
„ 13 of 1904 : 837, 846–64, 1198, 1209.[1]
„ 14 of 1904 : 1195 n. 2, 1266.
„ 9 of 1905 : 911, 912, 996 n. 2.
„ 11 of 1905 : 792.
„ 12 of 1905 : 818 n. 3.
„ 15 of 1905 : 890.
„ 17 of 1905 : 890.
„ 25 of 1905 : 818, 1237 n. 1.
Reserved Bill of 1906 : 1085.
No. 3 of 1906 : 814 n. 4.
„ 4 of 1906 : 818 n. 3.
„ 5 of 1906 : 1339.
„ 8 of 1906 : 897, 989 n. 1.
„ 9 of 1906 : 843–5, 890.
„ 11 of 1906 : 927.
„ 16 of 1906 : 637, 839.
„ 22 of 1906 : 1099.
„ 1 of 1907 : 1300.
„ 5 of 1907 : 370, 503.
„ 7 of 1907 : 1370.
„ 8 of 1907 : 884–5, 981, 1366, 1371.
„ 10 of 1907 : 923.
„ 23 of 1907 : 317.
„ 3 of 1908 : 812, 815 n. 1.
„ 15 of 1908 : 897, 915.
„ 16 of 1908 : 449.
„ 17 of 1908 : 1087.
„ 24 of 1908 : 915.
„ 25 of 1908 : 1083.
„ 4 of 1909 : 989 n. 1.
No. 6 of 1909 : 818 n. 3, 907.
„ 11 of 1909 : 411, 818 n. 3.
„ 14 of 1909 : 1291, 1298 n. 1.
„ 15 of 1909 : 1250, 1264–6, 1269 n. 1, 1320.
„ 20 of 1909 : 927.
„ 22 of 1909 : 816 n. 1, 1125 n. 1.
„ 23 of 1909 : 915, 916.
„ 25 of 1909 : 317.
„ 28 of 1909 : 816.
„ 29 of 1909 : 868–71.
„ 2 of 1910 : 258 n. 1, 1619 n. 3.
„ 3 of 1910 : 904, 987 n. 1, 1001.
„ 6 of 1910 : 1291, 1298 n. 1.
„ 7 of 1910 : 816.
„ 8 of 1910 : 901, 902, 930.
„ 10 of 1910 : 1083.
„ 11 of 1910 : 907, 1298 n. 1.
„ 14 of 1910 : 907, 1298 n. 1.
„ 18 of 1910 : 1292 n. 1.
„ 20 of 1910 : 919, 920.
„ 21 of 1910 (amended by No. 12 of 1911) : 817, 818, 1028, 1342 n. 1.
„ 22 of 1910 : 817, 818, 1028.
„ 25 of 1910 : 317, 816, 916, 917.
„ 26 of 1910 : 1087.
„ 27 of 1910 : 920–1.
„ 29 of 1910 : 258 n. 1.
„ 30 of 1910 (amended by No. 16 of 1911) : 399, 1292–5, 1297, 1298.
„ 31 of 1910 : 927.
„ 34 of 1910 : 775, 886.
„ 37 of 1910 (amended by No. 15 of 1911) : 1250, 1264–6.
„ 13 of 1911 : 1621.
„ 17 of 1911 : 1620.
Navigation Bill (Lighthouses Act No. 14 of 1911) : 1196 seq.

Ordinances of the Governor-General in Council for the Northern Territory.[2]

No. 1 of 1911 : 921 n. 1.
„ 2 of 1911 : 921 n 1.
„ 9 of 1911 : 921 n. 1.
„ 13 of 1911 : 1622.

NEW SOUTH WALES[3]

Ordinance No. 5 of 1828 : 1426.

Acts

No. 13 of 1848 : 417.
„ 34 of 1848 : 1397–8.
„ 17 of 1853. *See* Imperial Act 18 & 19 Vict. c. 54.
„ 19 of 1855 : 779 n. 1.

[1] Amended largely by No. 6 of 1911 to remove difficulties, including interference by High Court with the decisions of the Conciliation and Arbitration Court.

[2] No constitution has yet been granted to the territory.

[3] The Statutes of Public Utility have been edited by H. M. Cockshott and S. E. Lamb; there are so far available nine volumes covering up to the end of 1910.

No. 10 of 1857 : 433, 998.
„ 17 of 1858 : 1032.
„ 20 of 1858 : 481.
„ 3 of 1861 : 1075.
„ 19 of 1862 : 1449.
„ 5 of 1867 : 132, 1263.
„ 8 of 1867 : 1075.
„ 7 of 1874 : 481, 502 n. 1.
„ 20 of 1876 : 1245.
„ 21 of 1877 : 1238.
„ 28 of 1879 : 1238.
„ 23 of 1880 : 1452 n. 1.
„ 11 of 1881 : 1076.
„ 31 of 1881 : 1238.
„ 17 of 1883 : 382, 1398 n. 1.
„ 15 of 1887 : 1239, 1240.
„ 38 of 1893 : 481.
Reserved Bill of 1896 : 1080.
No. 34 of 1897 : 785.
„ 3 of 1898 : 1082.
„ 18 of 1898 : 838.
„ 27 of 1898 : 796.
„ 47 of 1899 : 1622.
„ 2 of 1899 : 949 n. 1.
„ 12 of 1899 : 1248 n. 1, 1269 n. 1.
„ 14 of 1899 : 1240, 1241.
„ 26 of 1900 (see No. 58 of 1901) : 635 n. 6.
„ 35 of 1900 : 1330.
„ 23 of 1902 : 1247 n. 4.
„ 31 of 1902 : 351.
„ 32 of 1902 (amended by No. 2 of 1908)[1] : 67, 310 (ss. 36–8), 355 n. 1 (ss. 5–9), 431 n. 2 (s. 7), 442 n. 1 (s. 36), 467 (s. 11), 470 n. 5 (ss. 10, 11), 494, 503, 524 (s. 16), 525, 529 n. 1, 1375 (s. 20), 1601 (s. 16).
„ 33 of 1902 : 480, 511.
„ 35 of 1902 : 905.
„ 1 of 1903 : 480, 488 n. 1.
„ 13 of 1903 : 371, 934.
„ 15 of 1905 : 1022.
„ 41 of 1906 : 307 n. 2, 480, 494, 495 n. 1, 498 n. 1, 503, 505 n. 1.
„ 42 of 1906 : 1028.
„ 2 of 1908 : 316.
„ 4 of 1908 : 1028.
„ 14 of 1909 : 915.
„ 22 of 1909 : 1380 n. 2.
„ 25 of 1909 : 1061.
„ 11 of 1910 : 480, 505 n. 1, 508.
„ 25 of 1910 : 351.
„ 44 of 1910 : 258.
„ 9 of 1911 : 481, 1620.

VICTORIA[2]

Acts

14 Vict. No. 47 : 8.
15 Vict. No. 10 : 1345.
17 Vict. No. 17 : 779 n. 1.
„ „ No. 19 (amended by Nos. 82 and 321) : 1426.
18 Vict. No. 39 : 1075.
No. 1 : 448 n. 1.
„ 33 : 483.
„ 39 : 1075.
„ 86 : 259.
„ 89 : 502 n. 2.
„ 227 : 1238 n. 1.
„ 233 : 1398 n. 1.
„ 235 : 1035.
„ 236 : 625.
„ 241 : 143, 259.
„ 259 : 1075.
„ 268 : 1238.
„ 294 : 601.
„ 362 : 604.
„ 389 : 1274.
„ 391 : 1449.
„ 417 (see 1083) : 1274.
„ 453 (now 1166) : 1245.
„ 634 : 621.
„ 702 : 624, 625.
„ 723 : 1076.
„ 780 : 68.
„ 961 : 1077.
„ 1005 (re-enacted as No. 1073) : 169, 1078.
„ 1056 : 1241–3.
„ 1059 : 1061.
„ 1075 : 68 (s. 13), 448 n. 1, 471 (s. 27), 481, 495, 526, 625 (s. 350).
„ 1126 : 484.
„ 1142 : 981 n. 1, 1022 n. 3, 1311, 1331 n. 4, 1346 n. 1.
„ 1166 : 1239, 1241.
„ 1242 : 483.
„ 1557 : 1204, 1207.
„ 1601 : 481, 483.
„ 1606 : 481, 483.
„ 1723 : 495.
„ 1725 : 89 n., 97.
„ 1835 : 1247 n. 4.
„ 1864 : 68, 69 (ss. 5, 6, 9), 305 (s. 9), 319 n. 1 (s. 5), 351 (s. 34), 435, 483 (s. 34), 526, 528 (ss. 30, 31), 625 (ss. 30, 31), 640 n. 2 (s. 30), 965 n. 1.

[1] New South Wales with Queensland alone of the States has repealed the whole of the old Constitution Act which it had power to repeal (18 & 19 Vict. c. 54), re-enacting it in part. The S. L. R. has not yet repealed the Act, but only portions thereof.

[2] Since the first Parliament the Acts have been numbered in one series; there were consolidations in 1864–5 and in 1890, carried out in great measure by Higinbotham C.J.; see Morris's *Memoir*, pp. 289–96.

No. 2075 (amended by No. 2329): 351, 526, 527 n. 2.
„ 2093: 484.
„ 2106: 1022, 1386.
„ 2185: 488, 625.
„ 2241: 850, 851, 852, 855.
„ 2257: 1061.
„ 2281: 473, 483, 505.
„ 2293: 1485.
„ 2321: 1619, 1620.
„ 2341: 1622.

QUEENSLAND [1]

8 Will. IV. No. 5: 1426.
16 Vict. No. 25: 1622.
Letters Patent, June 6, 1859: 34, 70, 428 (xiv & xxii), 433 n. 1 (xxii), 449 (xiii), 560 (i & ii), 1331 n. 1 (xv & xvi).

Acts

24 Vict. No. 3: 1449.
25 Vict. No. 7: 449.
31 Vict. No. 21: 496, 529.
31 Vict. No. 38: 70, 355 n. 1 (s. 2), 426 (s. 17), 431 (s. 9), 433 (s. 10), 442 n. 1 (s. 18), 449 (ss. 41–56), 456 (ss. 41–56), 467 (s. 25), 470 n. 5 (ss. 3, 12), 525 n. 1 (s. 6), 529 (ss. 20–6), 530 (s. 2), 560–5 (ss. 1, 2, 18), 998, 1331 n. 1 (ss. 4, 16, 17), 1375 (s. 24), 1596 n.
34 Vict. No. 28: 433.
41 Vict. No. 8: 1075.
„ „ No. 25: 1245.
42 Vict. No. 2: 1075.
47 Vict. No. 13: 1077.
48 Vict. No. 29: 70, 496 n. 1.
50 Vict. No. 14: 1407 n. 1.
51 Vict. No. 11: 1083 n.
53 Vict. No. 22: 1078.
54 Vict. No. 3: 502 n. 1.
„ „ No. 29: 1078.
56 Vict. No. 7: 508–10.
„ „ No. 11: 1083 n.
57 Vict. No. 4: 788.
60 Vict. No. 3: 70, 496, 497 n. 1 (a misprint), 529.
„ „ No. 15: 503.
61 Vict. No. 17: 1062.
„ „ No. 25: 1083 n.
62 Vict. No. 24: 1083 n.
63 Vict. No 11: 1247 n. 4.
64 Vict. No. 3: 502 n. 1.
„ „ No. 34: 1439.
2 Edw. VII. No. 1: 1062.
4 & 5 Edw. VII. No. 13: 1086.
5 Edw. VII. No. 1: 488 n. 1, 505 n. 1, 521 n. 1, 792, 1087.
5 Edw. VII. No. 15: 1086.
„ „ No. 34: 1331 n. 1.
8 Edw. VII. No. 2: 433, 998 n. 1.
„ „ No. 4: 586.
„ „ No. 5: 484, 505, 531, 586, 936.
„ „ No. 8: 936.
„ „ No. 11: 371, 933.
„ „ No. 16: 370, 530–3, 586, 935.
9 Edw. VII. No. 18: 503.
10 Edw. VII. No. 9: 1086.
„ „ No. 14: 1086.
1 Geo. V. No. 3: 485, 511, 512.
„ „ No. 5: 370, 933, 1452.
„ „ No. 11: 917 n. 1.
„ „ No. 12: 917 n. 1.
„ „ No. 15: 1622.
„ „ No. 21: 1327 n. 2.
2 Geo. V. c. 8: 1622.

SOUTH AUSTRALIA [2]

No. 5 of 1837: 1181 n. 1.
Ordinance No. 1 of 1851: 8, 408.
Ordinance No. 3 of 1853: 28
Ordinance No. 7 of 1853: 28.

Acts

No. 2 of 1855–6: 8, 32, 70 (ss. 29, 32, 33), 304, 403, 407 (s. 34), 408, 430 (s. 34), 431 n. 2 (s. 34), 433, 434 (s. 34), 442 n. 1 (s. 40), 448 (s. 35), 470 n. 5 (ss. 2, 3), 472 (s. 28), 496, 501 n. 2, 533, 535 (s. 1), 628, 1325, 1331 (ss. 30, 31).
„ 6 of 1855–6: 779 n. 1.
„ 10 of 1855–6: 404, 408, 430, 1325, 1344.
„ 31 of 1855–6: 881 n. 1.
„ 3 of 1857: 1075.
„ 19 of 1860: 1245.
„ 5 of 1861: 881 n. 1.
„ 14 of 1861: 1075.
„ 27 of 1863: 1245.
„ 24 of 1864: 1036.
„ 16 of 1868–9: 535 n. 1.
„ 21 of 1870–1: 1245.
„ 4 of 1871: 1164.
„ 8 of 1871: 1312.
„ 14 of 1872: 448 n. 3.
„ 5 of 1873: 71, 488 n. 1.
„ 213: 1076.
„ 236: 628 n. 1.
„ 307: 1276.
„ 345: 865 n.
„ 399 (continued by No. 476; *see also* No. 1029 s. 8): 503.

[1] A revised edition of the Acts is in preparation.
[2] Since 1875 the Acts are numbered in one series. There has been no consolidation.

No. 430: 448 n. 3.
„ 439: 1078.
„ 454: 1190 n. 3.
„ 623: 97.
„ 648: 248 n. 2.
„ 672: 1080.
„ 703 (amended by No. 795): 1247 n. 4.
„ 731: 496.
„ 763: 1087.
„ 779: 71, 533, 628 n. 1.
„ 790: 496.
„ 839: 1087.
„ 890: 1087.
„ 920: 629, 1620.
„ 946: 917, 918, 919.
„ 959: 71, 496, 533 (ss. 10–12), 536 (s. 21), 1620.
„ 971: 485, 505 n. 1, 535 n. 2.
„ 1000: 310.
„ 1024 (No. 1048 adopts similar principles for the State): 1062, 1087.
„ 1025: 370, 503 n. 4, 923 n. 1, 933, 950 n. 1.
„ 1029: 486, 629 n. 1, 918 n. 1, 1016.
„ 1048 (Bill of 1910 passed in 1911): 1062.
„ 1053 (Workmen's Compensation): 627.
Reserved Bill of 1910 (assented to in 1911): 96, 1024.

WESTERN AUSTRALIA [1]

Acts

No. 19 of 1863: 881.
„ 7 of 1867: 143.
„ 13 of 1870: 8, 1615.
„ 22 of 1873: 1615.
„ 21 of 1877: 1245.
„ 19 of 1878: 1622.
„ 24 of 1882: 1615.
„ 25 of 1884: 1077.
„ 10 of 1886: 1615.
„ 13 of 1886: 1077.
„ 18 of 1886: 1077.
„ 25 of 1886: 1064.
„ 3 of 1889: 1078.
„ 23 of 1889: see Imperial Act 53 & 54 Vict. c. 26.
„ 24 of 1889: 50, 1064.
„ 4 of 1890: 448 n. 2.
„ 14 of 1893: 632 n. 3.
„ 16 of 1893: 1452.
„ 1 of 1894: 1245.
No. 37 of 1894: 1063.
„ 25 of 1896: 1190 n. 3.
„ 5 of 1897: 434, 1063–5.
„ 13 of 1897: 1082.
„ 27 of 1897: 1078.
„ 9 of 1898: 143.
„ 19 of 1899: 73 (s. 43), 305 (s. 43), 486 (s. 26), 487 (ss. 3, 21), 488 n. 1, 497 (ss. 20, 31), 501 n. 1 (s. 21), 537 n. 1 (ss. 5–17), 538, 632, n. 3 (s. 46).
„ 5 of 1900: 537.
„ 34 of 1900: 503.
„ 39 of 1900: 1036.
„ 28 of 1902: 891.
„ 30 of 1902: 1007 n. 1.
„ 1 of 1904 (s. 6): 1087.
„ 15 of 1904 (s. 23): 1087.
„ 22 of 1904: 884, 1087.
„ 14 of 1905: 435, 459 n. 1, 1063 n. 1.
„ 16 of 1907: 633 n.
„ 27 of 1907: 486, 505 n. 1, 510, 521 n. 1, 537 n. 1, 792, 1087.
„ 26 of 1909: 1195 n. 2.
„ 44 of 1909: 1247 n. 4.
„ 6 of 1911: 434 n. 3, 464 n. 3, 513 n. 1.
„ 31 of 1911: 537 n. 1, 633.
„ 33 of 1911: 370, 503, 505 n. 1, 950 n. 1.
„ 42 of 1911: 1063 n. 1, 1064, 1065
„ 44 of 1911: 486, 505 n. 1, 510 n. 1, 537 n. 1, 1016.

TASMANIA [2]

Ordinance 15 Vict. No. 1: 8.

Acts

18 Vict. No. 17: 29, 33, 72 (s. 27), 442 n. 1 (s. 33), 449 (s. 29), 470 n. 5 (ss. 4, 5), 498, 539 n. 1, 540 (s. 33), 1332.
19 Vict. No. 17: 33 n. 1.
„ „ No. 23: 1311 n. 1.
20 Vict. No. 7: 1332.
„ „ No. 19: 1332.
22 Vict. No. 10: 1365 n. 2.
22 Vict. No. 17: 449, 456 n. 2.
„ „ No. 20: 1426.
23 Vict. No. 1: 142.
„ „ No. 8: 1622.
27 Vict. No. 20: 1036.
32 Vict. No. 30: 1036, 1449
33 Vict. No. 4: 72.

[1] The Statutes have been arranged by J. C. H. James up to 1895 only.
[2] The Statutes up to 1901 have been arranged and issued as in force then in 5 vols., by Frederick Stops, formerly secretary to the Law Dept., Hobart, 1904.

34 Vict. No. 42 : 72.
„ „ No. 43 : 764.
36 Vict. No. 22 : 1036.
38 Vict. No. 7 : 1245.
46 Vict. No. 8 : 72.
„ „ No. 9 : 72.
47 Vict. No. 48 : 1036.
48 Vict. No. 54 : 471.
49 Vict. No. 8 : 539 n. 1, 631 n. 1.
„ „ No. 15 : 1452.
„ „ No. 25 : 456 n. 2.
50 Vict. No. 36 : 1333.
51 Vict. No. 9 : 1077.
54 Vict. No. 58 : 502 n. 1.
56 Vict. No. 36 : 1333.
59 Vict. No. 17 : 1029.
60 Vict. No. 49 : 508.
„ „ No. 55 : 1080.
62 Vict. No. 69 : 1082.
63 Vict. No. 51 : 503.
64 Vict. No. 5 : 72, 487, 498, 539, 631 n. 1.
1 Edw. VII. No. 57 : 508.
3 Edw. VII. No. 13 : 488 n. 1.
5 Edw. VII. No. 1 : 792.
5 Edw. VII. No. 3 : 1247 n. 1.
6 Edw. VII. No. 12 (s. 12, see 64 Vict. No. 8, s. 3) : 72, 133, 150 n. 1, 729 n. 3, 948 n. 1, 953 n. 1.
7 Edw. VII. No. 7 : 487, 508, 539 n. 1.
„ „ No. 17 : 1022, 1386.
8 Edw. VII. No. 10 : 948 n. 1, 1386.
„ „ No. 12 : 539 n. 1.
9 Edw. VII. No. 5 : 865 n.
„ „ No. 8 : 1029 n. 2.
„ „ No. 26 : 1195 n. 2.
1 Geo. V. No. 38 : 319.
„ „ No. 53 : 370, 503, 923 n. 1, 950 n. 1.
„ „ c. 57 : 630.
„ „ c. 62 : 630.
„ „ c. 66 : 630.

NEW ZEALAND [1]

Acts

No. 22 of 1858 : 1334.
„ 71 of 1858 : 1334.
„ 7 of 1863 : 1263.
„ 10 of 1863 : 1036.
„ 13 of 1865 : 456 n. 2, 457 n. 1, 558.
„ 11 of 1866 : 271, 275 n. 1.
„ 39 of 1867 : 275 n. 1.
„ 93 of 1867 : 1037.
„ 99 of 1870 : 1164.
„ 72 of 1872 : 1058.
„ 56 of 1873 : 437, 1048.
„ 77 of 1873 : 75.
„ 21 of 1875 : 436, 977.
No. 29 of 1877 : 1007.
„ 30 of 1878 : 74.
„ 40 of 1879 : 489.
„ 43 of 1879 : 502 n. 1.
„ 57 of 1880 : 1245.
„ 14 of 1881 : 1058.
„ 47 of 1881 : 1076.
„ 4 of 1882 : 1421.
„ 29 of 1882 : 1336.
„ 50 of 1883 : 1037.
„ 34 of 1884 : 1078.
„ 34 of 1886 : 1078.
„ 14 of 1887 : 311 n. 3.
„ 25 of 1887 : 75.
„ 32 of 1889 : 1333.
„ 5 of 1890 : 1058.
„ 25 of 1891 : 540, 541, 581.
„ 54 of 1893 : 489.
„ 28 of 1894 : 1247 n. 4.
„ 2 of 1895 : 1247 n. 1.
„ 2 of 1896 : 489.
„ 19 of 1896 : 1078.
„ 64 of 1896 : 1080.
„ 42 of 1898 : 1241.
„ 33 of 1899 : 1082.
„ 44 of 1900 : 1058.
„ 72 of 1900 : 1245.
„ 73 of 1900 : 1037, 1315.
„ 74 of 1901 : 1037, 1315.
„ 50 of 1903 : 1277.
„ 96 of 1903 : 1018, 1190.
„ 18 of 1904 : 1241.
„ 8 of 1906 : 1022 n. 1.
„ 41 of 1906 : 1266.
„ 78 of 1907 : 1241.
„ 79 of 1907 : 1078.
„ 22 of 1908 : 75, 98 n. 2, 305, 311 n. 3., 1333 n. 2.
„ 26 of 1908 : 1485.
„ 28 of 1908 : 1060, 1061.
„ 29 of 1908 : 1237 n. 1.
„ 50 of 1908 : 1241.
„ 89 of 1908 : 1333 n. 2, 1346 n. 1.
„ 101 of 1908 : 75, 456 n. 2 (s. 242), 468 (ss. 7, 15), 470 n. 5 (s. 14), 488 (s. 35), 489 (s. 38), 498 (s. 24), 503, 571 (ss. 16–21), 540–2, 1375 (s. 5), 1589 n. 1 (ss. 2, 13).
„ 113 of 1908 : 1246.
„ 178 of 1908 : 1195, 1202–5, 1622.
„ 225 of 1908 : 1283.
„ 226 of 1908 : 506, 507.
„ 230 of 1908 : 1079.
„ 1 of 1909 : 259.
„ 9 of 1909 : 1291.
„ 15 of 1909 : 1059.
„ 28 of 1909 : 1079, 1265, 1320, 1328 n. 1.
„ 36 of 1909 : 1018, 1195.

[1] The Statutes were consolidated in 1908.

No. 15 of 1910 : 1022 n. 1.
„ 16 of 1910 : 1079.
„ 21 of 1910 : 1250, 1265.
„ 43 of 1910 : 259, 1619 n. 3.
„ 46 of 1910 : 934.
„ 67 of 1910 : 1079.
„ 68 of 1910 : 1333 n. 2.
„ 82 of 1910 : 1059 n. 1.
„ 85 of 1910 : 1085, 1086, 1211–15.
„ 9 of 1911 (amending the law) : 1029.
„ 16 of 1911 : 1622.
„ 19 of 1911 : 1620.
„ 37 of 1911 : 1623.

CAPE OF GOOD HOPE[1]

Letters Patent, May 23, 1850 : 157, 425, 1427.

Ordinances

No. 14 of 1845 : 1385 n. 1.
„ 3 of 1852 (*see also* Acts No. 6 of 1859 ; No. 3 of 1865 ; No. 7 of 1872 ; No. 18 of 1874 ; No. 39 of 1877 ; No. 17 of 1893 ; No. 41 of 1895 ; No. 2 of 1905) : 461 (s. 89), 511 (s. 40), 543, 544 (s. 88), 545 (s. 74), 639, 1019 (s. 82), 1450.

Acts

No. 1 of 1854 : 456 n. 2.
„ 3 of 1865 : 300.
„ 12 of 1871 : 299 n. 6.
„ 1 of 1872 (amended by No. 17 of 1893) : 46, 47, 75.
„ 18 of 1874 : 548 n. 2.
„ 5 of 1875 : 1450.
„ 39 of 1877 : 300.
„ 7 of 1878 : 1630 n. 1.
„ 21 of 1879 : 276 n. 2.
„ 1 of 1882 : 461.
„ 9 of 1882 : 490 n. 1.
„ 5 of 1883 : 266 n. 1.
„ 13 of 1883 : 456 n. 2.
„ 4 of 1884 : 1630 n. 1.
„ 21 of 1884 (amended by No. 15 of 1888) : 461.
„ 34 of 1883 : 299 n. 6.
„ 14 of 1887 : 490, 639.
„ 37 of 1888 (amended by No. 35 of 1904) : 144.
„ 1 of 1889 : 1623.
„ 9 of 1892 : 490 n. 1, 544, 639.
„ 32 of 1892 : 1630 n. 1.
„ 40 of 1892 : 1245.
„ 4 of 1893 : 1630 n. 1.
„ 5 of 1894 : 1622.
No. 3 of 1895 : 1623.
„ 16 of 1895 : 1630 n. 1
„ 41 of 1895 : 300.
„ 35 of 1896 : 1338 n. 3.
„ 29 of 1897 : 1622.
„ 19 of 1898 : 490 n. 1.
„ 20 of 1898 : 1295.
„ 48 of 1899 : 490 n. 1.
„ 4 of 1902 : 271 n. 5, 1262.
„ 5 of 1902 : 490 n. 1, 1262.
„ 6 of 1902 : 1262.
„ 10 of 1902 : 271 n. 5, 1262.
„ 14 of 1902 : 1295.
„ 47 of 1902 : 1089.
„ 35 of 1904 : 271 n. 5.
„ 37 of 1904 : 1079.
„ 35 of 1905 : 1452, 1624.
„ 3 of 1906 : 1089.
„ 15 of 1906 : 1079.
„ 6 of 1908 : 490 n. 1.
„ 14 of 1908 : 1630 n. 1.

NATAL[2]

Charter, July 15, 1856 : 48, 490 n. 1.

Laws

No. 11 of 1865 : 490 n. 1.
„ 1 of 1873 : 48.
„ 15 of 1877 : 1452.
„ 1 of 1883 : 49.
„ 2 of 1883 : 49, 490 n. 1.
„ 18 of 1891 : 1240 n. 1.
„ 1 of 1892 : 53, 54, 76, 77.
No. 14 of 1893 (amended by No. 10 of 1894 ; No. 3 of 1906 ; No. 14 of 1906) : 5, 54, 77, 305 (s. 9), 439, 448 (s. 42), 545, 546, 547 (ss. 48, 49), 955 (s. 9), 1019 (s. 6), 1026 (sched.), 1339 (ss. 43–5).

Acts

No. 14 of 1894 : 144.
„ 27 of 1895 : 448, 457 n. 2.
„ 8 of 1896 : 490 n. 1, 133.
„ 1 of 1897 : 490 n. 1, 1089, 1090.
„ 18 of 1897 : 1089, 1090.
„ 45 of 1898 : 1245.
„ 15 of 1900 : 1262.
„ 41 of 1901 : 1262.
„ 22 of 1902 : 271 n. 5.
„ 30 of 1902 : 1262.
„ 5 of 1903 : 1295 n. 1.
„ 26 of 1903 : 1262.
„ 30 of 1903 : 1090.
„ 36 of 1903 : 1265 n. 1, 1630 n. 1.
„ 3 of 1905 : 1293.
„ 30 of 1905 : 1265 n. 1, 1630 n. 1.

[1] Up to 1906 the Acts have been issued in a revised form.
[2] The Acts have been revised up to 1906 by R. L. Hitchins. Prior to responsible government they are styled 'Laws', though e. g. No. 14 of 1893 calls itself throughout the Constitution Act or Act.

No. 38 of 1905 : 566, 587.
„ 3 of 1906 : 821 n. 1, 1089.
„ 9 of 1906 : 1623.
„ 36 of 1906 : 1265 n. 1, 1630 n. 1.
„ 51 of 1906 : 271.
„ 22 of 1907 : 1630 n. 1.
„ 33 of 1907 : 1295 n. 1, 1630 n. 1.
„ 5 of 1908 : 275.
„ 8 of 1908 : 1358 n. 1.
„ 1 of 1909 : 1067, 1071 n. 2.
„ 2 of 1909 : 931, 937, 1039.
„ 22 of 1909 : 1090.
„ 9 of 1910 : 1442 n. 1.
„ 29 of 1910 : 1048 n. 4, 1067 n. 1.

THE TRANSVAAL

Letters Patent

March 31, 1905 : 55.
December 6, 1906 : 56, 78, 102, 439.
Clauses ii–vii : 547.
„ ix, x : 490 n. 1.
„ xv–xvii : 511, 961.
„ xviii : 501.
„ xxx : 501, 547.
„ xxxiii : 449.
„ xxxiv : 461.
„ xxxvii : 548, 642 n. 2.
„ xxxviii : 1019.
„ xxxix : 1001, 1054.
„ xliv : 461.
„ xlvii : 78.
„ xlviii : 1340.
„ xlix : 1012.
„ li : 953, 1054, 1055, 1071, 1073 n. 2.
„ lii : 1049, 1050.
„ lv : 548.
„ lvi : 548.

Ordinances

No. 35 of 1901 : 1094.
„ 38 of 1902 : 1262.
„ 5 of 1903 : 1095.
„ 22 of 1903 : 1262.
„ 51 of 1903 : 144.
„ 36 of 1904 : 1031.
„ 37 of 1904 : 1265 n. 1, 1630 n. 1.

Acts

No. 2 of 1907 : 1095.
„ 3 of 1907 : 449.
„ 12 of 1907 : 265.
No. 14 of 1907 : 265.
„ 15 of 1907 : 1095.
„ 25 of 1907 : 1452.
„ 19 of 1908 : 352.
„ 21 of 1908 : 1630 n. 1.
„ 36 of 1908 : 1097.
„ 28 of 1909 : 382, 395 n. 1, 1029, 1030.
„ 31 of 1909 : 1485.

ORANGE RIVER COLONY

Letters Patent,[1] June 5, 1907 : 56, 78, 102, 439.
Clauses ii–vii : 549.
„ ix, x : 490 n. 1.
„ xvi–xix : 511, 961.
„ xx : 501.
„ xxxii : 501, 550.
„ xxxv (Act No. 1 of 1908) : 449.
„ xxxvi : 461.
„ xxxix : 551, 642 n. 2.
„ xl : 1019.
„ xli : 1001, 1054.
„ xlvi : 461.
„ xlix : 78.
„ l : 1340.
„ li : 1012.
„ lii : 953, 1054, 1055, 1071, 1073 n. 2.
„ liii : 1049, 1050.
„ lvi, lvii : 550, 551.

Ordinances

No. 25 of 1902 : 1262.
„ 44 of 1903 : 144.
„ 17 of 1904 : 1031.
„ 25 of 1905 : 1630 n. 1.
„ 12 of 1907 : 1097 n. 1.

Acts

No. 22 of 1908 : 491.[2]
„ 35 of 1908 : 1452.

UNION OF SOUTH AFRICA

Acts

No. 1 of 1910 : 144.
„ 4 of 1910 : 994, 1324.
„ 5 of 1910 : 133, 150 n. 1, 266 n. 1, 729 n. 3, 948 n. 1, 953 n. 3.
„ 3 of 1911 : 984 n. 3.
„ 10 of 1911 : 1084 n. 2, 1493 n. 2.

[1] Amended by Act No. 21 of 1908 as to payment of members, and No. 22 of 1908 as to number of members of Assembly.

[2] Increasing the number of members of the Legislative Assembly from thirty-eight to thirty-nine.

No. 19 of 1911 : 449, 456, 457 n. 2, 964 n. 1.
„ 21 of 1911 : 985 n. 1, 989.
„ 23 of 1911 : 1068 n. 1.

NEWFOUNDLAND.

Royal Commission, March 2, and Proclamation, 26 July, 1832 : 24, 157, 1617.
Royal Instructions, May 4, 1855 : 24 n. 3, 102 n. 1, 439, 478 n. 3, 493 n. 2.
Letters Patent, March 28, 1876 : 66, 157, 304, 518, 597, 1604–8.

Acts

17 Vict. c. 2 : 1038.
18 Vict. c. 2 : 65.
„ „ c. 3 : 65.
19 Vict. c. 1 : 1167 n. 1.
21 Vict. c. 15 : 1035.
22 Vict. c. 8 : 1035.
28 Vict. c. 9 (cf. 29 Vict. c. 14 ; 30 Vict. c. 17 ; 2 Edw. VII. c. 4) : 1035.
50 Vict. c. 1 : 379.
50 Vict. c. 26 : 378.
51 Vict. c. 20 : 1237 n. 1.
53 Vict. c. 8 : 1035.
„ „ c. 19 : 1237 n. 1.
58 Vict. c. 7 : 1035.
„ „ c. 11 : 1035.
„ „ c. 12 : 1035.
60 Vict. c. 28 : 1035.
4 Edw. VII. c. 3 : 1338, 1360.
5 Edw. VII. c. 4 : 1017.
„ „ c. 17 : 1615.
6 Edw. VII. c. 1 : 1017.
„ „ c. 2 : 1017, 1080.
„ „ c. 3 : 1017.
„ „ c. 23 : 1017 n.
„ „ c. 29 : 1024 n. 1.
7 Edw. VII. c. 14 : 1017, 1080.
10 Edw. VII. c. 10 : 493 n. 2.
„ „ c. 14 : 458.
„ „ c. 17 : 1422.

Consolidated Statutes

1892, c. 2 : 456 n. 2, 470 n. 5, 493.
„ c. 3 : 221, 478.
„ c. 4 : 493 n. 2.
„ cc. 110, 111 : 1237 n. 1.

PART I. INTRODUCTORY

CHAPTER I

ORIGIN AND HISTORY OF RESPONSIBLE GOVERNMENT

§ 1. The Origin of Representative Government

In 1840, when responsible government may be said to commence, there were prevailing two main principles of law with regard to the position of the British Colonies. In the first place, it was held by the Crown lawyers that it was not possible to deprive an Englishman of the inestimable advantages of English law, and that therefore, if he settled in parts abroad which were not under a legitimate foreign sovereignty, he carried with him so much at least of the English law as was appropriate to the circumstances in which he found himself.[1] But obviously, the mere carrying with him of the provisions of such law would not have been adequate to meet the circumstances of a new Colony. It was impossible to expect the Parliament of England to legislate effectively for distant territories concerning which it had, and could have, no information, and it was therefore necessary that there should be passed by some competent authority legislation adapted to the needs of the new Colony. But if an Englishman carried with him English law, it was a fixed principle of that law in the late sixteenth and the

[1] 2 P. Will. 75; *Blankard* v. *Galdy*, 2 Salk. 411; *Forbes* v. *Cochrane*, 2 B. & C. 463; *Kielley* v. *Carson*, 4 Moo. P. C. 84; *The Falkland Islands Co.* v. *The Queen*, 2 Moo. P. C. (N.S.) 273; Forsyth, *Cases and Opinions on Constitutional Law*, pp. 18 seq. The ground of the distinction between settled and conquered and ceded colonies as set out in *Freeman* v. *Fairlie* (1 Moo. Ind. App. 324) is certainly inaccurate.

seventeenth centuries, when colonial settlements became of importance, that the money of the subject could only be voted by a representative legislature, and that the laws of England could only be changed by a similar legislature. The Crown lawyers, therefore, adopted the view that the King had the power in any Colony by settlement (this was the technical term adopted) to empower the Governor, or other representative of the Crown, to make laws for the peace, welfare, and good government of the settlement, with the advice and consent of a Council which acted both as a legislative and executive authority and of an Assembly which consisted of the whole or the major portion of the freeholders of the Colony. It was not in the power of the Crown to legislate for such a Colony with the advice of a nominee Council only, though it was never decided in the Courts to what extent the people must be represented in the Assembly; as a matter of fact, the representation in every case was a decidedly liberal one.

The other principle which guided the lawyers of the day was the doctrine then prevalent at international law of the absolute power possessed by a conqueror over the people of the country he conquered, an idea applied also to cases of cession. In their view, as the conqueror was not bound in international law even to spare the lives of those who were overcome by him, so he need not accord them any civil rights whatever, and what he did accord was his to grant and to take away. Thence followed the doctrine that the Crown has uncontrolled legislative authority over the conquered or ceded Colony.[1] But it would be a mistake to suppose that this status was considered a specially desirable one, even from the royal point of view, especially if, as was the case with the Colonies early so acquired, there was a chance of white settlement: in those cases the Crown was ready and willing to grant a constitution of the same liberal type as had been necessarily granted to Colonies which had been acquired by settlement. Nothing, perhaps, can illustrate

[1] 2 P. Will. 75; *Smith* v. *Brown*, 2 Salk. 666; *Beaumont* v. *Barrett*, 1 Moo. P. C. at p. 75; *Cameron* v. *Kyte*, 3 Knapp, at p. 346.

more strongly the force of this view than that in 1763, on the cession of French Canada, the Royal Commission to the Captain-General and Governor-in-Chief of the Province of Quebec contemplated the calling together for purposes of legislation of the freeholders of the province, although it was cautiously provided in the instructions that in the meantime, until the condition of affairs allowed this to be done, the Governor could legislate with the advice of the Council with which he was associated in the Government. It might, however, have been thought that if such grants of favour could be made they could also be taken away, but that view, which was certainly the natural one, was finally disposed of by the decision of the case of *Campbell* v. *Hall*,[1] when it was laid down after long delay and much hesitation, but in decisive terms, by Lord Mansfield, that a grant of a representative constitution could not be recalled, and that the legislative power of the Crown in respect of a conquered or ceded colony departed when the Crown had granted such a constitution, unless, indeed, the Crown had reserved a right of revocation in the instrument by which the constitution was granted. The decision rests on no very intelligible ground of law, but in point of expediency it was certainly deserving of approval.

From these principles flowed the result that the Imperial Parliament had soon to be invoked for the purpose of securing the establishment of suitable legislative arrangements in the Colonies. If a Colony were acquired by settlement, the only constitution which could be granted was one which had a lower house elected by the freeholders, or at any rate by a considerable part of the freeholders, for the exact nature of the franchise was not defined by any judgement of a court, and the Crown had some latitude in settling the details of the franchise. Even if a Colony had been acquired by conquest, if the Crown had bestowed upon it

[1] 20 St. Tr. 239. Contrast the case of Cape Breton, which had only a Governor and Council from 1784 to 1820. It was decided (5 Moo. P. C. 259) that the province had no claim to separate existence when merged by the Crown with Nova Scotia in 1820.

a representative constitution, that constitution could not be recalled by the power which had granted it, and therefore an Imperial Act was needed to secure the reversal of a policy which might have proved imprudently generous. Thus it has resulted that in many cases the constitutions of the self-governing parts of the Empire rest on Imperial enactments and not on the royal prerogative, whether exercised in the shape of the creation in a settled Colony of a miniature of the Imperial constitution, or in the shape of the grant by a legislative Act of a constitution to a Colony acquired by conquest or cession.

Thus in the case of Canada the provisions of the Royal Commission of 1763 were allowed to remain a dead letter: an Assembly was indeed convoked *pro forma*, but was never allowed to assemble:[1] moreover, the requirement that members of the Assembly were to take the oaths of allegiance and supremacy and make the declaration against transubstantiation was a hopeless drawback to any possibility of summoning a legislature on the lines contemplated by the Royal Commission, which indeed was a document hardly defended by any one, and for which all seemed to desire to avoid accepting responsibility. Accordingly a purely nominee legislature was established for Canada in 1774, by the Act 14 Geo. III. c. 83. The transition to representative government took place in 1791, when the Act 31 Geo. III. c. 31 divided Canada into two provinces and provided each province with the full apparatus of a legislature, consisting of a Governor, a Council, and an Assembly. The same principle prevailed in 1840, when the Union Act of that year, 3 & 4 Vict. c. 35, united the two provinces under a representative legislature, but simultaneously a new start was given in constitutional history by the enunciation and adoption of the principle of responsible government.

Of the other provinces of the Dominion, Nova Scotia received a legislature of the usual bicameral type in 1758,[2]

[1] Garneau, *Histoire de Canada*, ii. 92, 108.

[2] Houston, *Constitutional Documents of Canada*, p. 11; Canada *Sess. Pap.*, 1883, No. 70, pp. 12–6.

under the royal prerogative to create a legislature in a settled Colony: before that date, from 1713 the Government had been administered and legislation carried by a Governor or Lieutenant-Governor, with the aid of a Council which was at once a legislative and an executive body, but the creation of an Assembly followed upon the realization of the fact by the Imperial Government, on the advice of the law officers, that the legislative power of the Crown in the Province could probably not legally be exercised unless an Assembly was summoned. The island of Prince Edward, once part of the Province of Nova Scotia, was given a separate Lieutenant-Governor and a Council with executive and legislative functions in 1769, and for the same reasons as in the case of Nova Scotia itself an Assembly was called into being and met in 1773.[1] In 1784 the Province of New Brunswick was created with a Council which, as usual, united legislative and executive functions and an Assembly. In both these cases the authority upon which the constitution was based was the power of the Crown to summon miniature Parliaments in the Colonies.[2] Responsible government in all three followed the creation of it in Canada, and was fully established in Nova Scotia and New Brunswick in 1848 and in Prince Edward Island in 1850–1.

In the case of the territories which now constitute the Province of British Columbia, and which were long in the hands of the Hudson's Bay Company, Vancouver Island was created as a Crown Colony with a nominee legislature in the year 1849, but in 1856 an Assembly was called, despite the insignificant population of the island. In 1858[3] the territory on the mainland known as New Caledonia was made into a Crown Colony, in consequence of the influx of inhabitants thither as a result of the discoveries of gold. In 1866[4] the mainland and the island were united under the single title of British Columbia, and a legislature of the usual non-representative type was created. But,

[1] Houston, *op. cit.*, p. 21; Canada *Sess. Pap.*, 1883, No. 70, p. 47.
[2] Houston, *op. cit.*, p. 22; Canada *Sess. Pap.*, 1883, No. 70, p. 2.
[3] 21 & 22 Vict. c. 99. [4] 29 & 30 Vict. c. 67.

in view of union with Canada in 1871,[1] full responsible government was set up in accordance with the desire of the Dominion and the Province alike.[2]

The history of the remaining Canadian Provinces is peculiar. It was the aim of the Federal Government to secure the control of the vast lands which were included in the grants to the Hudson's Bay Company, and the Imperial Government were anxious to assist them in this attempt. An Imperial Act of 1868[3] accordingly provided for the acceptance by the Crown of the surrender of the chartered company's lands, privileges, and rights, and terms of surrender were arranged with the Canadian Government in the following year, while an Order in Council of June 30, 1870, declared that the North-west Territory and Rupert's Land should form part of the Dominion of Canada. Provision was also made by Imperial legislation of 1871 to make clear the right of the Canadian Parliament to establish new provinces in the Dominion, and to legislate in such manner as it thought fit for the government of parts of North America which were not included in any province of the Dominion. In virtue of the powers thus conferred Canadian legislation of 1870 established a new province in the shape of Manitoba, with a fully-developed Government consisting of a Lieutenant-Governor with a Council and an Assembly, the Government being conducted on the principles of responsible government. The rest of the territories remained for years under a Crown Colony form of administration, but in 1905 two new provinces, Alberta and Saskatchewan, were formed by Canadian Acts and granted responsible government.

Newfoundland was long treated not as a Colony at all, but as a mere temporary place of resort for fishermen from England, and every attempt was made to discourage anything like permanent settlement. Thus, so far as law was enforced at all, it was administered by officers appointed in

[1] Canada *Statutes*, 1872, p. lxxxix.

[2] See 33 & 34 Vict. c. 66; Order in Council, August 9, 1870; Colonial Act, No. 147, 1871.

[3] 31 & 32 Vict. c. 105.

virtue of Imperial Acts, and it was not until 1832[1] that the Imperial Acts were modified so as to allow of the exercise of the prerogative and the creation of a representative legislature of the ordinary type with a Council and Assembly. In 1855 responsible government was finally conceded.

In Australia at first the settlements were treated as little more than convict stations, and the Governor ruled as he pleased and made what regulations he pleased. The growth of population and the settlement of free men soon rendered this state of affairs impossible, and in 1819 it was definitely recognized that the only manner in which to enact new laws was by some form of legislature. It was clearly impossible to call an Assembly, which was the only power available to the Crown, and the course of passing an Imperial Act was therefore adopted in 1823. Under this Act and a charter of justice issued in the same year, the legislative power was exercised by a nominee Council, and this Council was confirmed by the Act of 1828,[2] which placed the Government of New South Wales on a more definite basis. In 1842[3] the principle of representative government was introduced in the unusual form of the creation of a Council one-third nominee and two-thirds elective, while in 1850[4] the Legislature was allowed, by an Imperial Act of that year, to alter its constitution by substituting two houses for one. It did so in an Act 17 Vict. No. 41, which went beyond the powers actually conferred in some regards, and was therefore confirmed with modifications by the Imperial Act 18 & 19 Vict. c. 54, and at the same time responsible government was introduced into the Colony. In the case of Tasmania, at first a dependency of New South Wales, a nominee legislature was created in 1825 under the authority of the Imperial Act of 1823. That body, though enlarged in 1842, remained nominee until 1851, but the Council of two-thirds

[1] 2 & 3 Will. IV. c. 78; cf. 5 Geo. IV. c. 67 (part repealed by 36 & 37 Vict. c. 91). The constitution was somewhat altered under 5 & 6 Vict. c. 120, and restored with limitations under 10 & 11 Vict. c. 44.

[2] 9 Geo. IV. c. 83.

[3] 5 & 6 Vict. c. 76.

[4] 13 & 14 Vict. c. 59.

elected and one-third nominee members set up in that year exercised the power of creating two houses accorded them in 1850 by a local Act, and with the royal assent to that Act the principle of responsible government was formally introduced in 1855. In the case of Victoria, which was part of New South Wales until 1850, the Act of that year created a legislature of the same type as that subsisting in New South Wales, and that body likewise exercised the power of creating a Parliament with two chambers by a Bill which was confirmed by an Imperial Act, 18 & 19 Vict. c. 55. Queensland, also a part of New South Wales, received a constitution of the usual bicameral type in 1859, with responsible government forthwith. South Australia has a separate history: originating in 1834 as an experiment in free settlement, it was governed by a nominee Council from 1836 up to 1851, on which date it possessed under the authority given by the Imperial Act of 1850 a Council of twenty-four members, one-third only nominee, while in 1855–6, by a further exercise of the power given by the Act of 1850, the Legislature was reconstituted on the usual bicameral lines and responsible government came into force. In Western Australia a nominee Council existed in virtue of various Imperial Acts until 1868, when a representative element was introduced, and in 1870, in virtue of the Imperial Act of 1850, the Council became elective as to two-thirds of its numbers. In 1889 the Council passed an Act establishing an ordinary bicameral constitution, which was confirmed by an Imperial Act of 1890, and responsible government became a *fait accompli*.

In the case of New Zealand there was little real organization of government until, by an Imperial Act of 1840,[1] a Crown Colony form of Government was instituted. Naturally that did not in any way please the people there, and an Imperial Act of 1847 [2] was intended to create an elaborate form of government with a central Legislature, which should be representative, and a number of provincial Councils also representative, but the members of the Councils were to be

[1] 3 & 4 Vict. c. 62. [2] See Henderson, *Sir George Grey*, pp. 121 seq.

elected indirectly, and the members of the central body were all to be members of a provincial legislature. But this Act did not take full effect, and in 1852[1] a proper measure of representative government with a less complicated constitution, and one which abolished the connexion of the central and local legislatures, was introduced. Without legal change of the constitution responsible government was introduced in 1855–6.

§ 2. The Instability of Representative Government

In these cases it will be seen that, as a rule, the progress has been from a representative form of government to the full self-government. It is true that in the case of Queensland there was no period of representative government, but the people of Queensland, as part of New South Wales, had passed through the experience both of Crown Colony administration and of representative government. In the case of the Transvaal and the Orange River Colony the grant of responsible government followed immediately upon the possession of a nominated legislature, but many of the statesmen who formed part of the first administration had had experience of self-government either in the Cape or in the former Transvaal and Orange Free State Republics. In the case of Manitoba the transition was from the curious and indefinite rule of the Hudson's Bay Company[2] to ordinary responsible government, and in that case all those who formed the Government had had experience of responsible government in other parts of Canada.

But it would be a mistake to assume that representative government normally results in an advance to responsible government. As a matter of fact, while the cases in which responsible government has been an advance from a preliminary period of representative government are so important as to cause the impression that representative institutions are a stage towards responsible government, in point of fact the cases of retrogression are at least as numerous. For example, Jamaica, after two centuries of

[1] 15 & 16 Vict. c. 72.

[2] See Report of Select Committee of House of Commons, 31 July, 1857.

nearly responsible government,[1] surrendered its legislature in 1866, a surrender which was accepted and ratified by an Act of the Imperial Parliament, it being held that the grant of a constitution did not include the right to destroy that constitution. Similarly, in 1876,[2] Tobago, Grenada, and St. Vincent surrendered their independent legislatures, while in the case of the Leeward Islands, Antigua, Dominica, Montserrat, St. Kitts, Nevis, and the Virgin Islands, the process of surrender which began in the middle of the nineteenth century, and which was accelerated by the federation of the group in 1871,[3] became complete in 1898, when the financial pressure which had been the cause of the earlier modifications of the constitutions ended in the surrender by Antigua and Dominica of the representative character of their legislatures. British Honduras also in 1870 consented to a modification of its constitution under which the legislative power was vested in a nominee Council, though in 1853 a Legislative Assembly had been formally constituted consisting of eighteen elective and three nominated members, and replacing the informal gathering, first of all the people, and later of a limited number, which had governed a Colony which had originally existed merely on sufferance as a body of logwood cutters, but which eventually was recognized as a full Colony.

British Guiana, after long disputes with the Imperial Government, retains in financial matters a certain amount of independence, but the independence is strictly limited, for not only can the Crown legislate by Order in Council in general matters, but even in financial matters the power which is granted to the Legislature to criticize freely the estimates and generally to deal with financial questions, is seriously limited by the fact that it is only granted by an Order in Council, renewed from time to time, which renders

[1] *House of Lords Papers*, 1864, xiii. 205; Imperial Act, 29 & 30 Vict. c. 12. [2] See the acceptance in 39 & 40 Vict. c. 47.

[3] 34 & 35 Vict. c. 107. Originally all the islands had bicameral legislatures, but first they were by Act reduced to unicameral, then the Assemblies turned themselves into Councils nominated by the Governor.

the power conditional on the existence of a Civil List, which is enacted in the Order in Council itself.[1] There remain as full members of the class of representative government in the British Empire only the Bahamas, Barbados, and Bermuda, all of them islands. In the case of the Bahamas it still remains open for any member of the Lower House to propose money votes; in Bermuda the practice has been somewhat restricted by the resolution of the House of Assembly to deal with the estimates in one body annually, but the power could be resumed at any time; while in Barbados an Act[2] was passed in 1892 in order to secure greater regulation of financial administration, under which a body is created called the Executive Committee, which consists of the Governor as chairman, the members of the Executive Council, one member of the Legislative Council and four members of the House of Assembly who are nominated by the Governor. This body introduces all money votes, prepares the estimates, and initiates all Government measures.

Representative government has thus proved essentially unstable in character, tending on the one hand to develop into full self-government, and on the other hand to fall back into a form of government under which the Legislature as well as the Executive is controlled by the Crown. It would be premature to pronounce that the system of representative government is fundamentally unsound as a permanent solution of the relations of the Executive and the Legislature; it has existed and still exists in certain parts of the world, and has worked with some success. But it is fair to say that in the British Empire it has never been a fortunate experiment. It has been found impossible to reconcile the relations of the Executive officers appointed in many cases from outside with the Legislature of the day. The Legislature, on the one hand, has been helpless in the face of its total inability to secure the adoption of a policy in general harmony with its desires and aims, while on the other hand the Executive Government, forced to rely upon the Legis-

[1] *Colonial Office List*, 1911, pp. 98, 99.

[2] See *Parl. Pap.*, C. 2645, Barbados Acts, No. 55 of 1891 and No. 9 of 1892.

lature for the greater portion of its pecuniary resources, has been thwarted and harassed in its aims by the resistance of a body over which it has no efficient control. Governors have repeatedly attempted to govern by relying on frequent dissolutions, but this policy has of course seldom been successful, and in the main tends to defeat its own aims by exasperating the representatives of the people and the constituencies by which they are returned. Under the circumstances the existence of a strong Executive is impossible, and the bankruptcy of the system was seen strikingly in the rebellions of 1837 and 1838 in Lower and Upper Canada, and similarly in the growing weakness of the Government of Jamaica, which ended in the rising of 1865 among the negro population.[1] As might be expected from the weakness of the Government, the rising was put down with unnecessary violence, and the Governor was recalled, but yet earlier the depression caused by the abolition of slavery had led to a grave constitutional crisis—the Assembly refusing to vote supplies and endeavouring to enforce sweeping reductions in establishments without compensation to the displaced officers.

Lord Melbourne's Government in 1839 had proposed to suspend the constitution, but the Bill then introduced was defeated, and though harmony was restored temporarily in 1854 by a measure of responsible government, after the suppression of the rebellion in 1865 the Governor, at a meeting of the Legislature, urged the unsuitability of the then existing form of government to meet the circumstances of the community, and the necessity of making some sweeping change by which a strong Government might be created. The Legislature willingly abrogated all the existing machinery of legislation, and left it to Her Majesty's Government to substitute any other form of government which might be better suited to the altered circumstances of the Colony. While changes in the constitution have since taken place in the direction of greater representation of the people,

[1] Cf. Lord Elgin's view, Walrond, *Letters and Journals of Lord Elgin*, pp. 125, 126; Adderley, *Colonial Policy*, pp. 227 seq.

the Council is still composed of a majority of official members, although unless the matter is declared to be of pressing importance by the Governor, on certain questions the elected members are allowed to decide the issue.

§ 3. Responsible Government in Canada

The introduction of responsible government is inseparably connected with the name of Lord Durham and his report[1] of Jan. 31, 1839, on the condition of Canada, whither he went as special commissioner to settle the affairs of the provinces after the abortive rebellions in both Upper and Lower Canada had proved the bankruptcy of the existing system of government. In neither province had the scheme of representative government been in the least successful. The Executive Government had some resources apart from parliamentary grants, in the shape of the hereditary Crown revenues and the casual revenues, but these were small, though the Crown owned vast tracts of land and was potentially in possession of the means of future greatness. On the other hand, the Legislature had no control at all over the Executive, and one part of it, the Legislative Council, was clearly and wholly out of sympathy with the other branch of it, while from members of the Legislative Council the Governor accepted advice as to his executive actions. The result was constant friction, amidst which the provinces failed utterly to progress, contrasting very strangely with the states of the American Union to the south of the border-line, and inviting invidious comments. Every possible device was tried to overcome the friction: Governors were conciliatory, Governors were dictatorial, but both policies signally failed, and Lord Durham found himself in the face of complete breakdown of all constitutional government: in Lower Canada, indeed, as the result of the rebellion, the constitution had been recalled by an Imperial

[1] Reprinted by Methuen in 1902. Cf. Egerton, *Canada*, pp. 145–53; the report is being edited and commented on by Sir C. Lucas. For the views of his opponents, and a report of a select committee of the Legislative Council of Upper Canada, see Egerton and Grant, *Canadian Constitutional History*, pp. 173 seq.

Act which permitted the Governor-General to legislate with the advice of a Council summoned by himself.

It is no doubt easy to show that the conception entertained by Lord Durham differed very considerably from responsible government as understood in 1911, and that he overestimated the advantages of the measure as a perfect and final settlement of all colonial difficulties. Lord Durham's vision was imperfect, but he said enough to establish his claim to have seen more clearly, and to have expressed more articulately than any of his contemporaries the solution for the difficulties then confronting government in Canada. The substantial correctness of his views is shown by the fact that in its essence his exposition of the character of responsible government might be accepted even at the present day : in rejecting the proposed solution of the constitutional question by the expedient of an elected Executive Council, an idea which has analogies in the early history of English constitutional government, he wrote :—

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.

No alteration in the conditions laid down in this passage has been made since : the only point in which changes have taken place is with regard to the further and more complete carrying out of the principles which were there enunciated. Lord Durham gave a list of matters in which he considered Imperial interference justified : this list contains only ' 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 all other matters the colonists should have a free hand, as they were the most interested in their own administration and legislation, and were those

on whom the results of unsatisfactory government first recoiled. He laid special stress on the necessity of leaving to the local Government all patronage, a recommendation not altogether palatable at a time when, despite vigorous disclaimers, posts in the Colonies were a recognized way of disposing of younger sons for whom no other employment could decently be found. To his list of exceptions to the rule of self-government must of course be added military and naval affairs, which he naturally, at a time when two risings had been put down with the aid of Imperial troops, assumed to be matters for Imperial control. The omission of questions affecting the natives is probably to be attributed to the fact that the question of the rights of the Indians did not present itself as of much consequence in the provinces which he deemed to be ripe for self-government at the time of his visit to the Dominion.

The Imperial Government were in no hurry to adopt in their full form the proposals of Lord Durham in favour of responsible government, but in his instructions to Mr. C. Poulett Thomson when he went out as Governor, Lord John Russell took, on October 16, 1839,[1] the important step of announcing that the principal offices of the Colony would not be considered as being held by a tenure equivalent to one during good behaviour, but that the holders would be liable to be called upon to retire whenever, from motives of public policy or for other reasons, this should be found expedient. A further definition of responsible government was arrived at after the Constitution Act of 1840 re-united the two Canadas and placed them as a unit under one Governor-General. On September 3, 1841, Mr. Harrison submitted to the Legislative Assembly of Canada, in substitution for a set of resolutions proposed by Mr. R. Baldwin, a series of resolutions which define as follows the system of government:—

The head of the Executive Government of the Province being within the limits of his Government the representative of the Sovereign is responsible to the Imperial authority

[1] *Parl. Pap.*, H. C. 621, 1848, p. 5; cf. Egerton and Grant, *Canadian Constitutional History*, pp. 266 seq.

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alone, but that nevertheless the management of our local affairs can only be conducted by him by and with the assistance, counsel, and information of subordinate officers in the Province: (2) That in order to preserve between the different branches of the Provincial Parliament that harmony which is essential to the peace, welfare, and good government of the Province, the chief advisers of the representative of the sovereign constituting a provincial administration under him ought to be possessed of the confidence of the representatives of the people, thus affording a guarantee that the well-understood wishes and interests of the people which our Gracious Sovereign has declared shall be the rule of the Provincial Government will on all occasions be faithfully represented and advocated: (3) That the people of the Province have moreover a right to expect from such provincial administration the exertion of their best efforts that the Imperial authority within its constitutional limits shall be exercised in the manner most consistent with their well-understood wishes and interest.

Mr. Baldwin proposed a further resolution to assert the constitutional right of the Assembly to hold the provincial administration responsible for using their best efforts to procure from the Imperial authorities that their action in matters affecting Canadian interests should be exercised with a similar regard to the interests and wishes of the Canadian people. But this resolution was unanimously rejected after debate. It ran, in fact, counter to the dispatch from Lord John Russell of October 14, 1839,[1] in which he somewhat vehemently denied the possibility of full ministerial responsibility in Canada. He asserted that the prerogative in the United Kingdom was now always exercised on advice, but that could not be the case in Canada, for Canadian ministers could not advise the Crown, for the Crown had other advisers for the same functions, and with superior authority. This was obvious in the case of foreign war and international relations, whether of trade or of diplomacy, but it applied also even to internal relations, for no Imperial Government could acquiesce in the state of affairs which existed in Lower Canada under Mr. Papineau,

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

when British officers were punished for doing their duty, British emigrants were defrauded of their property, and British merchants discouraged in their lawful pursuits. The Legislature therefore claimed only what the Secretary of State conceded, full responsibility in local matters subject to the fact that the Governor was not responsible to them but to the Crown only.

Lord Sydenham died of an accident before he could be called upon to realize the ideal of the Legislature,[1] but his successor, Sir C. Bagot, who had been Ambassador to Russia when the famous attempt of that Government to claim as *mare clausum* the waters of Behring Sea led to the protests of the United States and England, which were to be used with such effect by the latter in the arbitration over the fur seals in 1894, did his best to live up to the maxims of the resolutions, and so did his successor, Lord Metcalfe, whose views of government, however, formed in India and Jamaica, rendered him hardly an ideal selection for the post. He quarrelled with his Ministry on a question of patronage; the Government resigned, and with the greatest difficulty he formed a Conservative administration and dissolved and appealed to the country. His high character and his energy secured him a majority, but he had utterly disregarded the rôle of a constitutional Governor,[2] and it was not unfortunate for his reputation that he had to retire through ill-health in 1845. The difficulties with America over the Oregon boundary caused his successor to be chosen for his military qualities, but on Lord Cathcart's retirement Lord Elgin was chosen by the Whig administration for the post.

It was certainly Lord Elgin who first consistently applied the maxims of responsible government in practice.[3] He was

[1] His last exploit was carrying a Municipal Districts Bill in the teeth of much opposition; see Egerton and Grant, *op. cit.*, pp. 287, 288.

[2] His views as expressed in 1843 are given in Egerton and Grant, pp. 295, 296. Cf. below, p. 21.

[3] See extracts from his correspondence, ibid., pp. 310–34. Cf. also Earl Grey, *Colonial Policy of Lord John Russell's Administration*, i. 203; Munro, *Constitution of Canada*, p. 20; Egerton, *Canada*, pp. 191 seq.

determined to stand apart from any appearance of favouring any one side in the country, and to accept any measure which was suggested by his ministers, unless it were of so extreme a party character that the Assembly or the people would be sure to approve his refusal. He had troubles to face: his first ministry, a Conservative one, was very weak, and he found it difficult to induce them to face Parliament, while they were unable to undertake any substantial work because of the chances of defeat in the Assembly; he noted also that the racial split was unhappy; a Conservative administration meant British control, a Liberal one a French dominion, and he wished for a consummation which has partly been fulfilled in our time, the division of the French into two parties in some correspondence with the divisions in the British party. The principle which governed his action he thus described:—

> I give to my ministers all constitutional support, frankly and without reserve, and the benefit of the best advice that I can afford them in their difficulties. In return for this I expect that they will, in so far as it is possible for them to do so, carry out my views for the maintenance of the connexion of Great Britain and the advancement of the interests of the Province. On this tacit understanding we have acted together harmoniously up to this time, although I have never concealed from them that I intend to do nothing which may prevent me from working cordially with their opponents if they are forced upon me. That ministries and oppositions should occasionally change places is of the very essence of our constitutional system, and it is probably the most conservative element which it contains. By subjecting all sections of politicians in their turn to official responsibilities it obliges heated partisans to place some restraints on passion, and to confine within the bound of decency the patriotic zeal with which when out of place they are wont to be animated.

Lord Elgin's principles were carried out in practice when, in March 1848, a vote of no confidence by the Assembly led to the resignation of his ministers: he made no attempt to keep them in office, and merely appointed a ministry from the opposition, which act he reported to the Secretary of

State, requesting the issue of the usual warrants for the appointments.[1] The act was a simple one, but it signified for the first time the adoption of ministerial responsibility: a Government which had worked harmoniously with the Governor had for the first time been ejected from office by a vote of the Legislature, and the Governor had made no effort to reverse the popular decision. He was later to show his determination to accept any measure proposed by the Government unless he thought it was disapproved by the Assembly or the people. The question of the losses caused by the suppression of the rebellion of Lower Canada had been the source of unending ill-feeling and trouble, and the new Government in 1849 introduced a measure appropriating £90,000 for the payment of claims based on wanton damage and destruction, excluding from the benefit of the law persons convicted of treason. This modest measure, which had been preceded by inquiries authorized by a Conservative Government in Lord Metcalfe's time, roused the Tories to fury; they sought to embarrass the Governor-General by deluging him with petitions to dissolve Parliament, or at least to reserve the Bill for the royal pleasure. Lord Elgin might easily have evaded responsibility by adopting the second alternative, but he preferred the more courageous and statesmanlike course of assenting to the Bill. He pointed out that a dissolution might have led to a rebellion, but certainly would not have led to the reversal of the established policy, and to reserve the Bill would have involved the Government at home in difficulties which it was not fair to cast upon them.[2]

Lord Elgin was rewarded for his courage by an attack on his person in Montreal and an attempt at home to secure the disallowance of the Bill. But he had the consolation of seeing the satisfactory termination of a vexed question, and in the remaining years of his office he was instrumental in securing one great boon for Canada, in the shape of the reciprocity treaty with the United States in 1854. He was

[1] *Parl. Pap.*, H. C. 621, 1848, p. 6. [2] *Parl. Pap.*, May 25, 1849, p. 6.

also an intermediary with the Home Government in the matter of the troops, and used his influence against the determination to make the Colony rely solely on its own strength for defence purposes. He recognized the duty of the Governor-General to exercise a moderating effect on governmental bitterness, to constitute himself the patron of education, of moral and social efforts, and to wield an unobtrusive but pervading power for good in the Colony, and when he left Canada he had given a clear and convincing example of all that was best in responsible government.

In the case of Nova Scotia the principle of responsible government had been adopted in theory contemporaneously with its acceptance for Canada, but it was by no means at once put into effect. In a dispatch of November 3, 1846,[1] however, Earl Grey, in replying to a private communication from Sir John Harvey, laid down the principle that the Lieutenant-Governor should not dismiss his ministers, but allow them to be forced into resignation by lack of support in the Legislature. He also advised him that he should accept the proposals of his ministers unless they seemed to be based merely on considerations of party advantage, but even in such cases the refusal must be conditioned by the fact that it entitled the ministers to resign, and that if the public supported them concession to their views became inevitable, since it could not be too distinctly acknowledged that it was neither possible nor desirable to carry on the Government of any of the British Provinces in North America in opposition to the opinion of the inhabitants. The Lieutenant-Governor then proceeded to endeavour to arrange a coalition on the basis of the Liberals being offered four seats in the Council and one office, but that was declined

[1] *Parl. Pap.*, H. C. 621, 1848, pp. 7, 8; Earl Grey, *Colonial Policy*, i. 209–13. The Executive Council was made distinct from the Legislative Council in 1838, by the instructions to Lord Durham; see Canada *Sess. Pap.* 1883, No. 70, pp. 8, 39; Bourinot, *Constitution of Canada*, p. 68; Egerton and Grant, *op. cit.*, pp. 297–310. For arguments for responsible government see Howe's *Letters and Speeches*, extracts of which are given by Egerton and Grant, pp. 197–252.

on the ground of the unfairness of the proposal. The Liberal leaders pointed out that from 1840 to 1843 they had left the Conservatives to enjoy a majority of the seats and the posts, that the agreement had been broken up by the action of the Conservatives in 1843 in engrossing seven seats in the Executive Council, and that they had accordingly abandoned their coalition, and that now the House only supported the Government by one vote instead of their commanding three-fourths of the members as before 1843. In a dispatch of February 2, 1847,[1] the Lieutenant-Governor forwarded to the Secretary of State copies of two memoranda by his Council which asked for a statement of the views of Earl Grey as to the mode of conducting the Government: they deprecated the adoption of full self-government as understood by their rivals, especially Mr. Howe, and they sought to maintain the limited interpretation put on responsible government by Sir Charles Metcalfe when Governor-General of Canada, when he asserted his refusal to rely blindly on the advice of the Executive Council or to surrender the control of patronage into their hands, a view which had been accepted by the House of Assembly on March 4, 1844, as a correct interpretation of the rule of responsible government. They then referred to the fact that Lord Falkland had consistently refused to govern with any but a coalition ministry, and that when at the elections of 1843 Mr. Howe, then a member of the coalition, went to the country declaring for full responsible government, he had been defeated, and his subsequent conduct in attacking the Governor in his newspaper had rendered his appointment to office in a coalition impossible. They also argued from the poverty of the province that a large adoption of the changing of offices would work very badly indeed.

Earl Grey's reply of March 31, 1847,[2] recapitulated the principles of responsible government which he thought both parties really accepted. He laid stress on the necessity for the party on whose advice the Lieutenant-Governor acted

[1] *Parl. Pap.*, H. C. 621, 1848, p. 15. [2] Ibid., p. 29.

having a majority in the Assembly, and on the other hand he urged that, as a rule, public officers should hold as in the United Kingdom by a permanent tenure, while a limited number of officers should be political officers, viz. the Attorney-General, the Solicitor-General, the Provincial Secretary, and possibly two more officers, and he advised that salaries be attached to two or three places in the Executive Council to secure the services of qualified men. Moreover, any political changes which required the surrender of offices hitherto deemed to be permanent should be accompanied by the grant of pensions.

In January 1848 the dispatch from the Secretary of State was laid before the Legislature, and at the same time the attention of the Houses was called to the proposals of the Imperial Government for the surrender of the Crown revenues in return for the grant by Act of a Civil List. The Assembly asserted its approval of the principles enumerated in the dispatch, and promised to consider the question of a Civil List, and then proceeded to defeat the Government by twenty-nine to twenty-two votes. The members of the Executive Council tendered their resignations, with the exception of the Provincial Secretary, and, as the opposition declined to take office without being accorded as a political post that of Secretary, it was necessary to remove the Secretary from office by the exercise of the prerogative. In the case of the other two political officers, the Attorney-General and the Solicitor-General, trouble was avoided by their voluntary resignation, and the new Government, on February 8, 1848, asserted formally its concurrence in the views of the Secretary of State as to the permanency of ordinary public posts. The establishment of responsible government was finally perfected by the election of the Attorney-General and the Provincial Secretary for the constituencies to which they had submitted themselves after accepting office. Matters, however, were not yet disposed of, as unhappily the new Government insisted on the dismissal of the Treasurer, whose post it was intended to divide into two, a Receiver-General and a Financial Secretary, without compensation to him for

loss of office. The Lieutenant-Governor endeavoured to induce them to reconsider the decision, but in vain, and he then acquiesced in the result without making any attempt to dissolve Parliament and appeal to the country against his ministers. His action was attacked in the Imperial House of Commons on March 26, 1849, but was successfully defended by the Secretary of State.[1]

In New Brunswick also there was delay in adopting the principles of responsible government, to which, as usual, the Lieutenant-Governor was not partial. But events in Nova Scotia precipitated action, and on February 4, 1847, there was presented to the Lieutenant-Governor, Sir E. Head, an address praying that there might be laid before the House any dispatch from the Secretary of State regarding the tenure of office in the province or responsible government. Accordingly an extract from Earl Grey's dispatch to Sir John Harvey was laid before the House, and on February 24 the House resolved, by a majority of twenty-three to eleven, that it should approve of the principles laid down in that dispatch, and of their application to the case of New Brunswick.[2]

In the case of Prince Edward Island there was some delay in the granting of full self-government, partly due to the fact that there was a feud between the proprietors of the island and their tenants, which proved wholly incapable of solution until, on entry into the Dominion, the proprietors were bought out at the cost of the Dominion. Efforts were, however, made to secure some degree of harmony between the Assembly and the Executive Government, and in a petition of 1847 [3] the House of Assembly asked for the appointment of four members of the Executive Council from their numbers.

[1] *Parl. Pap.*, H. C. 621, 1848, pp. 33–40. Cf. *Letters and Speeches of J. Howe*, i. 553, 562–4.

[2] *Parl. Pap.*, H. C. 621, 1848, p. 40. In 1832 the Executive and Legislative Councils had been separated; see Lord Glenelg's dispatch of April 30, 1837, in Canada *Sess. Pap.* 1883, No. 70, p. 18. The separation in Canada was introduced by the Act 31 Geo. III. c. 31.

[3] *Parl. Pap.*, H. C. 566, 1847. See also the Address to the Crown of March 23, 1850.

Even then the grant of self-government which the Assembly claimed to have been foreshadowed in 1839 was delayed until 1851, when it came into full effect.

In the case of British Columbia self-government was granted on its entry into the Dominion of Canada, by the creation of a representative Legislature by an Order in Council of August 9, 1870, under the Act 33 & 34 Vict. c. 66; and by the local Act No. 147, 1871, and was continued by the instructions to the Lieutenant-Governor given by the Dominion Government; it already had an Executive distinct from a Legislative Council: the same remark applies also to Manitoba, which was created entirely by Dominion Acts and instructions, and to Alberta and Saskatchewan in 1905, though much earlier a certain limited self-government had been conferred upon the North-west Provinces, in 1897.[1]

In the case of Newfoundland representative government had rather a stormy inception: the Legislature was distracted by a quarrel between the two Houses as to appropriation, which prevented the usual Acts being passed in 1837 and 1839; then questions of privilege led to much excitement and ill-feeling, and the interference of the Catholic clergy in elections produced strong party disturbances. Already, in 1842,[2] an Imperial Act was passed to allow the Crown to establish a property qualification for members not to exceed a hundred pounds income or £500 capital value, to lengthen up to two years the periods of residence laid down in the Commission of 1832 authorizing the summoning of a legislature, to amalgamate the two Houses provided that there should never be more than two-fifths of the members nominee members, to forbid money votes being brought forward save on the advice of the Government, and so forth. The Act was a temporary one, and was extended for one year in 1846, and in 1847[3] the provisions

[1] See Mr. Sifton in Canada *House of Commons Debates*, 1897, ii. 4115, explaining the Act 60 & 61 Vict. c. 28.

[2] 5 & 6 Vict. c. 120.

[3] 10 & 11 Vict. c. 44. The provisions are still law under instructions of 1842 and May 4, 1855, which carry out the powers given by the Acts.

above mentioned, save that for a single-chambered legislature, were made permanent. Another provision in the original Act, providing for the appointment of a separate Executive Council, was not made permanent, and therefore lapsed. But these measures were only a slight remedy for the difficulty, and the colonists became more and more insistent in the demand for responsible government when they saw it established in the Provinces of Nova Scotia, New Brunswick, and Prince Edward Island. On the other hand, the Imperial Government were hampered in their desire to meet the wishes of the people by the fact that both France and America had important treaty rights on the coast of the Colony, and that therefore there was risk in abandoning the control of the Imperial Government over the Colony. Eventually it was determined to give way, and the grant of responsible government was made on the passing of Acts by the Legislature for the purpose of providing retiring allowances for the officers who retired on political grounds, and for increasing the number of members of the Legislative Assembly.[1] At the same time, in 1856, a dispatch from Mr. Labouchere, which has become famous in Newfoundland history, asserted that in future there would be no question of altering the treaty obligations affecting the Colony save after full consultation with the Colonial Government.

§ 4. Responsible Government in Australasia

It is hardly necessary to enter into the details of the discussion of the grant of responsible government to the Colonies of Australia in the period between 1840 and 1850. It was recognized that a change in the form of government to responsible government was natural, and indeed inevitable, once the system had been established firmly in the case of Canada, and the Constitution Act of 1850 contemplated the alteration of their existing constitutions by the Colonies of New South Wales, Tasmania, Victoria, and South Australia.

[1] See *Parl. Pap.*, H. C. 273, 1855; Prowse, *History of Newfoundland*, pp. 466 seq.

In 1852 the Legislative Council of New South Wales appointed a select committee to prepare a Bill to carry into effect the powers conceded by the Imperial Act. This committee drew up a Bill in the form of an Imperial Act, with two Bills attached to alter the constitution and to grant a Civil List. This form was adopted because of the necessity of securing the repeal of the Imperial Acts which regulated the sale and management of waste lands in the Colonies and the appropriation of the revenues thence arising, which the Colonies desired to have under their own control and management.

In a dispatch of December 15, 1852,[1] Sir John Pakington announced the decision of the Imperial Government with regard to the future of the Colony. They were prepared to grant responsible government in view of the discoveries of gold and the influx of population; they were also willing to concede the control of the waste lands and the appropriation of the proceeds, of which already one half was applied to the general purposes of the Colony and the other half to immigration. They were not able to accept the proposal that the right of the Crown to disallow Acts should be restricted in any formal manner to Acts of local interest, for they could see no means of drawing a satisfactory distinction in these matters; but they approved of the creation of two Houses, and of the adoption of ministerial responsibility.

A copy of the dispatch to New South Wales was simultaneously sent to Victoria, with an intimation that the views therein laid down applied equally to that Colony, and thus the Legislative Council was invited to follow the example of that of New South Wales, and send forward detailed proposals for a new constitution.[2] No criticisms were offered on the draft sent by New South Wales, which was not received by the Secretary of State until January 22, 1853, for it was thought better to await the receipt of the draft as finally passed by the Council. A copy of the dispatch

[1] *Parl. Pap.*, March 14, 1853, pp. 44 seq.
[2] Ibid., p. 57.

was also sent to South Australia[1] with an assurance that, while the Imperial Government had no desire to discriminate between that Colony and the others, in view of its short experience of representative government, they did not know how far the proposals therein contained would be welcome in the Colony, and they left it to the Governor to decide in what way they should be made known to the people. This dispatch crossed one from the Governor, forwarding a petition from the Legislative Council to be accorded the control over such portion of the revenues from lands as was not devoted to immigration, subject to such provision as might be necessary being made from the revenues by the Governor for the use of the aborigines.

The New South Wales Bill was proceeded with and further discussed in the Colony: unhappily the committee were induced to recommend the adoption of an hereditary tenure for the Upper House, so as to assimilate it to the House of Lords,[2] and there arose a controversy about that House which resulted in numerous petitions showing that an elective House would be preferred; others again desired a nominee House, appointed not for life but for five years: while others desired that the northern portions of the Colony should be given a separate existence, a desire acceded to in 1859. In the meantime, while the Bill was delayed, the Duke of Newcastle, in a dispatch of August 4, 1853,[3] intimated to the Governor that he should take care to warn all newly-appointed holders of posts which would be likely to be treated as political that they could not expect the usual security of tenure, and added that he trusted that there would be no idea of trying responsible government with a single chamber. At the end of the year the Governor sent home the Bill passed by the Legislature as 17 Vict. No. 41.[4]

On receiving the decision of the Imperial Government to permit responsible government, the Legislative Council of

[1] *Parl. Pap.*, March 14, 1853, p. 72.

[2] Tasmania rejected the idea; see *Debates, &c., of the Legislative Council*, pp. 69 seq. Cf. Rusden, *Hist. of Australia*, iii. 68 seq.

[3] *Parl. Pap.*, August 10, 1854, p. 62.

[4] Ibid., pp. 27 seq.

Victoria at once proceeded to appoint a committee to frame a constitution, and a Bill was passed through the Council and sent home for approval. Like the New South Wales Bill, it embodied measures for the creation of two Houses and the provision of pensions for officers retiring through political changes; it vested the appointment of non-political officers in the Governor in Council, and contemplated responsible government. But Victoria differed from New South Wales in contemplating that the Upper House would be elective and not nominee.[1]

In South Australia the announcement of the determination to grant responsible government was heartily welcomed, and a Bill was prepared which passed the Legislative Council as Act No. 3 of 1853, and was duly reserved for the signification of the royal pleasure. The Bill adopted the principle of a bicameral legislature, and made the Upper Chamber nominee; in other respects it followed generally the model of the New South Wales and Victoria laws, while a subsequent Bill, No. 7 of 1853, granted a Civil List and made provision for the pensions of officers retiring on political grounds.[2] All three Bills, that of New South Wales, that of Victoria, and that of South Australia, were now in the hands of the Imperial Government, but the Secretary of State, in a dispatch of July 3, 1854,[3] explained to the various Colonies that there had not been time to deal with the questions involved in that session of Parliament, all three Bills containing admittedly clauses which required the alteration of existing Imperial Acts.

Tasmania had lagged behind, but on August 25, 1853,[4] the Lieutenant-Governor, Sir W. Denison, addressed the Secretary of State with a suggestion that responsible government should be allowed in its fullness to the Colony, and the Legislative Council also desired the change. The Duke of Newcastle, in a dispatch of January 30, 1854,[5] asserted that the Imperial Government were prepared to concede respon-

[1] *Parl. Pap.*, August 10, 1854, pp. 100 seq.
[2] Ibid., pp. 131 seq.
[3] Ibid., p. 63.
[4] Ibid., p. 162.
[5] Ibid., p. 166.

sible government on the same terms of the grant of a suitable Civil List and the undertaking to make proper provision for both civil and military expenditure. This dispatch crossed a dispatch from Sir W. Denison of February 14, 1854,[1] in which he reviewed the reasons in favour of the grant of responsible government to Tasmania, and pressed for its adoption. He expressed the hope that there would be no objection to the adoption, instead of the principle of nomination, of the principle of election for the Upper House. In his reply of August 3, 1854,[2] the Secretary of State confirmed the dispatch of January 30, and expressed the view that the principle of election might be conceded. He referred to the delay in dealing with the Bills of the other three Colonies, and suggested that a Bill might be passed in Tasmania forthwith, and urged that it would be convenient if, unlike the other Bills, that from Tasmania kept within the legal powers of the Legislative Council. The reply to this was the passing of the Tasmanian Act, 18 Vict. No. 17, which constituted a Parliament and granted a Civil List, and which was reserved for the royal assent by the Lieutenant-Governor.[3]

In the three Bills of New South Wales, Victoria, and South Australia, an ingenious attempt was made to distinguish between Bills which were of Imperial concern and those which were not of such concern. The latter the Governor was to assent to at his discretion, or to reject, but the Crown had no further power with regard to them. But in the case of the former, besides the power of assent or rejection, in which the discretion of the Governor could be fettered by royal instructions, there was also the power of reservation subject to such instructions, and even after assent there was a power of disallowance. In the case of South Australia there was no attempt made to decide in the Act what were matters of Imperial interest and what not. Any doubt on the question was left to be decided by the Privy Council, but it was otherwise both in the case of New South Wales and of Victoria. The provisions in the case of Victoria

[1] *Parl. Pap.*, March 1855, p. 1. [2] Ibid., p. 20. [3] Ibid., pp. 11 seq.

differed from those in the case of New South Wales mainly in that they added the case of divorce Bills to those which were named as of Imperial interest in the list adopted by the sister Colony. The provisions are of considerable interest, both for the fact that they constitute a deliberate and early attempt to distinguish between local and Imperial affairs, and because they indicate roughly the lines on which Imperial control of the Dominion Governments and Parliaments has been exercised, and those of New South Wales may be quoted at length. Clause one of the Bill gives legislative authority to the new Parliament, and then adds provisos, of which the relevant one runs :—[1]

II. The Bills on imperial subjects which may be reserved for the signification of Her Majesty's pleasure, or which, after being assented to by the Governor in Her Majesty's name, may be afterwards disallowed by Her Majesty within the period hereinafter specified, are as follow; that is to say,—

1. Bills touching the allegiance of the inhabitants of this Colony to Her Majesty's Crown.
2. Bills touching the naturalization of aliens.
3. Bills relating to treaties between the Crown and any foreign power.
4. Bills relating to political intercourse and communications between this Colony and any officer of a foreign power or dependency.
5. Bills relating to the employment, command, and discipline of Her Majesty's sea and land forces within this Colony, and whatever relates to the defence of the Colony from foreign aggression, including the command of the municipal militia and marine.
6. Bills relating to the crime of high treason.

III. Whenever any question shall arise as to the right of the Governor to reserve any Bill for the signification of Her Majesty's pleasure thereon, or as to the right of Her Majesty to disallow any such Bill, the same shall be determined by the Judicial Committee of the Privy Council, and in no other manner, except by the consent of the said Legislature of New South Wales, and such question shall be raised by an address to Her Majesty in Her Privy Council

[1] See *Parl. Pap.*, May 14, 1855, p. 4.

by both Houses of the said Legislature, setting forth the question so to be determined: Provided that all such Bills shall be absolutely in abeyance pending any such determination, and that they shall be afterwards submitted for the signification of Her Majesty's pleasure thereon, or remitted to the Colony for the exercise of the Governor's discretion, according to the decision of the Judicial Committee in each such case.

The Imperial Government were unable to accept the clauses in question, and they accordingly omitted them in confirming the Act by the Imperial Act 18 & 19 Vict. c. 54. They further inserted provisions permitting the alteration of the constitution by the new Legislature, and made certain minor alterations. The Governor was also instructed that he was not required to reserve Bills of local interest merely, nor even Bills affecting the Civil List save so far as the Bills in question affected existing holders of office, whose interests were to be respected. At the same time another Act (c. 56) was passed to repeal the laws regarding the management of the Crown lands in Australia, completing the concession granted by the Constitution Act, and steps were taken to vest the administration of the Government, in the case of absence or incapacity of the Governor, in the Chief Justice, the President of the Legislative Council, and the Colonial Secretary jointly, since under the new arrangements the Colonial Secretary would be a political officer. The constitution was received gladly in the Colony, and the Governor found only inconvenience in the desire of the existing officers who were liable to retire on political grounds claiming to be allowed to retire forthwith, without waiting for the political grounds to take effect, a course which he and the judges whom he consulted declared that they could not do if they wished to secure the pensions provided for them.[1]

In the case of Victoria an Imperial Act, 18 & 19 Vict. c. 55, confirmed the constitution, amending it in the same sense as the similar Act for New South Wales, and the same instructions were addressed to the Governor as to not

[1] *Parl. Pap.*, July 24, 1856, pp. 15 seq.

reserving as a general rule Bills of local interest. A curious contretemps resulted from the passing of the Act: under the interpretation put on the Act by his law officers, the system of responsible government was brought into effect before a new legislature came into existence, and the sitting Legislative Council proved ready to defeat the officers of the Government who had to face them in their new capacity as ministers.[1]

In the case of South Australia the Imperial Government did not proceed as in the case of New South Wales and Victoria to pass an Act confirming the Colonial Bill, No. 3 of 1853, but they suggested in a dispatch of May 4, 1855, that the Legislative Council would do well to reconsider the provisions of the original Bill regarding the Legislative Council.[2] It was added that if this were done, and if the provisions affecting the Imperial right of disallowance which restricted the right to Bills affecting Imperial interests were altered, it would not be essential to provide for the ratification of the Bill by an Imperial Act, as the passing of the Imperial Act, 18 & 19 Vict. c. 56, regarding the waste lands, rendered further Imperial legislation needless, unless the fundamental principles of the Bill were altered. The Governor, on the receipt of this dispatch, in accordance with a suggestion contained in it proceeded to dissolve the elective portion of the Legislative Council, but he put before the people as an alternative to responsible government the adoption of a system of having a single chamber of four official nominees, of twelve elective members selected on a restricted franchise, and of twenty-four members elected on a low franchise. This scheme fell entirely flat, and in the result the Legislative Council passed an Act, No. 2 of 1855–6, which created a bicameral legislature, made provision for retiring officers, laid down a Civil List, and provided for ministerial tenure of office. This Act received in due course the royal assent.[3]

In the case of Tasmania the same procedure was adopted:

[1] *Parl. Pap.*, July 24, 1856, pp. 45 seq.; Rusden, *Hist. of Australia*, iii. 140 seq.

[2] *Parl. Pap.*, July 24, 1856, p. 108.

[3] Ibid., pp. 65 seq., 109.

the passing of the Imperial Act, 18 & 19 Vict. c. 56, allowed the Crown to assent to the reserved Bill, 18 Vict. No. 17, without further Imperial legislation.[1]

There were, of course, minor difficulties yet to be disposed of. In the case of New South Wales the Governor did not like the system of issuing a commission to administer the Government in case of his removal to three persons, and indeed the plan was obviously impracticable, and therefore the Imperial Government decided to vest the acting appointment for the time being in the military officer next senior to the Major-General commanding in Australia. Again, the Governor desired to be authorized to remove members of the Executive Council instead of permitting them to remain members though not under summons, and he was authorized to do this by additional instructions of March 10, 1859. And he was authorized by dispatch to remit fines exceeding £50, the limit under the old instructions. Moreover, in 1859 the appointment of a member of the Executive Council without portfolio was reported and approved.

In Victoria more serious troubles arose: the Legislative Council proceeded to endeavour to throw upon the Governor responsibility for appointments, and made attempts to secure access to papers on which he had discussed questions of appointments with his ministers. He resisted these attempts, but was inclined to favour the idea of creating behind the Executive Council, in the sense of Cabinet, a wider council corresponding to the Privy Council in England, which the Governor could resort to for advice if he were in great doubt as to his line of action. This view was supported by the fact that he also held that he had no power to remove members of the Executive Council,[2] and the ministers who formed members of Mr. O'Shanassy's Ministry declined to resign

[1] *Parl. Pap.*, July 24, 1856, p. 154. The name was changed from Van Diemen's Land to Tasmania by an Order in Council of July 21, 1855; see also the Act, 19 Vict. No. 17. For the cause of change, see *Parl. Pap.*, April 20, 1855, pp. 26, 27.

[2] Under Crown Colony administration the Governor has only power to suspend, not to remove.

when asked to do so. The Governor was given by additional royal instructions of March 10, 1859, powers to remove members of the Executive Council, but he did not exercise them, and in the long run the result which has persisted to the present day was established, under which the Executive Councillors retain that position for life, but only the members of the Ministry of the day are normally summoned to the meetings of the Executive Council, though members can be removed, and have been removed, if their retention of the position would create a scandal. The idea of using the Council as a whole for any but merely formal purposes was discarded. On the other hand, the Major-General commanding, who had the succession to the government, was allowed to retain a seat, though not a member of the Ministry.

In the case of South Australia the same questions arose, but they were disposed of by the issue of a new commission under letters patent of February 22, 1858, which empowered the Governor to appoint members to the Executive Council in addition to those provided for in the Constitution Act, and to remove members; while on the other hand, the administration of the Government was entrusted to the officer commanding for the time being in South Australia. In Tasmania also the question of the Council was considered, but in that case the decision arrived at followed the model of Victoria, and not that of New South Wales and South Australia.

In granting responsible government to New South Wales the Imperial Government expressly recognized that it was desirable to distinguish the case of the remoter parts of the Colony and to divide the Colony. The Imperial Act, 18 & 19 Vict. c. 54, therefore contained power to the Crown to establish a separate Colony out of the northern part of the Colony, and this was done, after petitions from the inhabitants and much discussion, by letters patent of June 6, 1859, which were afterwards confirmed by an Act of the Imperial Parliament,[1] as doubts had arisen as to the fact whether they strictly complied with the terms of the authority conveyed by the Act of 1855. The new Governor, Sir George Bowen,

[1] 24 & 25 Vict. c. 44. The point at issue was the franchise.

of the Colony which was called Queensland, had to govern for six months without any legislature, but he had as his Colonial Secretary, Mr. (afterwards Sir Robert) Herbert, who accompanied him from England, and he with his two other chief officers, the Attorney-General and the Colonial Treasurer, presented themselves for election for the Assembly and were duly appointed, thus giving the Governor the advantage of experienced officers in the Ministry. The Legislative Council was nominated by the Governor of New South Wales, but he wisely accepted the advice of the Governor of Queensland, and thus a curiously inconvenient arrangement resulted without injury to the new Colony.[1]

Western Australia still stood outside the system in this as in many other ways. While the rest of Australia was destined to adopt at no distant date a policy of extreme opposition to native immigration, Western Australia looked to the east for its connexion, and under its Crown Colony administration seemed to have little in common with the rest of the continent, from which it was isolated by lands deemed to be desert and utterly useless, though in 1911 that judgement shows signs of being reversed. But the desire for responsible government was strengthened by the gradual influx of settlers from the west when the gold resources of the Colony became known, and in April 1883 the Administrator was asked to ascertain from the Home Government whether responsible government could be conceded. The reply of Lord Derby, of July 23, 1883,[2] indicated difficulties in the vast size of the Colony, the small population, and the fact that a demand for responsible government would probably mean that the Colony must be divided as New South Wales had been divided, since the interests of the tropical north and the rest of the Colony were divergent. The Governor, in a dispatch of April 9, 1884,[3] was inclined to advise that the grant of responsible government should depend on the result of the elections of 1885; he suggested that the four nominated unofficial

[1] *Parl. Pap.*, August 1861.
[2] Ibid., C. 5743, p. 2.
[3] Ibid., pp. 5 seq.

members of the existing Legislative Council should be replaced by an official nominee and three elective members, and that two unofficial members should be added to the Executive Council as in the case of Natal. On the grant of self-government the northern part of the Colony should be made a separate Colony under a Lieutenant-Governor. The question was again referred to by the Governor in a dispatch of November 18, 1886,[1] when he was told in reply [2] that he should make it clear that the Imperial Government would not be prepared to surrender to so small a population the control of all the land in Western Australia. On July 12, 1887,[3] the Governor reported a resolution passed by the Legislative Council in favour of responsible government. He defended the view, and gave reasons for holding that the Colony should not be divided as was suggested. The population of the northern districts had rapidly increased through the rush to the Kimberley goldfields, the people there were accustomed to self-government in the eastern provinces, and nothing less was at all likely to satisfy their demands. He recommended that provision be made for the natives by retaining the aborigines protection board which was instituted in 1886 under the sole control of the Governor, who should be entrusted with £6,000 a year for the benefit of the aborigines, and should control the protectors of natives and witnesses to native labour contracts. He recommended a nominee council, to be turned after a brief period into an elective body, and made suggestions for the Lower House being empowered to pass Bills over the head of the Legislative Council, after a delay of eight months, by a two-thirds majority, while on the other hand tacking should be forbidden. In a reply by dispatch on December 12, 1887,[4] Sir H. Holland explained the views of the Imperial Government: they thought that they could not surrender the territory north of the Murchison River to the responsible government which they were prepared to see established; in the northern territory the lands must be retained in the hands

[1] *Parl. Pap.*, C. 5743, p. 11.
[2] Ibid.
[3] Ibid., p. 12.
[4] Ibid., pp. 23 seq.

of the Crown on the understanding that the moneys received should form a fund for the benefit of the Colony which ultimately would be there established. They were not prepared to divide the Colony, for the scanty population of the north could not afford to pay for an administration, and the Imperial Government were not prepared to place it on the Imperial estimates. The lands south of the Murchison would be subject to the full measure of Colonial control. On January 3, 1888,[1] a further dispatch was sent, deprecating any attempt to introduce a power to override an Upper House, and suggesting that a nominee body would be better in the first instance, unless the example of Ontario were followed and only one chamber was created, which the Secretary of State was apparently inclined to favour at the start. Approval was expressed of the proposal to safeguard the natives, and stress was laid on the need of a Civil List for the salaries of the Governor, the judges, and three or four ministers. The Governor replied in a dispatch of May 28, 1888,[2] in which he summed up the position: the Legislative Council were opposed to one chamber, and so was he; Ontario was not a full Colony; again, all the other States had bicameral legislatures, and a check on hasty legislation was desirable. They objected to any reservation regarding the natives, but he felt that that was essential, and would relieve the ministers of much undesirable pressure from interested parties. He agreed with the Council that there was nothing to be gained from treating in any differential manner the proceeds of land leased in the north, especially as the sums coming in were less than the expenses.

In a reply of July 30, 1888,[3] the Secretary of State stated that he adhered to his view as to the proceeds of lands in the north, and the control of the Imperial Government over them: he agreed to a bicameral system, but preferred a nominee Upper House appointed for six years; he also thought that responsible government should be proceeded

[1] *Parl Pap.*, C. 5743, p. 25. [2] Ibid., pp. 34 seq.
[3] Ibid., p. 53.

with slowly, as there was a deficit in the revenue and the extra expenses must be considered. He also insisted on the retention of an independent aborigines board, and he sent out a draft Bill based on the Governor's draft, embodying the changes desired. Later correspondence made it clear that the first Legislative Council was to be nominated by the Governor on his own responsibility. The Bill was laid before the Legislative Council, which accepted the views of the Home Government on most points, but desired an elective council, and on a suggestion of the Governor's the Secretary of State agreed to allow a nominee council to be appointed, to be succeeded in six years, or when the population reached 60,000, by an elective body. The Bill as amended was laid before the country, a general election took place, and the Bill was then brought before the local Legislature. There were made several amendments shortening the duration of Parliament to four years, which were accepted by the Home Government, but that Government insisted on the strict adoption of the proposed Civil List, and on empowering the Governor, without the consent of the Executive Council, to set aside native reserves, though the Governor was prepared to give way on these points as being of minor importance.[1]

The demand of the Colony for full self-government was supported by the other Colonial Governments in Australia, but some opposition developed itself in England, where it was felt that if the land were handed over *en bloc* to the Western Australia Government there would be an end of any prospect of large British emigration to the Colony. Sir N. Broome, the Governor, took the unusual course of writing to *The Times* a letter to dispel the idea that there would be any prejudice to emigration by the transfer of control to the local Government, but the Imperial Government could not undertake to pass the Bill as an Imperial Act that year (1889), in view of the late date at which it could be introduced, and the unexpectedly strong opposition which revealed itself to the proposal. The Australian Colonies then

[1] *Parl. Pap.*, C. 5752.

proceeded to deluge the Colonial Office with representations in favour of the grant of self-government and the control of the waste lands, and the Government of Western Australia sent home, at their suggestion and that of the Colonial Secretary, a deputation consisting of Mr. Parker and Sir T. Cockburn Campbell; while Mr. (now Sir John) Forrest was deputed to go to the Eastern States, a deputation not approved by the Secretary of State.[1] The Bill was in 1890 introduced again into Parliament and referred to a select committee, who heard the views of persons interested, including the deputation and the Governor,[2] and the Bill finally became without serious alteration an Imperial Act, 53 & 54 Vict. c. 26, whereupon responsible government was at once introduced.

In the case of New Zealand the proceedings were somewhat peculiar. The House of Representatives, which was constituted by the Act of 1852, proceeded at once, when it met in June 1854, to consider the question of responsible government, and ended with presenting an address on June 6 to the officer administering the Government asking that ministerial responsibility should be established in the conduct of executive and legislative proceedings by the Government as an essential means by which the general Government could exercise a control over the provincial Government, and as a no less indispensable means of obtaining for the general Government the confidence and attachment of the people. In this position, Lieutenant-Colonel Wynyard, who was administering the Government in the absence of Sir George Grey, consulted his Executive Council, which consisted, as under the old scheme, of permanent officers, the Colonial Secretary, the Attorney-General, and the Treasurer; and he was advised by them that he could not properly do anything which would result in the adoption of full responsible government without the approval of the Home Government. The Attorney-General advised that the Act of 1852 contained no reference to the adoption of constitutional government, and that indeed the provisions for the reference of laws to the House of the Legislature for

[1] *Parl. Pap.*, C. 5919. [2] Ibid., H. C. 160, 1890.

consideration implied that the Governor should take an active and independent part in legislation inconsistent with the idea of ministerial responsibility. But they also agreed that, in the temper of the Legislature, no useful purpose could be served unless the Governor could act in accordance with the wishes of the leaders of the House, and they accordingly suggested that, while the existing officers should retain their places on the Council, there should be added three more members taken from the House of Representatives who would carry on the business of the Government in the Assembly, while allowing the existing officers to carry on the ordinary duties of their office.[1] This curious arrangement was accepted by the leaders of the House of Representatives, and not only were three members of that House made Executive Councillors, but a fourth member was added to represent the Legislative Council, which had entirely disapproved of the ignoring of that House in the appointments to the Executive Council. For two months the arrangement worked, but then the members who had been introduced from the Legislature decided that they could not remain members of the Executive Council unless given the full authority and responsibility of executive office. They urged that the House of Representatives would not consent to pass the important measures before it unless it was assured that the measures which it passed would be carried into effect by those in whom it had confidence and over whom it possessed control; they declared their willingness to make provision in the shape of pensions for the retiring officers, and suggested that the principle of responsible government should at once be adopted. The Administrator could not see his way to consent to this proposal: the Attorney-General and the Treasurer were Imperial officers, and he was not willing to relieve them, even at their request, of their offices until he had ascertained the decision on the subject of the Secretary of State for the Colonies. As a result, the four new members of the Executive Council resigned, and the Governor sent messages to the Council and the House of Representatives dealing with his

[1] *Parl. Pap.*, H. C. 160, 1855, pp. 1 seq. Rusden, *New Zealand*, i. 543 seq.

action on the matter. The Council assured him of sympathy and support, while asking that responsible government should be granted, and the House of Representatives, though at first less conciliatory, agreed ultimately to pass the necessary votes of supply on the understanding that, pending the receipt of the decision of the Secretary of State, the existing members only should constitute the Executive Council, and no attempt should be made to confuse the position of the old members of a Crown Colony Executive with the members of an executive which rested on parliamentary support.[1]

The decision of the Secretary of State was conveyed in a dispatch of December 8, 1854,[2] in which he informed the Administrator that Her Majesty's Government had no desire whatever to offer opposition to the establishment of the system known as responsible government in New Zealand, and had no reason to doubt that it would prove the best adapted for developing the interests as well as satisfying the wishes of the community, and the only terms which they had to make was the condition accepted by the General Assembly of making fair provision for the officers affected by the new arrangement, who had had a reasonable right to expect that their posts would be permanent, and who under the new system would be liable to retire on political grounds. Accordingly the principle was to be applied forthwith, and steps were taken to appoint a government of ministers, pensions being provided for the former members of the Executive Council.

§ 5. Responsible Government in South Africa

In the case of the Cape of Good Hope the question was inaugurated by Lord Carnarvon in a dispatch to Sir P. Wodehouse of January 26, 1867,[3] in which he announced that the Imperial Government had decided that the burden of military expenditure in respect of the Colony must be assumed by the Colonial Government. The principle of

[1] *Parl. Pap.*, H. C. 160, 1855, pp. 9 seq. [2] Ibid., p. 39.

[3] Ibid., H. C. 181, 1870, p. 1. Representative government dated from 1853.

making the Colonies pay for their own defence had been adopted elsewhere and should be applied to the Cape, nor could the financial difficulties of the Cape be regarded as excusing the payment for their own defence. It was therefore intended at once to diminish the forces in the Cape to three battalions and to support them for the year 1867 free of charge. In 1868 two battalions only would be supported free of cost, and for the third the Colony must be willing to pay at the Australian rate of £40 a man. In 1869 one battalion only would be supplied without charge; in 1870 all soldiers must be paid for, and in 1871–2 the full rates of £40 for an infantryman and £70 for an artilleryman would be payable, and the whole arrangement would be reconsidered after 1872. The terms offered were recommended for acceptance with a distinct intimation that they were the best which would be accorded.

Sir P. Wodehouse replied on July 16, 1867.[1] He forwarded resolutions from the whole House of Parliament, in which they protested against the withdrawal on the ground that the policy of the Government was not within their control, and that the measures taken by the Government were the cause of the military dangers from the natives which rendered necessary the maintenance of the troops. The Governor criticized the representations of the Legislature unfavourably, but he advanced other grounds for the retention of the troops at the Imperial expense. Responsible government was not really desired by the Colony, but the position of the Executive Government under the present form of constitution was such that nothing could be weaker or more objectionable, and without Imperial troops no Governor not supported by a responsible ministry could regulate the affairs of the country at all. He referred to the difficulties existing between the two races in the Colony, and he declared that if the troops were to be entrusted to the dominant party in the Legislature the whole of the troops should be withdrawn, and not left to be disposed of by a Government which the Imperial Government could not in any way control.

[1] *Parl. Pap.*, H. C. 181, 1870, p. 3.

This vigorous protest induced the Duke of Buckingham in his reply of December 9, 1867,[1] to promise that in view of the financial difficulties of the Colony no steps should be taken to insist on payment in respect of the year 1868, and the matter was for the moment shelved. But it was revived in 1869 by a dispatch of July 2, 1869,[2] in which the Governor requested the Imperial Government to consider and adopt some general policy with regard to the South African territories and their administration. In reply, Lord Granville in a dispatch of December 9[3] placed before the Governor two alternatives. He pointed out that the Governor had been unable to induce the Legislature to bring order into the finances of the country, while again their proposals for financial changes had not met with his approval. The Imperial Government were not willing to continue to bear the cost of the military defence of the Cape, and would withdraw one regiment in 1870–1 and another in 1871–2, leaving one regiment only for the protection of Simon's Bay. The Governor was therefore asked to place before the Legislature the alternatives of placing more power in the hands of the Executive or of adopting the system of responsible government.

On January 17, 1870,[4] the Governor replied. He expressed very strongly the view that the present constitution was unsatisfactory, but he deprecated responsible government, which he deemed to be an absolute contradiction in terms. How could a ministry responsible to its own constituencies render obedience to the permanent power? The issue between them might be shirked or postponed, but it must come. Responsible government he had always held to be applicable only to communities fast advancing to fitness for absolute independence, and he thought that the course of events in British North America, Australia, New Zealand, and Jamaica had gone very far to establish that view. He looked upon the country as entirely unsuited for independence, and he could not satisfy himself of the justice or

[1] *Parl. Pap.*, H. C. 181, 1870, p. 13.
[2] Ibid., p. 14.
[3] Ibid., p. 15.
[4] Ibid., pp. 17, 18 seq.

humanity of handing over the large native population to the uncontrolled management of a legislature composed of those whose habits, interests, and prejudices were so entirely different. He had therefore prepared and introduced into the Legislature a Bill to reduce the two Houses into one, consisting of a nominee president, four persons holding offices of profit under the Crown, and thirty-two elective members. It was the hope of the Governor thus to secure the more effective presentation of the views of the Government in the Legislature, and to restore the power of the Executive to carry its wishes into law. Lord Granville, on March 24, 1870,[1] replied, demurring to the Governor's views of responsible government, and expressing doubt if the change of legislature would effect much strengthening of the Government, and stating that if the Bill were rejected the Colony must face the alternatives laid down in his dispatch of December 9, 1869.

Naturally the Bill was rejected in the Lower House by a majority of thirty-four to twenty-six, but in reporting the fact on April 2,[2] the Governor still pressed for the retention of the troops, urging that in view of the position in Natal the troops must be retained, leaving it for the Colonial Government to give more adequate power to the Executive. But though the Legislative Assembly supported the Governor by an address to the throne praying for the retention of the troops, the Imperial Government declined to accede to the request, and the Government were told that they must take steps to place the finances in order and to make other provision for Colonial defence.

Matters were now complicated by the discovery of diamonds in territory claimed by the Orange Free State, but on October 17[3] Lord Kimberley addressed a letter to Sir H. Barkly, who had been chosen to be the new Governor of the Colony, declaring that the existing form of government could not be allowed to continue, and must be replaced by a Crown Colony control or by responsible government. The

[1] *Parl. Pap.*, H. C. 181, 1870, pp. 18, 26. [2] Ibid., II, 1870, pp. 3 seq.
[3] Ibid., C. 459, p. 46.

existing constitution, which placed an insuperable power of obstruction in the hands of a legislature not responsible for the conduct of affairs was a system only defensible as one of transition. The social and financial evils to which it was liable had only been partly averted by Imperial assistance, and by a succession of able Governors. In a further letter of November 17 [1], Lord Kimberley intimated that a second regiment would be allowed to remain in the Colony pending the decision as to the adoption of responsible government, and for some time after, but the Imperial Government were determined not to maintain Imperial forces in South Africa except for Imperial purposes, and he warned the new Governor that no extension of British South Africa would be contemplated unless the Cape accepted responsible government. Meanwhile the question of the annexation of Waterboer's territory came prominently to the front, and on the Cape Legislature agreeing to provide for the administration and defence of the territory in question, a commission was issued on May 17, 1871, authorizing the annexation of the lands in question to the Cape. Before this commission was received in the Colony, the existing chief officers of the Government presented a statement [2] of reasons for deploring the introduction of responsible government. The paper drawn up by them on April 26, 1871, is an able one, and effectively shows the difficulties of government at all in a country where there was so great a preponderance of the native race, where there was a sharp line of cleavage between the two sections of the European population, where education even among Europeans was so backward, where communications were so difficult, and where the people of the eastern province could not be effectively represented in Parliament, as their leaders could not afford to surrender their private interests to the necessity of a long parliamentary session and absence from their homes. But they were not able to show any real prospect of improvement under the constitution as it stood. They evidently hoped that the state of confusion and difficulty in the finances might pass away, but

[1] *Parl. Pap.*, C. 459, p. 66.

[2] Ibid., pp. 173 seq.

they could not adduce any reason for this hope. At the beginning of June 1871 the matter was brought before the House in a motion by Mr. Molteno, when the House approved the principle of responsible government,[1] and a Bill was introduced for the purpose which was carried by thirty-one votes to twenty-six. The Bill contained the curious provision that the Governor could select as his ministers persons not members of either House, and that they could speak but not vote in either House of Parliament. In sending home the Bill the Governor stated that though the majority was small it did not fully represent the real feeling in the country; the members for the eastern province were afraid that a responsible government sitting at Capetown would neglect their interests, while members for the frontier districts, though in favour of responsible government, desired to have it thrust upon them by the Imperial Government in order that they might be able, despite responsible government, to maintain their claim to military protection at Imperial charges. In the Upper House, however, the Bill came to grief, even after the curious clause in question had been deleted in the Lower House. The final vote was twelve to nine, and in the majority were eight eastern members and four western members as opposed to seven western members and two eastern members, showing very clearly, as the Governor pointed out, that the old issue of west and east had determined the day. But the Governor added that he had no doubt that the principle of responsible government would be adopted with no long delay, and the Secretary of State re-echoed his view in acknowledging the receipt of the news of the defeat of the measure.[2]

The Governor was right in his prediction of the future. In June 1872 the Council passed the Bill for responsible government by eleven to ten votes, the change in view being due to the fact that two of the four western members had decided to give their constituencies the opportunity of expressing their opinions on the topic, and had received so clear a mandate as to render them determined to cast their

[1] *Parl. Pap.*, C. 459, pp. 186 seq. [2] Ibid., pp. 197 seq.

votes in favour of responsible government. The Bill was carried in the Lower House by thirty-five to twenty-five votes, and the Governor was delighted by the result. But the eastern members of the Council were so naturally indignant at the acceptance of so important a measure by so narrow a majority—they had cleverly managed, by placing one of the majority who passed the second reading in the chair, to compel the majority to carry all motions in committee by the chairman's casting vote—that they entered a weighty protest against the acceptance of responsible government as far as the eastern province was concerned. To tell the truth, it was clear that a general election might properly have taken place, not that it would have reversed the result, but that it would have placed it on a basis more secure than the very slight majority obtained in the Council.[1]

The Bill was a brief one, and merely made it possible for officers of the Government in certain positions to sit in either House of Parliament, and provided that the Crown should fix pensions for officers who would retire on political grounds, viz. the Colonial Secretary, the Treasurer, and the Attorney-General. The Secretary of State gladly secured the royal assent to the reserved Bill, and issued new letters patent re-appointing Sir H. Barkly to be Governor. The Colonial Secretary was not prepared to face an attempt at election to Parliament, and the Governor sent for the leader of the movement in favour of responsible government, Mr. Porter, who, however, was unable on grounds of age to form a ministry, and accordingly the Governor selected Mr. Molteno for the task, which he successfully carried out. At the same time the Governor, following the precedent he himself had set in Victoria, retained as an executive councillor the officer commanding the troops in the Cape, who was destined to succeed to the administration in the absence or incapacity of the Governor. The party opposed to responsible government continued to petition the Crown, but the Secretary of State declined[2] to accept their views in favour

[1] *Parl. Pap.*, C. 732, pp. 8 seq., 21 seq., 60 seq.

[2] Ibid., pp. 161 seq.; H. L. 286, 1872.

of a dismemberment of the province. He urged that if the representation of east and west were unfair the Parliament could alter it and adjust it, and all that he would do was to suggest that if the experiment of having a single legislature would not work steps might be taken to divide the country into two provinces, and have a central and two provincial legislatures; but this he deemed only proper to be resorted to if the existing arrangement should prove unsatisfactory. He refuted the comparison with New South Wales and Queensland by pointing out that the size of Queensland and of New South Wales was out of all proportion to that of the Cape.

In the case of Natal responsible government was discussed almost *ad nauseam* before it was adopted. Representative government was established by the charter of 1856, and in 1869 a supplementary charter was issued under which the Lieutenant-Governor was empowered to appoint two elective members of the Legislative Council, a body of mixed nominees and elective members, to be members of the Executive Council. In 1870 the Council was asked to pass a Bill bestowing responsible government on the Colony, creating a legislature of twenty elective members, and providing for the possibility of union with the Transvaal Republic and the Orange Free State: the Bill was not to become law without an Act of the Imperial Parliament, but it did not pass the House. In 1873 three elected and one nominee members were added to the House, and in 1875 a curious change was made in the constitution of the Legislative Council by adding to it for five years eight non-official nominee members, and by requiring that taxation Bills should only be carried by two-thirds of the members present when they were discussed. In 1880 another Bill for responsible government was introduced, providing for a legislature of two Houses, the upper being a nominee body, and for ministerial responsibility. It was sent home by the request of the House with an address to the Queen, but Sir Garnet Wolseley, then in connexion with the native disturbances Governor and High Commissioner of South-east Africa, reported unfavourably upon the project, and

Lord Kimberley, in a dispatch of March 15, 1881, declined to advise the Crown to accede to the petition, on the grounds that the grant of responsible government would render the Colony liable to provide for its own defence against internal disturbances as well as from outside aggression, that the Colony was unable to meet this liability from its own resources, that the Imperial Government could not hold itself responsible for the outcome of a policy over which it had no control, and that therefore responsible government must be preceded by federation with the neighbouring states. To this decision a reply was sent by the Legislative Council urging reconsideration, pointing out that federation was not in sight, and insisting that the main burden of internal defence did rest, under any circumstances, with them. In replying on February 2, 1882, the Secretary of State authorized the resubmission of the question after an election to the Legislature, but the proposal was then shelved, the members not yet feeling prepared to assume the burden of responsible government in its entirety. Steps were, however, taken to increase the number of members and to extend the franchise, but practically nothing was done to give a native franchise—a fact on which both the Governor and the Secretary of State commented with regret. In 1884 the Council made an attempt to elicit from the Home Government what degree of military defence would be provided in the event of self-government being adopted, but that Government was not prepared to answer so hypothetical a question. In 1888[1] the question was again brought before the Home Government on the motion of the Legislative Council: they urged that the slow progress of the Colony was due to the divorce between the legislative and the executive power, which created the unfortunate feeling that the Government was not really that of the people at all; while again, the views of the majority of the popular representatives in the chamber could be thwarted by the action of a minority of elective members together with the nominee members. Moreover, the views of the Colony were represented to the Imperial

[1] *Parl. Pap.*, C. 6487, pp. 1 seq.

Government not by their representatives, but by a Governor who did not act on ministerial advice. They recognized the difficulties of the questions of defence, the native policy, and the position of Zululand, which they desired to have incorporated with Natal, and the complications arising from the small number of people in the Colony from which to form the parties necessary for the conduct of ministerial government, but none of these obstacles need, they thought, be fatal, and they adduced reasons for this belief. In particular, they offered that all matters relative to the natives should originate in the Upper House, which was to be nominee, and which would thus be exempt from prejudices such as might exist in a popular body.

In replying on March 5, 1889,[1] Lord Knutsford said that the willingness of the Imperial Government to grant responsible government was well known, but he indicated that the proposals as to native affairs were inadequate to secure the passing of measures in their interests; he said that the Imperial troops would be withdrawn, but that five years' grace would be given for the Colony to concert its own measures of defence after the passing of self-government, that the annexation of Zululand was not likely soon to be conceded, and that after self-government was conceded it was probable that the relations of Natal with the native tribes beyond its borders would be entrusted to the Governor, who would be made a High Commissioner for the purpose. The Legislative Council then asked for any suggestions as to provisions for native interests, and Lord Knutsford indicated the reservation of Bills affecting natives, and added that Bills for compulsory labour, the increase of the hut tax, limitation of freedom of contract, further restrictions as regards passes, alteration of native law, and so on, would not be likely when reserved to be sanctioned. He also asked for the establishment of a protection board for the natives on the model of that set up in Western Australia under the reserved Colonial Bill of 1889, and the placing of a sum not less than £16,000 annually at the disposal of that board to be spent

[1] *Parl. Pap.*, C. 6487, p. 21.

in the interests of the natives, free from all parliamentary control. But in any case a general election must precede any thought of granting responsible government. Such an election held in 1890 [1] resulted in the appointment of fourteen members in favour of and ten against responsible government, the majority representing the coast and the border districts, where the Boer influence prevailed, and the minority coming from Pietermaritzburg and Umvoti. A Bill was accordingly drafted by a committee to establish responsible government, which made provision for a legislature of two houses, the upper nominee, for a permanent Under-Secretary for Native Affairs, and for the provision of an annual sum for native purposes. It was also provided that Bills affecting only a class of the population must be passed by a two-thirds majority on the second reading and third reading in the Legislative Assembly. The Government was to be administered by six ministers, and the constitution of the houses could only be altered by the concurrence of an absolute majority for the time being of the members of both houses on the second and third readings. Provision was also made for pensions to officers retiring on political grounds.[2] The Bill was, however, altered in the Council so as to substitute one for two houses. It also purported to transfer to the Government of the day all the powers of the Governor as Supreme Chief of the natives, which he had exercised hitherto without any control whatever. Native interests were to be protected by reservation of bills for the royal assent and by preliminary consideration by a committee of the Legislative Council. The Governor, in sending home the Bill,[3] deprecated the proposal for a single chamber, as affording risk of hasty legislation, considered that he should be left free to refuse, if he thought fit, ministerial advice as to his action as Supreme Chief, though he would as a rule accept it, leaving ministers in case of difference to initiate legislation to effect their ends, which legislation would be reserved for the royal assent. He doubted if the provision for the natives was adequate, but he thought

[1] *Parl. Pap.*, C. 6487, p. 25. [2] Ibid., pp. 28 seq. [3] Ibid., pp. 36 seq.

that a protection board would not work well. He also recommended that responsible government be accorded: the old form had worn out, the expenditure was large and the loan commitments heavy, and the Colony should stand in these matters on its own responsibility. On the other hand, he later forwarded petitions from residents in the country protesting against the grant of responsible government. It was argued that the numbers were in favour rather of the retention of the existing system of government, and it was suggested that a referendum was necessary.[1]

The Secretary of State, in a dispatch of May 28, 1891,[2] intimated that it would not be possible to give the royal assent to the Bill as it stood; but he accepted the judgement of the Colony as being in favour of responsible government. He criticized, though not being totally opposed to, the system of having but one chamber, as without a parallel in the rest of the Empire in self-governing communities: he definitely declined to allow the Supreme Chief to be required to act in accordance with ministerial advice, though he was satisfied with the provision made as to the reservation of Bills affecting Asiatics or natives. He thought that the appropriation for the natives must be made definitely a part of the constitution, and not left vague as was proposed, and he also recommended the omission of those clauses in the Bill which were intended to give legislative force to the ordinary arrangements regarding constitutional government and the position of ministers. On the other hand, he was satisfied with the position of the judges and of civil servants, to which the Governor had taken exception, subject to provision being made that civil servants should retain their existing pension rights. He also asked that the Governor's salary in the Civil List should be raised from £3,000 to £4,000.

The views of the Secretary of State were communicated to the Legislative Council, and on August 10, 1891,[3] the Governor sent home the Bill as amended by the Council in

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

the recent session of the Legislature. Many of the points criticized by the Secretary of State were amended to meet his views, but the draft still claimed ministerial control over the actions of the Governor as Supreme Chief, still left the disposal of the sum of £20,000 provided for native purposes to the Legislative Council, which remained unicameral, and made no provision to secure officers on retirement the pensions which they would have received under the existing form of government. On December 2, 1891,[1] Lord Knutsford intimated that the Crown could not be advised to assent to the reserved Bill, on the ground that the desires of the Imperial Government as to the interests of the natives had not been met. Moreover, it was pointed out, the fact that only one chamber was proposed told against acceptance; the original proposal of the Committee of 1888 had been that there should be two chambers, and that all measures affecting the natives should originate in the Upper House; that would not indeed have been a sufficient security for the passing of measures in the interest of the natives, but it would have been a security against hasty legislation against their interest, and in view of the refusal of the Legislative Council to make the provision suggested by the Imperial Government to secure native rights, and of the unicameral condition of the Legislature, the Bill must lapse. On the other hand, if the Legislature were prepared to alter the Bill so as to comply with the views of the Imperial Government, the Council should be dissolved so that the people could decide on the question.

On March 8, 1892,[2] the Governor sent home a new Bill which created a nominee Upper House by turning the Legislative Council previously proposed into a Council and a House of Assembly, deleted the clause requiring reservation of Bills affecting differentially non-Europeans, deleted the provision for a committee of the former single chamber to consider before introduction measures differentially affecting non-Europeans, granted a sum of £10,000 unconditionally for the natives, and inserted a clause maintaining the right

[1] *Parl. Pap.*, C. 7013, p. 18. [2] Ibid., pp. 24 seq.

of civil servants to appeal to the Secretary of State. But the Bill still insisted on the powers of the Supreme Chief being exercised on the advice of the Executive Council. Sir John Robinson and Mr. G. M. (afterwards Sir George) Sutton were sent home on a deputation to urge the acceptance of the Bill on the home authorities,[1] but the Imperial Government stood firm, and the Bill was modified in some particulars, and especially so as to leave out all claim of the Colonial Government to control the Supreme Chief in his action.[2] At the same time, the delegates were informed that the Governor would be instructed to discuss his proposed actions with them and to secure their concurrence if possible, and it was anticipated that agreement would be usually the case.

The Bill so amended was laid before the Legislative Council, and the Council then dissolved, the elections resulting in the return of ten members in favour of and fourteen against responsible government. But four of the members were unseated on an election petition, and first two and then two more members in favour of responsible government were returned; the Bill as amended by the Imperial Government became law as Act No. 14 of 1893, and responsible government was inaugurated. It has often been contended that the grant of responsible government to Natal was premature and unwise, and there is no doubt that the small size of the Colony, the paucity of the white population, which was even then vastly outnumbered by the native population, and the presence in the Colony of a large number of natives of India whose industry was essential for the development of the Colony, but whose presence was, on many grounds, not very acceptable when their indentures expired and they settled there, combined to render the experiment a difficult one, and one which certainly never led to the same satisfactory results as were manifested elsewhere in the Empire. But the grant can be justified on the ground that it was practically an essential preliminary to the possibility of the Colony joining a con-

[1] *Parl. Pap.*, C. 7013, pp. 39 seq. [2] Ibid., pp. 41 seq.

federation, for naturally the other powers in South Africa could not be expected to tender the same respect to a possession administered under Imperial control as to a self-governing Colony.

In the case of the Transvaal and the Orange River Colony, it was agreed in the terms of surrender of the Boer forces in the field that the conquered Colonies should be granted representative institutions leading up to self-government of the usual Colonial type at as early a date as possible.[1] In the case of the Transvaal it was proposed to carry into effect this undertaking by the letters patent of March 31, 1905, which were designed to establish in the Transvaal a representative legislature consisting of thirty to thirty-five elected members and not more than nine or less than six nominees, who would have been officials of the Government. The constitution was in some ways one which might have been expected to be acceptable to the Boer section of the population, for they had never enjoyed under the previous republican régime what would be deemed self-government in accordance with English views. But it was fated to meet with disapproval: the progressive section of the Boers had, under the régime of President Kruger, aimed at securing a fuller measure of responsible government, and naturally they saw no particular advantage in a system which had admittedly been a failure in the case of the Cape and Natal. In these cases, indeed, it had been no doubt a necessary preliminary to full responsibility, but in the Transvaal there were already many people accustomed to responsible government. Again, the British element in the population saw without much enthusiasm the continuance of a rule that would keep them under the control of an Executive which they could not hope to influence in any adequate degree.[2] On the other hand, the Executive Government were not likely to be successful in managing the affairs of the Colony under a system which left them in a hopeless minority in the Legislature, so that they would probably be reduced to ruling by a coalition with a minority in that body. There was, indeed, present every

[1] *Parl. Pap.*, Cd. 1096. [2] Ibid., Cd. 2400, 2479, 2482, 2563, 3250.

element of difficulty and confusion, and the adoption of the form of government could only be justified by the fact that so recently after a grave war there would be risk in entrusting the Government to a responsible ministry, which would be likely to voice the sentiments of one only of the two sections of the people and to neglect the interests of the other. Moreover, by some advocates of the rights of the natives it was felt that their interests would receive more careful consideration from a Government which was under the Imperial control than from a local executive responsible only to a legislature in which the natives were, in accordance with the terms of the surrender of the Boers, entirely unrepresented.

There were other reasons of convenience in favour of the maintenance of the representative form of government as a preliminary stage : it was recognized on every side that it would be well that the Orange River Colony should not be constituted under a responsible government until the experiment had been tried first in the Transvaal, but so long as the two Colonies were under the Imperial control it would be easy to maintain the working of the Intercolonial Council which had been called into being in order to manage the railway and police affairs, amongst others, of the two Colonies. On the grant of responsible government to one Colony it was felt that it would be very inconvenient if the other were still under the Colonial Office. But these considerations were deemed inadequate by the Imperial Government, on the formation of Sir Henry Campbell-Bannerman's administration, to justify the trying of an experiment in a form of government which had never been yet a permanent success, and which would only in any case be a temporary measure. They decided, therefore, to introduce full ministerial responsibility for the general government of the two Colonies, the letters patent for the Transvaal being introduced first of all,[1] and then those for the Orange River Colony.[2] The arrangement by which the Intercolonial Council managed the railways of the two Colonies as one

[1] On December 6, 1906. Cf. *Hansard*, ser. 4, clxvii. 939 seq., 1063 seq.

[2] On June 5, 1907.

concern was to remain in force, subject to the right of either Colony to terminate it upon notice given, and some steps were taken to place under independent boards in both Colonies the affairs of the land-settlers, who had taken up land on the faith of Government promises of assistance, and whose interests were, it was thought, possibly liable to too strict treatment from a responsible government—not an impossibility, in view of the fact that the settlement policy had been inaugurated in part as a means of bringing in British settlers to redress the balance of nationalities in both Colonies. Subject, however, to that exception, which was merely to be temporary, for the clauses enjoining it were to expire in five years, the Imperial Government conceded full self-government to republics which but a few years before had been engaged in a prolonged and dangerous war with the metropolis of the Empire. The contrast was strengthened by the fact that the first elections in the Transvaal returned to power the ex-leader of the Boer forces, General Botha, and by a stroke of good fortune he was able to be present at the Colonial Conference of 1907 and to advise His Majesty's Government upon the questions affecting the defence of the Colony of which he was Premier. The Transvaal was fated to have but a short separate existence as a Colony of the Empire, but the conduct of its government was marked by singular ability, and the confidence reposed in the value of responsible institutions by the Imperial Government in 1906 was proved to be fully justified. In fact, no more signal example of the benefits of the system have ever been seen. In the Orange River Colony much the same results followed from the concession of responsible government until 1909, when the efforts of the Minister of Education, an enthusiastic believer in bilingual education, resulted in some difficulties with the English officers of the education department, culminating in the dismissal of three inspectors[1] and ultimately the resignation of the very able Director of Education. But despite this regrettable incident, in which it would be unfair to see

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

any racial feeling as such, the grant of self-government was a success, though party government was impossible in a Colony where the opposition was in the extreme feeble.

In the case of the great federations, Canada, Australia, and the Union of South Africa, responsible government came into force at once, and they were planned by Colonies possessing a full measure of responsible government.

CHAPTER II

THE LEGAL BASIS OF RESPONSIBLE GOVERNMENT

§ 1. Responsible Government in Canada

It was one of the theses of the distinguished Victorian Chief Justice, Mr. Higinbotham,[1] that responsible government in the Colonies differed from that government in England by reason of its being derived from the statute law, and not as in England from the common law. The statement was based on a study of the Constitution Act of Victoria, and he admitted with desirable candour that the purpose of responsible government was merely rudely expressed therein: it is also clear that he had made no adequate study—indeed, it is fair to say that it would probably have been difficult for him to do so—of the actual fact as to the introduction of responsible government into Canada, for if he had done so he might have modified his conclusions very materially. As a matter of fact, it is not untrue to say that, generally speaking, the introduction of responsible government has been due to constitutional practice and usage based on the practices in force in the Mother Country, and that therefore the responsible government of the Dominions rests on no fundamentally different basis from the responsible government of the United Kingdom. It needs only to be added that in some degree there is a greater recognition of responsible government in Colonial constitutions than in the British constitution, but, as will be seen, that recognition goes far short of establishing the rule of responsible government.

It was in the case of the Government of Canada that the rule was first applied; in the Act for uniting the Provinces of Lower and Upper Canada of 1840 it is impossible to find

[1] Morris, *Memoir of George Higinbotham*, pp. 170 seq. Contrast Jenkyns, *British Rule and Jurisdiction beyond the Seas*, pp. 61 seq.

a word as to the adoption of responsible government, and in the royal instructions issued together with his commission to Lord Sydenham, and to his successors, Sir C. Bagot, Sir C. Metcalfe, Lord Cathcart, and Lord Elgin, and to their successors, there is not a single word of responsible government. The commissions provide for the existence of an Executive Council, but they do not say that it is to be composed of responsible ministers, and they expressly seem to contemplate that the Executive Council is a body to advise the Governor, whose advice he may or may not take, as he will. Indeed, in the case of New Zealand, the wording of the instructions was considered by the Attorney-General in 1854[1] to show that full responsible government was not contemplated at all. The real authority for the adoption of responsible government is not to be found in the law of the land, not even in the formal royal instructions, which of course were not law but usage, but in the dispatches from Lord John Russell dated October 14 and 16, 1839,[2] in one of which he adopted in a somewhat curious manner the principle of responsible government for internal affairs only, while denying that a full measure of responsible government was possible; the other laid down that officers were not, in the case of those holding the chief positions, to be deemed to hold by a permanent tenure, but to be liable to removal as often as sufficient motives of public policy might suggest the expediency of that step. He also intimated that the grant of pensions to displaced officers would be suitable, but he expressed even that view with a certain vagueness. And down to the termination of the independent existence of Canada as a province the position was not varied: the principle of responsible government rested on nothing more than practice, its binding force on the action of the Governor, who was subject, of course, to the possibility of his recall by the Imperial Government on the one hand, and the rendering of his position untenable by the Legislature refusing to work with him, on the other.

[1] *Parl. Pap.*, H. C. 160, 1855, pp. 2 seq. For the Canadian instructions, see Canada *Sess. Pap.*, 1906, No. 18.

[2] *Parl. Pap.*, H. C. 621, 1848, pp. 3 seq.

In the case of Nova Scotia,[1] Lord Sydenham on his visit in 1840 suggested that the members of the Executive Council should normally be chosen from the members of the two houses of the Legislature, and Mr. Howe was offered and accepted a seat on an undertaking to modify the extreme character of his views on the question of responsible government. No change was made in the royal instructions to provide for this system being carried out, and as a matter of fact, as long as he was administering the Government, Lord Falkland declined to put the full principles of self-government into effect: he did not approve of them, and he insisted on ruling with a coalition Executive Council, which he thought was the proper mode of procedure. In this view he had indeed the support of the House of Assembly for a time, for in March 4, 1844, they adopted a resolution which showed clearly that they considered that a Governor was only to be advised generally by his Council, and that he could not repudiate the obligation of deciding on his own responsibility what was best. But this system came to an end in 1848, totally without any legal change, but by the insistence by the party which commanded the majority of the Legislature on the adoption of the new system, and on the instruction given by dispatch to the Lieutenant-Governor, that he should act on the principles of responsible government. Indeed, the strong step was taken of removing, under the power which all Canadian Governors had, one member of the Executive Council from office, as he declined to retire voluntarily. At the same time steps were taken to secure the passing of an Act, 12 Vict. c. 1, for granting to the Crown a Civil List in return for the surrender of the hereditary revenues of the Crown in the province. The same step of securing a Civil List was adopted in the Union Act of 1840, and for a time stress was laid upon it, not as creating responsible government, which it obviously did not, for such lists had been aimed at ever since representative government existed, but because it was felt that a Provincial Parliament should be compelled to determine to spend a certain sum of money at least

[1] *Parl. Pap.*, H. C. 621, 1848, pp. 9 seq.

on the civil government, and that the salary of the Governor should be put beyond the necessity of an annual vote.

In the case of New Brunswick the course of events was precisely the same as in Nova Scotia, which formed the model for the advocates of responsible government in that province.[1] In Prince Edward Island there was more delay and difficulty. Up to March 1849 the Imperial Government had defrayed part of the Civil List charges of the island, but on that date the payments were stopped, and by a dispatch of December 27, 1849, the Secretary of State offered to surrender the Crown lands, funds, quit-rents and permanent revenues belonging to the Crown in exchange for a Civil List, and later, in a dispatch of February 18, 1850, he expressed the view that the Imperial Government would be prepared to concede responsible government in exchange for a Civil List. The Legislature then passed a Civil List Act, but declined entirely to deal with business for the present until the Executive Government should be brought into harmony with the legislative body. The Civil List Act contained a provision that it was conditional on the surrender of the Crown revenues, and on the grant of a system of responsible government similar to that which was in force in the Provinces of Canada, Nova Scotia, and New Brunswick, and it omitted to make any provision for the pensions of retiring officers. The Secretary of State decided to accept the proposal of the Legislature, subject to certain detailed modifications in the Civil List, to the omission of the requirement regarding responsible government, and to the provision of pensions for the officers retiring on political grounds. The reasons for his decision were that the grant of responsible government had never been embodied as a condition in similar Acts, and there was good reason why it should not be so, for the term, though very well understood for practical purposes, had no definite meaning in law, and it was therefore impossible to say what would be a fulfilment of the condition, within the technical sense, which might be put by legal

[1] The process was only complete in 1854; see Hannay, *New Brunswick*, ii. 47, 79, 117, 133, 170 seq.

interpretation on the words. The only conditions, therefore, to be inserted in the Act on the part of Her Majesty's Government were those relative to the surrender of the Crown revenues; the rest stood (as was the case in the other North American Provinces referred to) on the faith of the Crown. The views of the Secretary of State in the main prevailed, and the requirement of responsible government was omitted from the Act as passed in 1851 (No. 3) in response to his despatch of Jan. 31, 1851. Therefore in Prince Edward Island also no mention of responsible government or legal provision regarding it, other than the grant of pensions for retiring officers, is known.

To allow responsible government to rest upon constitutional practice has prevailed ever since in the Dominion. The constitutions of the Provinces of British Columbia, of Manitoba, and of Alberta and Saskatchewan, contain practically nothing which effects responsible government. The Acts of these Colonies merely provide that the Executive Council shall consist of such persons as the Governor may appoint, or they specify certain officers who shall be members of the Executive Council, but not who shall constitute the Executive Council. They also permit the members of the Council or certain specified officers to sit in Parliament without even re-election.[1] The case of Alberta may be cited as illustrating the whole practice, and as one of the most striking examples of the unwillingness of Canada to reduce responsible government to a legal system: the Constitution Act provides that the Executive Council of the said province shall be composed of such persons under such designations as the Lieutenant-Governor from time to time

[1] For Ontario and Quebec see 30 Vict. c. 3, s. 63; Ontario Act, 1908, c. 6; Quebec *Rev. Stat.*, 1909, ss. 572 seq.; Nova Scotia *Rev. Stat.*, 1900, c. 9 (number fixed at nine); New Brunswick *Rev. Stat.*, 1903, c. 10; Manitoba *Rev. Stat.*, 1902, c. 59; British Columbia Act, 1908, c. 128 (number limited to seven); Saskatchewan and Alberta Acts of Canada, cc. 42 and 3, 1905; Alberta Act, 1909, c. 6; Saskatchewan Act, 1906, c. 3. In Prince Edward Island the number is unlimited, as it rests on the old instructions of 1872 to Lord Dufferin, confirmed by the Order in Council of 1873 incorporating the province in the Dominion.

thinks fit. The Legislative Assembly Act of the Province, 1909, c. 2 provides that there shall be eligible for election and voting in the Assembly any person 'being a member of the Executive Council, or holding any of the following offices, that is to say, President or Chairman of the Council, Attorney-General, Provincial Secretary, Minister of Agriculture, Minister of Public Works, Minister of Education, or the minister or head of any other public department that may hereafter be organized by statute, of this Province'.

Yet though there is so little of legal sanction the system of responsible government is in fullest operation throughout the Dominion of Canada. The maxims which regulate the tenure of office by a Government in this country are faithfully observed as much as in the Colonies generally, despite one or two cases of straining of constitutional forms, which, however, have been punished in one way or the other. It is established usage that a Lieutenant-Governor must govern with the support of a ministry, who again must have the support of the Legislative Assembly, and that ministers will retire when they are defeated, unless they ask for and receive a dissolution of Parliament. It would be idle to claim that there is any clear distinction between the basis of self-government in the Provinces of Canada and the case of English self-government, and Chief Justice Higinbotham would never have made the statutory basis of self-government in the Colonies a basis of discrimination had he known the facts of Canadian history.

Of course, as in the case of England, self-government is enforced by certain ultimate sanctions. The chief one in the Provinces, where there is no question, as in the Mother Country, of the needs of defence, is of course the requirement of an Appropriation Act annually, and the refusal of such an Act will always be successful in causing a Lieutenant-Governor to yield: indeed, it is certain that he would now be dismissed by the Dominion Government long before anything so drastic took place, as the case of Mr. McInnes in 1900 shows.[1] In the case of a Colony the same rule

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

applies, but the dismissal would be by the Crown. An instance where illegal appropriations took place without the Governor being dismissed, is a good illustration of the exception which proves the rule. It was in the case of the Cape, where during the Boer War it became out of the question to summon the Parliament within the usual time of meeting, and the Government had to be carried on without legal sanction for the expenditure. The Governor's action was not merely approved by a Ministry who possessed the confidence of the portion of the population which was loyal to the Crown, but it was rendered possible and effective by the presence and protection of the Imperial forces in South Africa.[1] Of course, even in a province, as Mr. McInnes's case will show, it is possible for a Lieutenant-Governor to govern with the aid of ministers who have no parliamentary support, but that can never be for long, and in a sense it is a position which, by parliamentary practice, occurs in this country as well as in the Colonies, in every case where a beaten Government asks for and obtains a dissolution of Parliament, until the elections are complete.

§ 2. NEWFOUNDLAND

In the case of Newfoundland the conditions laid down by the dispatch from the Duke of Newcastle of February 21, 1854,[2] for the grant of responsible government were, as subsequently modified, two only—the provision of adequate pensions for officers who would be displaced on political grounds, and the passing of a measure to increase the size of the House of Assembly to thirty, and to provide for redistribution of seats so as to afford fair representation of the Protestant majority in the Colony. These measures were duly passed by the Legislature as 18 Vict. c. 2 and c. 3 respectively, and thereupon the Imperial Government took steps to issue a new commission, appointing Mr. (afterwards Sir Charles) Darling to be Governor, in which provision was made for the appointment of a separate Executive Council for the island in place of the combined Executive and

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

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

Legislative Council which had until then existed, while a Legislative Council was established to consist of not less than ten nor more than fifteen nominee members. The commission provides that the Executive Council shall be composed in such manner as may be directed by Instructions, and the Instructions merely say :—

> Now We do direct and declare Our pleasure to be, that the said Executive Council shall consist of such persons, not exceeding seven in number, as you shall from time to time by instruments passed under the public seal of Our said Island, in Our name and on Our behalf, nominate and appoint to be members of the said Council, all which persons shall hold their places in the said Council during our pleasure.

The Instructions have not materially been altered since : the Executive Council is to consist of any persons, not limited in number, who are members of the Council by any law of the island, and of such others as the Governor may appoint, and no law provides for the appointment of any Executive Councillors *ex officio*. Moreover, there is no law requiring, any more than in the case of the Canadian Provinces, members of the Executive Council to be members of the Legislature in either house. It is of course, as in these provinces, the custom that they should be members, but it is useless to deny that responsible government in Newfoundland rests as entirely upon the common law as it does in the United Kingdom.

§ 3. The Australian Colonies and States

In Canada and Newfoundland we have seen that responsible government is essentially informal in character : it is established by well-understood practices, but not by law. Ministers need not be members of the Legislature, and they can if they like legally hold office for ever, if the Governor chooses to keep them there, in the face of all the protests the Legislature might like to pass. In the case of the Australian Colonies the matter is otherwise : it would be impossible to say that responsible government rests there on legal enactment, but there do exist legal rules which

to some extent condition the action of the Governor, and help to render responsible government in part necessary. These rules were adopted deliberately as the expression of a desire to secure the régime of constitutional rule, but it must be admitted that they fall lamentably short of achieving in law any such result as their framers aimed at.

In the New South Wales Constitution[1] as approved by the Imperial Government, it is provided in s. 37 that the appointment to all public offices under the Government which should be vacated or created should be vested in the Governor with the advice of the Executive Council, with the exception of the appointments of the officers liable to retire on political grounds, which appointments should be vested in the Governor alone, while minor appointments by Act of the Legislature or by order of the Governor in Council might be entrusted to heads of departments or other officers. Provision is also made for a Civil List on condition of the surrender of the revenues of the Crown, and provision is made for pensions for officers who on political grounds may retire or be released from their offices. Moreover, it is laid down in s. 18 that any person holding any office of profit under the Crown shall be incapable of being elected, or of sitting or voting as a member of the Legislative Assembly, unless he is one of the officers of the Government specified in the section, viz. the Colonial Secretary, Colonial Treasurer, Auditor-General, Attorney-General, and Solicitor-General, or one of such additional officers, not being more than five, as the Governor with the advice of the Executive Council may from time to time, by a notice in the Government gazette, declare to be capable of being elected a member of the Assembly, but re-election was required until 1906, when the practice was abolished. These provisions sum up the legal sanction for responsible government in New South Wales even at the present day, and it is clear that they are utterly insufficient to give the Government a parliamentary basis,

[1] 18 & 19 Vict. c. 54 (confirming and altering 17 Vict. No. 41 of the local Legislature). Cf. Act No. 32 of 1902, which adds nothing beyond an incidental recognition of ministers as executive councillors.

for they do not require even one member of the Government to be a member of the legislative body.

In the case of Victoria there is more legal sanction. The Constitution [1] as approved by the Imperial Government contains, besides the provisions for the appointment of all save political officers by the Governor in Council, the grant of a Civil List in exchange for the Crown revenue, and the provision of pensions for officers retiring on political grounds, the following clause (s. 18) :—

> Of the following officers of Government for the time being, that is to say, the Colonial Secretary or Chief Secretary, Attorney-General, Colonial Treasurer or Treasurer, Commissioner of Public Works, Collector of Customs or Commissioner of Trade and Customs, Surveyor-General or Commissioner of Crown Lands and Survey, and Solicitor-General, or the persons for the time being holding those offices, four at least shall be members of the Council or Assembly.

These officers were required to undergo re-election if they accepted office while in Parliament. But this was carried further by the *Officials in Parliament Act*, 1883, s. 2, which authorized the Governor to appoint a number of officers, not exceeding ten, who should be capable of being elected members of either House of Parliament, and of sitting and voting therein, '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 section was consolidated as s. 13 of the *Constitution Act Amendment Act*, 1890. As in the case of New South Wales, re-election remained necessary, but, as in that case, a change of office did not necessitate re-election. This provision was revised by the Act No. 1864 of 1903, which provides as follows :—

> 5. (1) Notwithstanding anything contained in the Constitution Act Amendment Acts it shall be lawful for the Governor from time to time to appoint any number of officers, so that the entire number shall not at any one

[1] 18 & 19 Vict. c. 55 (confirming and altering a reserved Bill of the local Legislature).

time exceed eight, who shall be capable of being elected members of either House of Parliament, and of sitting or voting therein. (2) 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 Council or Assembly. (3) Not more than two of such officers shall at any one time be members of the Council, and not more than six of such officers shall at any one time be members of the Assembly.

6. No responsible minister of the Crown shall hold office for a longer period than three months, unless he is or becomes a member of the Council or Assembly.

Provision was also made by s. 9 for ministers to be able to sit and speak in either house, though not to vote in any but the house of which he was a member, if the House consented, and provided that only one minister at a time had the privilege in either house.

It is clear that the provisions of 1903 carry the matter a good deal further than usual. Historically they are adopted in part from the precedent of Natal in 1893, in part from the provisions of the Commonwealth Constitution. But they do not establish responsible government: they do not even constitute the Executive Council, and, as in the case of New South Wales and the other States, the royal instructions still leave the Governor free to appoint such other persons as he pleases to be members of the Executive Council of the State. But they provide the Governor with a nucleus of a Council who are responsible ministers, and they provide that responsible ministers must in part be also in Parliament: the provisions are clumsy, but it is clear that at any one time four must be in Parliament, and that no one of the whole number can hold an office for over three months without becoming a member of Parliament. But, again, while a Parliamentary Executive is contemplated, though not legally provided for in complete measure, there is no hint that the Executive must control Parliament or depend on Parliament for its position. The Governor might theoretically call in a number of non-ministers to make up his Council, and again, ministers might legally remain in

office though without support in Parliament, if they could only keep seats in Parliament.

In the case of Queensland the model of New South Wales was followed in the Order in Council of June 6, 1859, and in the *Constitution Act*, 31 Vict. No. 38, and the same rules apply. The grant of the Crown revenues was already made, and there were no political pensions. Officers were to be appointed by the Governor in Council save in the case of political officers, who were to be appointed by the Governor alone, and minor officers, for whom similar provision was made as in New South Wales. Nothing is added to this by act of the Legislature or by the royal instructions, and the practice of responsible government rests on usage alone. The Act 60 Vict. No. 3 merely permits ministers to sit in Parliament and dispenses with re-election on acceptance of office. Eight may sit, seven in the Assembly and one in the Council.

In the case of South Australia, on the other hand, an effort was made to embody in the act[1] some of the principles of self-government. By s. 29 of the *Constitution Act*, No. 2 of 1855–6, it is provided that appointments of officers are to be made by the Governor with the advice of his Executive Council, save in the case of officers who are required to be members of Parliament, the appointment or dismissal of whom is by the Act vested in the Governor alone, while minor appointments may be delegated by the Legislature or by the Governor in Council to the heads of departments or other officers. S. 32 provides that after the first general election of the Parliament no person shall hold any of the offices of Chief Secretary, Attorney-General, Commissioner of Crown Lands and Immigration, and Commissioner of Public Works for any longer period than three calendar months, unless he shall be a member of the Legislative Council or House of Assembly, and the persons for the time being holding such offices shall *ex officio* be members of

[1] It refers to officers as 'liable to loss of office by reason of their inability to become members of the said Parliament, or to command the support of a majority of the members thereof', a very striking case of the express affirmation of the constitutional principle, but only in a minor matter.

the Executive Council. S. 33 provides: 'No officer of the Government shall be bound to obey any order of the Governor involving any expenditure of public money: nor shall any warrant for the payment of money or any appointment to or dismissal from office be valid except as herein provided, unless such order, warrant, appointment, or dismissal shall be signed by the Governor, and countersigned by the Chief Secretary.' Ministers do not vacate their seats on accepting office. Provision is also made as usual for a Civil List, and for pensions to officers retiring on political grounds.[1] Act No. 5 of 1873 altered the position slightly by providing that the Attorney-General need not be a political officer in the sense of being a member of Parliament, but he must hold office only as long as the Ministry of which he was a member held office. An additional minister was also added, to hold office on the same terms as the other ministers. Act No. 779 of 1901 provided, as an act of retrenchment on federation, that there should be only four officers who should bear such titles and fill such offices as the Governor might appoint. Act No. 959 of 1908 raised the number to six, one of whom should be an honorary minister, and not more than four of the ministers were to be at any one time members of the House of Assembly. The royal instructions recognize that some members of the Executive Council are so *ex officio*, but they do not limit the number, and the Chief Justice who administers the Government in the absence or incapacity of the Governor has a seat in that body.

Even the moderate provisions of the Act of 1855–6 were criticized as being an undue effort to legislate on matters regarding the prerogative, but the Lieutenant-Governor, in reporting on the Bill,[2] stated that he was advised that the provisions were not illegal, and that it was for the Imperial Government to decide if they should be approved or not. No exception was expressed in respect of them by that Government.

In the case of Tasmania, on the other hand, the absolute

[1] See p. 70, note.

[2] *Parl. Pap.*, July 24, 1856, p. 68.

silence of the Constitution Act of 18 Vict. No. 17 is quite remarkable. The Act provides for a Civil List, and for compensation to officers who may retire on political grounds :—

Whereas by the operation of this Act certain Officers of the Government will be more liable to loss of office on political grounds than heretofore and it is just to compensate the present holders of such office for the actual loss of such offices in case the same should happen upon political grounds or at their option to compensate them for such increased liability to loss of office.

But it does not vest any official appointments in the Governor in Council, and it makes no provision for ministerial office. It does provide in s. 27 for the vacating of places in Parliament if an officer accepts office under the Crown at pleasure, but apparently all such persons were eligible for re-election, and no distinction is made between political and ordinary offices. An Act 34 Vict. No. 42 provided that no officers holding appointments from the Governor or the Governor in Council should be elected members of Parliament except the Colonial Secretary, the Colonial Treasurer,[1] the Attorney-General, and the Minister of Lands and Works. By another Act 64 Vict. No. 5, s. 8, provision was made to alter the provisions of s. 27 of the *Constitution Act* so as to provide that ministers need not vacate office on accepting office after election to Parliament. The only other legislation bearing remotely on the question is the provision in the Acts of the Legislature for the creation of the new office of Minister of Lands and Works in 1869,[2] and various Acts settling the salaries of the ministers of the Crown.[3] But it may also be noted that the *Interpretation Act*, 1906, defines the Governor to mean the Governor acting with the advice of his Executive Council. There is not, however, a trace of connexion between the Ministry and Parliament as far as law is concerned.

[1] Renamed Chief Secretary and Treasurer by 46 Vict. No. 8.

[2] 33 Vict. No. 4.

[3] 46 Vict. No. 9; until 1910 the salaries were fixed annually, usually at £750, with £200 for the Premier extra. In 1910 these sums were made permanent.

In the case of Western Australia there is more conscious effort to provide for ministerial responsibility. There is made provision for the payment of pensions to officers removed on political grounds: there is also a provision exactly like that in force in New South Wales, Queensland and South Australia, vesting the appointments of officers in the hands of the Governor in Council, except in the case of political offices, or of minor offices, which could be left by Act or order of the Governor in Council to the disposal of the heads of departments. A Civil List is provided with five ministerial salaries in return for the surrender of the Crown revenues. S. 24 of the Constitution lays down that officers holding offices of profit under the Crown shall lose office on election to the Parliament, but it excepts from the operation of this rule the five executive offices (one of which must be held by a member of the Legislative Council) of the Government liable to be vacated on political grounds, which shall be designated and declared by the Governor in Council within one month of the coming into operation of the Act. Members of Parliament accepting political office were to vacate their seats, but to be liable to re-election or, while the Council was nominee, to renomination. The Act 63 Vict. No. 19 continues these provisions, but also provides definitely for the position of the Executive Government as follows:—

43. (1) There may be six principal executive offices of the Government liable to be vacated on political grounds and no more. (2) The said offices shall be such six offices as shall be designated and declared by the Governor in Council from time to time to be the six principal executive offices of the Government for the purposes of this Act. (3) One at least of such executive offices shall always be held by a member of the Legislative Council,

the last sub-section repeating a provision as to the Council contained in s. 13 of the Constitution. The royal instructions recognize the right of the Governor to select such persons as he thinks fit to make up the Executive Council, and, as will be seen, the Acts do not actually refer in terms to the constitution of the Executive Council at all.

§ 4. New Zealand

We have seen in the preceding chapter how it was found possible to create responsible government out of the representative constitution granted by the Act of 1852, without any alteration of the actual conditions of the law or even of the royal instructions regarding the composition of the Executive Council. As Sir George Grey said in his dispatch of December 8, 1854 :—[1]

I do not understand the opinion which some portions of this correspondence seem to convey, and which is supported by the language of your address of August 31, that legislative enactment by the General Assembly is required to bring the change into operation. In this country the recognized plan of Parliamentary Government by which ministers are responsible to Parliament and their continuance in office practically depends on the vote of the two Houses, rests on no written law, but on usage only. In carrying a similar system into effect in the North American Colonies, legislation has indeed been necessary to make a binding arrangement for the surrender by the Crown of the territorial revenue which has generally formed part of the scheme and for the establishment of a Civil List, but not for any other purpose. In New Zealand the territorial revenue has already been conceded to the Assembly, and Her Majesty's Government have no terms to propose with regard to the Civil List already established. Unless, therefore, there are local laws in existence which would be repugnant to the new system legislation seems uncalled for except for the very simple purpose of securing their pensions to retiring officers, and if uncalled for such legislation is undesirable, because the laws so enacted would probably stand in the way of the various partial changes which it might be necessary to adopt in the details of a system in its nature liable to much modification.

The *Parliamentary Disqualification Act*, 1878, of New Zealand took steps to disqualify officers holding appointments under the Government from membership of the General Assembly, but it made an exception in the case of members of the Executive Council, provided that there were not more than ten, of whom two must be members of

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

the Maori race. The *Legislature Act*, 1908, provides similarly, but omits the limitation in number. The only other reference to the topic is in the Acts conferring salaries on members of the Executive Council who are ministers passed in 1873 and 1887, which are thus consolidated in s. 10 of the *Civil List Act*, 1908, No. 22 :—

> Each of the Ministers to whom salary is appropriated under this Act shall be a member of the Executive Council holding one or more of the ministerial offices mentioned in the second schedule hereto, but if two or more such offices are held at any one time by the same minister, he shall nevertheless be paid the salary attached to one of the said offices only.

The letters patent do not fetter in any way the discretion of the Governor as to the number or choice of Executive councillors.

§ 5. South Africa

In the case of the Cape again we find the utmost simplicity in the circumstances affecting responsible government. The Act for that purpose passed in 1872, No. 1, contains only provision for the appointment of two new officers, one a Commissioner of Crown Lands and Public Works, the other a Secretary for Native Affairs, who shall hold office during pleasure and be appointed by the Crown, not, as usual in these cases, by the Governor. These officers and the offices of Colonial Secretary, Treasurer, and Attorney-General are declared to be capable of being held by persons who are members of Parliament and who are to have a right of debate in either house if members of one, but not to vote except in the house to which he has been elected. Pensions are also provided for the three officers then holding the posts of Secretary, Treasurer, and Attorney-General in the event of retirement on political grounds, and the salaries of ministers are laid down and their posts declared not to be pensionable. The new letters patent do not attempt to alter the composition of the Executive Council, leaving it open to the Governor to appoint any person whom he chooses in addition to any who might by law be members. No law ever made any ministers

members, and from the first to the last ministerial responsibility has existed merely by custom.

In the case of Natal there is a complete contrast, and a most determined effort was made to secure the principles of constitutional government being inserted in the Act altering the constitution. The reserved Bill, No. 1 of 1892, contained a clause providing that the Governor should designate not more than six ministerial offices within a month from the coming into force of the Act, and thereafter from time to time as might be necessary. The holders of such offices were to be appointed by the Crown and were to hold office during pleasure, and the offices were to be liable to be vacated on political grounds. Each minister should be a member of the Legislative Council, or be or become within four months a member of the Legislative Assembly, but not more than two ministers should be members of the Council at once. Each minister could sit and speak in either house, but vote only in the house of which he was a member. Then it was laid down by s. 12 : 'The words Governor in Council in this Act or in any other law or Act appearing shall be deemed to mean the Governor acting with the advice of his ministers, and such ministers shall constitute the Executive Council.' Lord Knutsford's dispatch of July 5, 1892,[1] criticized this as follows :—

9. I have further to acquaint you that I have discussed with the Delegates various points of detail in which they agree with me that the language of the Bill was capable of improvement without impairing the sense. With one exception these were questions of language or of arrangement which explain themselves. I should, however, observe that the addition to Clause 3 is simply a precaution in case an unforeseen emergency should make it necessary to obtain Legislative authority for any purpose, before the arrangements can be completed for inaugurating the new Constitution.

10. The one exception to which I refer is in Clause 12, which Clause, as passed, declared that the Ministers should constitute the Executive Council. Such a provision appears out of place in a Constitution Act, of which the primary

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

object is the creation of Legislative Chambers, and the regulation of their functions; while the object in view would equally well be attained in another way. In fact, throughout the Colonies the resignation by Colonial Ministers of their seats in the Executive Council is rather a matter of unwritten practice than of positive law.

11. The Executive Council in the Australian Colonies is constituted by the Letters Patent, and in every Colony, with two exceptions, Ministers retire from the Council as a matter of course when they leave office. In the other two, Ministers nominally remain members of the Executive Council, but they are not summoned to its meetings, and I may observe that this practice, which is based upon a supposed analogy to the Privy Council in England, is found to be the less convenient of the two. The Governor possesses under the Letters Patent a general power to remove from office, and this power would enable him to dismiss an Executive Councillor, should he attempt to retain his seat, or claim to take advantage of it, against the wish of the incoming Ministers. I propose to advise Her Majesty to issue for Natal, in place of the existing Charter, fresh Letters Patent, following the Australian model, so that the words in the amended Bill will be unnecessary.

I feel confident that it will be agreed that the Constitution Act should not contain any provision as to the composition of the Executive Council.

Accordingly, the Bill as it became law as Act No. 14 of 1893, contained only the provisions for six ministerial officers, for their right to sit in the Legislature without re-election, and for the obligation to secure a seat, if not already a member on appointment to the Ministry, within four months. Appointments to all offices except those liable to be vacated on political grounds were vested in the Governor in Council, and besides a Civil List with a special provision for the natives there was provided a schedule of pensions for officers retiring on political grounds from their posts. The new letters patent contained only the usual provision allowing the Governor to appoint to the Council those who were *ex officio* members—there were none—and any other persons, the whole forming a close parallel to the somewhat earlier Act in the case of Western Australia.

In the case of the Transvaal, as was natural, the model of the case of Natal was followed exactly. Clause xlvii of the letters patent of December 6, 1906, provides for the appointment of not more than six ministers to be appointed by the Governor in the King's name, and to hold office at pleasure. These ministers were not subject to re-election if members of the Legislature, or to disqualification from election if not members, and a minister could speak in both houses, but vote only in the house of which he was a member. But there was no provision requiring that he should be a member of either house within any fixed period or at all. In addition a Civil List was granted, and provision made for pensions to retiring officers, and all appointments were vested in the hands of the Governor in Council, save in the case of ministers, and subject to any law which might be passed. But the letters patent creating the office of Governor which were simultaneously issued enlarged the position by providing that ministers should be part of the Executive Council, but it was not provided that the ministers should constitute the Council. In the case of the Orange River Colony the same provisions were adopted, but only five ministerial offices were laid down.

§ 6. The Federations and the Union

In none of the cases which have so far been discussed is any provision to be found creating an Executive Council. The reason is not difficult to see: it is due to the same fact as accounts for the absence in the constitutions of Colonies generally of any provision regarding the office of Governor. When it was proposed in the Natal case to insert such provision, the step was deprecated by the Home Government on the ground that the matter was essentially one for the prerogative and should not be made the matter of an Act, and the proposal was dropped.[1] But the case is otherwise with the Federations and the Union, for obvious reasons. The prerogative of the Crown to create a Governor-General over several provinces or states is indeed clear; it was

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

exercised in the early days of Australia, and also frequently and regularly in the case of Canada. But that was the creation by the prerogative of an officer with powers over a series of Colonies which he exercised separately in each; he had not and could not have any power over the Colonies as a unit of law,[1] and therefore both the Federal Acts and the Union Act provide for the appointment of a Governor-General and for the administration of the Government by him with the aid of a Council which is called in Canada the Privy Council, in South Africa and in the Commonwealth the Executive Council. But it is important to note how little more is provided by the Dominion Constitution. S. 8 of the *British North America Act*, 1867, declares that the executive government of Canada is vested in the Queen; s. 11 provides:—

> There shall be a Council to aid and advise in the Government of Canada to be styled the Queen's Privy Council for Canada, and the persons who are to be members of that Council shall be from time to time chosen and summoned by the Governor-General and sworn in as Privy Councillors, and members thereof may be from time to time removed by the Governor-General.

The Dominion Constitution contains no other provision regarding the matter: the qualifications of senators do not contain any mention of a senator not being a minister, and the qualifications of members are left to the local laws of the provinces to decide until the Parliament of Canada decides otherwise. But the Dominion Parliament has required re-election in case of the acceptance of salaried office in the Ministry. In Canada the model of the Imperial Privy Council has been followed, and the members of the Privy Council retain membership unless formally dismissed, which would only take place in circumstances which would justify a similar deletion of the name from the roll in England. The Privy Council has also contained some members who have never held ministerial office and who are only appointed *honoris causa*. But the rule of cabinet government, which

[1] So in the case of the Windward Islands the Governor is one, but there are three Colonies with nothing in common save the Governor.

has been developed in Canada perhaps more perfectly than elsewhere, is carried on, as Bourinot[1] points out, under the constitutional usage, not under the régime of formal law, just as much in the Dominion as in the Provinces.

In the case of the Commonwealth, s. 61 of the Constitution vests in the Queen the executive power of the Commonwealth and renders it exercisable by the Governor-General as the Queen's representative. S. 62 provides :—

> There shall be a Federal Executive Council to advise the Governor-General in the government of the Commonwealth, and the members of the Council shall be chosen and summoned by the Governor-General and sworn as Executive Councillors, and shall hold office during his pleasure.

S. 64 permits the Governor-General to appoint officers to administer such departments of the Government as the Governor-General in Council may establish. Such officers shall hold office during the pleasure of the Governor-General. They shall be members of the Federal Executive Council, and shall be the Queen's Ministers of State for the Commonwealth. After the first general election no minister of state shall hold office for a longer period than three months unless he is or becomes a senator or a member of the House of Representatives. By s. 65, until the Parliament otherwise provides, the ministers of state are not to exceed seven in number, and shall hold such offices as the Parliament or, in the absence of provision, the Governor-General directs. Ministers are permitted to hold seats in Parliament without re-election. Even in this case it will be seen that it is not claimed that the Executive Council shall be composed of ministers only, and the letters patent of the Governor-General permit him to appoint such persons besides ministers as he thinks fit.

In the case of the Union of South Africa the model of the Commonwealth has been followed with exactness. There are to be ten ministers who shall be members of the Executive Council, and who must be either members of Parliament or must obtain seats within three months. They are not subject to re-election because of acceptance of office. But here

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

again the ministers do not constitute the Executive Council; they are only an essential part of it.[1]

This review of the conditions in force will show how far from accurate was Mr. Higinbotham's view that the responsible government of the Colonies rested on parliamentary enactment. In some cases there is no trace of such enactment; in other cases certain members must be included in the Executive Council of the Governor. But there is no attempt to do more than provide that the members who are *ex officio* Executive Councillors are also to be, or some of them are to be, members of Parliament. Not one constitution attempts to lay down the law that a government must rule by a parliamentary majority. But of course the rule is none the less binding, though it is not laid down in formal language, and the advantage that it does not rest on enactments is seen in the obvious difficulty which would arise if any effort were made to set forth in terms of law a system so complicated and difficult to express with precision.

[1] 9 Edw. VII. c. 9, ss. 12, 14.

PART II. THE EXECUTIVE GOVERNMENT

CHAPTER I

THE GOVERNOR

§ 1. The Appointment of the Governor

The Governor of a Colony or State and the Governor-General of a Federation or Union are alike appointed by the Imperial Government, technically by the King on the advice of the appropriate minister, the Secretary of State for the Colonies. Of course, in the case of the great appointments, those to Canada, the Commonwealth, and New Zealand, and to the Union of South Africa, it is clear that the Prime Minister is entitled to be consulted, while on questions of his personal representation in a great Dominion of the Crown it is certain that the Sovereign must be expected to take a personal interest, and it was believed that the Duke of Connaught's selection as Governor-General of Canada was an act of King Edward's. But in addition to the home authorities there has gradually been evolved the practice of informally consulting the Government of the Dominion or State in question. The innovation was one against which Mr. Higinbotham with all his heart protested; he considered, in his zeal for the separation of the Imperial and the Colonial spheres, that it was never right to allow of any such proceeding as a consultation beforehand with the Government, however informal.[1] The matter came to a head in 1888, when the Government of Queensland asked that they should be given an opportunity of learning the name of the officer

[1] Morris, *Memoir of George Higinbotham*, p. 203.

proposed for appointment before he was actually appointed.[1] Lord Knutsford, in a letter to the Agent-General of Queensland of October 19, 1888, declined to comply with the proposal on the ground that it was obvious that the officer charged with the duty of conducting the foreign relations of the Crown, and of advising the Crown when any question of Imperial as distinct from Colonial relations arose, must be selected by the Secretary of State for the Queen's approval, and must owe his appointment and be responsible to the Crown alone. It was not possible, therefore, for the responsible ministers of the Colony to share the responsibility of nominating the Governor, or to have a veto in the selection. But the Secretary of State was deeply conscious of the necessity of selecting a person of high capacity and character for the important post, and hoped that the selection made would prove acceptable. The choice fell on Sir H. Blake, and evoked a storm of indignation: the Ministry joined with the opposition under Sir Samuel Griffith in deprecating the appointment, and communicated their views through the Agent-General, a course to which Lord Knutsford took exception, preferring that the matter should be dealt with in the usual formal manner through the officer administering the Government, to whom he telegraphed asking the grounds of the objection to the appointment proposed. At this juncture the Agent-General of South Australia intervened with a request from his Government that they might be informed who was to succeed Sir W. Robinson. The case for the refusal to give the required information was conveyed to the Agent-General in a letter from the Colonial Office of November 15, 1888, in which stress was laid upon the Imperial duties of the officer selected, and on the danger of charges of favouritism being brought against a Colonial Governor, who was approved by a Colonial Government, if he used his discretion in the delicate business of granting a dissolution in their favour. Moreover, it was intimated that it would be difficult to ask a distinguished man to undertake a post

[1] *Parl. Pap.*, C. 5828 (1889). Cf. Dilke, *Problems of Greater Britain*, i. 337, 338.

subject to his appointment meeting the approval of persons at a distance who could have no knowledge of his capacities for the post. The Government of Queensland put in a strong reply to the request for information of the grounds on which the refusal to accept Sir H. Blake was based: they said that his previous experience, one year in Newfoundland, was no recommendation: the Governor must be, as well as an Imperial officer, a person acceptable to the Colonial Government with which he must work and which paid his salary. On the other hand, in a discussion in the Victorian Legislative Assembly on November 16, 1888, the Premier declared himself opposed to any attempt to secure a voice in the selection of Governors. The Government of South Australia, however, on November 21 sent home a telegram in which they disclaimed the right to appoint a Governor, but pointed out very effectively the advantages of their being consulted in advance as to the selection, in which case they could bring forward any serious objection—and no other objection would be alleged. They also offered to suggest a name if the Imperial Government wished. New South Wales chimed in on November 22 by sending an address from the Legislative Assembly, in which they asked that no future Governor should be sent out who had not held high political office in the United Kingdom, or been in Parliament. They also added that it would be in accordance with the constitutional privileges of the Colonies if the name of any intended appointee were communicated to the Colonial Government.

Sir H. Blake solved the question by resigning, but on July 8, 1889, Lord Knutsford explained to all the Australian States and New Zealand his views on the matter. After referring to the protests of the three Colonies he proceeded:—[1]

Of the remaining Australasian Colonies under Responsible Government, Victoria has declared strongly against any communications with the Colonial Ministers in regard to the selection of the Governor, and the Governments of New Zealand and Tasmania have made no representation on the subject to Her Majesty's Government. I may add that

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

although there has been no official correspondence with Canada on this question, I have been informed that the Dominion Government are decidedly of opinion that the appointment of a Governor-General should be made without any reference to the responsible Ministers.

Her Majesty's Government have read with attention the debates in the Colonial Parliaments, and without referring in detail to those discussions it may suffice for me to say generally that the fuller reports of them have confirmed the opinion which Her Majesty's Government had been led to form after considering the information previously received by telegraph, namely, that the expediency of making any constitutional change in the mode of appointing the Governor of an Australian Colony has not been established. They believe, in fact, that the objections stated in the letter addressed on November 15th last to the Agent-General for South Australia, a copy of which is annexed for convenience of reference, greatly outweigh the advantage which they might in some cases derive from a knowledge of the opinion of the gentlemen at the time serving as Colonial Ministers.

Her Majesty's Government feel that they are justified in claiming, for themselves as well as for their predecessors, that a remarkable measure of success, both as regards the capacity and character of the Governors appointed, and as regards the approval with which those appointments have been received in the Colonies, has attended the sincere endeavours which have at all times been made to secure the best possible selection in each case. They desire at the same time to point out the difficulties which might arise if the area of selection were absolutely limited, as has been suggested, to persons who have held high political office in England, or have been members of the Imperial Parliament. Such persons are frequently not prepared to retire from a promising public career at home in order to serve out of England for a term of years, and it is worthy of observation that the suggested limitation would have excluded almost all of the most successful Australasian Governors.

It appears, indeed, to be necessary on every ground that Her Majesty's Government should conduct, without assistance from the Colony, the confidential negotiations preliminary to the selection of a Governor, while they could not invite a person so selected by them to allow his name to be submitted for the approval of gentlemen at a distance, to whom (though well and favourably known here) he may be altogether unknown.

I can therefore only repeat that the true interests of the Colonies, and the preservation of friendly and constitutional relations between the Colonies and this country will, in the opinion of Her Majesty's Government, be best secured by adhering to the principles upon which the appointment of Governor has hitherto been made.

None the less, the position taken up by Lord Knutsford did not prove possible of successful defence. The Marquess of Normanby was objected to by South Australia, and the appointment could not be proceeded with, and in fact the principle of consultation was in effect granted.[1] Indeed, it was not reasonable to deny it, and it was said that the Government of New Zealand were consulted regarding Lord Onslow's successor.[2] The choice of able men is not so limited in the United Kingdom that the Government can ever be in a serious difficulty as to how to fill up a post, if for any good ground an objection is taken to a nominee of the Government. The result of consultation is not to transfer the control from the Government to the Colony: it merely ensures that the appointment when made shall be a popular one, and no Governor is likely to be induced to be unfair by the fact that a particular party accepted his appointment: he is normally quite well aware that the opposition would have accepted him just as readily as did the Government of the day. On the other hand, the Imperial Government have maintained their resolve not to allow suggestions for the appointment to be made, at any rate in any formal way, though every effort is made to humour individual idiosyncrasies, such as the apparent desire of New Zealand—the most democratic of all Colonies—for a peer at the head of the Government.

§ 2. The Governors of the Australian States

The question of the position of the Governor in the Australian States has, however, become somewhat pressing since federation reduced the importance of the position.

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

[2] *Canadian Gazette*, xviii. 446.

Even before that there were spasmodic attempts to suggest the cessation of the practice of sending out Governors from home, but the idea was unquestionably much strengthened by the coming into force of federation. It was known that the Provinces of Canada were administered by Lieutenant-Governors appointed by the Governor-General, and, though that arrangement was not popular with the supporters of state rights, who recognized that to confer the power of appointment on the Governor-General was to subject the states to federal control in a way quite inconsistent with their own views and aspirations, they were inclined in view of possible economies to diminish the salary of the Governor and allow the Chief Justice to hold the post as well as his own. This view was supported by others who were totally opposed to the maintenance of state rights, and who welcomed any step which would have the result of lowering the status of the states and furthering their ideal of their abolition as independent entities.[1] Moreover, events made it necessary for all the Governments to economize, and the obvious economy of cutting down the Governor's pay was appreciated on all sides. But the movement did not ultimately prevail as much as was expected,[2] and the State Premiers in their Conference at Brisbane in May 1907 passed a resolution against any interference with the existing system, as being likely to tend to the lowering of the position of the states, though the representatives of South Australia expressed the view of the State Government in favour of the change from home to local appointments.[3] None the less, in the Legis-

[1] A Bill to reconstitute the Commonwealth on the lines of the South African Union was introduced into the Commonwealth Parliament in 1910 by a Labour member as a *ballon d'essai*.

[2] From federation onwards there were constant proposals to reduce salaries, and in point of fact that of the Governor of Tasmania was cut down to £2,750, and that of the Governor of Queensland to £3,000. But the Governments did not press for local appointments. Allowances were also varied and reduced, and the State Governments of New South Wales and Victoria transferred the Government Houses to the Federal Government for the use of the Governor-General, supplying other houses instead.

[3] See Victoria *Parl. Pap.*, 1907, No. 23, pp. 298–301. The question was

lative Assembly of Victoria in the year 1908, a resolution was introduced in favour of local appointments, and, though there was no intention of proceeding with it, it passed, despite the Premier's opposition, by two votes, and the Assembly again asserted their view in the succeeding Parliament of 1909. In 1908 the proposal was formally made by Mr. Price, the Labour Premier of South Australia, that the new Governor should be a citizen of the state: it was not proposed to deprive the Crown of the right of appointment, but it was desired that the choice should fall on a member of the community of South Australia, and that it should be admitted that even the highest post in the community was open to its citizens. It was generally understood that it was not proposed, had the selection been left to the Government, to select the Chief Justice, as was suggested in the case of Victoria, but to choose a distinguished citizen formerly in politics for the post. But although Mr. Price visited England and had a discussion with Lord Crewe on the topic, the Secretary of State found himself unable to accede to the proposal on grounds which are explained in a dispatch of October 9, 1908.

The suggestion was made in the following memorandum for the Secretary of State, dated August 13, 1908 :—[1]

Premier's Office, Adelaide, August 13th, 1908.

MY LORD—I have the honor to submit the following statement to your Lordship :—

In the interview which your Lordship was good enough to grant me during my recent visit to England, I had the honor to place before you the views held by my Government

discussed in the Western Australia Legislative Assembly on August 27, 1902, in the Victorian Assembly in March 1903; see also South Australia *Parliamentary Paper*, 1900, No. 99; New South Wales Acts, No. 41 of 1901, No. 32 of 1902 (reducing the amount to £5,000 from £7,000). In 1901 the Victorian salary was reduced to £5,000.

[1] The Legislative Council of South Australia objected strongly to the dispatch of Mr. Price, with which they entirely disagreed; cf. *Parliamentary Debates*, 1908, pp. 158 seq., 175 seq. See New South Wales *Parl. Pap.*, 1908, No. 104; and cf. Western Australia *Parliamentary Debates*, 1908, pp. 1114 seq.

concerning the appointment of future Governors to this State.

I have now the honor to lay before you officially a statement in which those views are set out in greater detail, and beg respectfully to ask that your Lordship will give it your favorable consideration.

I. The State of South Australia enjoys the inestimable privilege of self-government under His Most Gracious Majesty the King, except in such important affairs as have been transferred by the people to the control of the Government of the Commonwealth of Australia.

II. From the time when self-government was granted to the people of South Australia, the administration has been vested in the Governor as the representative of the Crown.

III. From the foundation of the State to the present time our Governors have been sent to us from Great Britain.

IV. The gentlemen who have had the honor to represent the Crown in this State have discharged their duties with zeal and with dignity, to the great satisfaction of His Majesty's subjects in this portion of the Empire.

V. During the period of colonisation it was no doubt advisable to appoint to this office a gentleman specially qualified to direct and guide the administration of government.

VI. Eight years ago the Home Parliament, by passing the Commonwealth Constitution Act, opened a new era in the government of Australia. Under this Act His Most Gracious Majesty the King is represented in Australia by a Governor-General. This high office has been occupied by noblemen distinguished for their skill in constitutional government, and for the dignity with which they have exercised the powers assigned to them by the Crown. The creation of this exalted office has exercised a modifying influence on the position of the State Governor.

VII. The cost of the Federal Government, in which is included the maintenance of the Governor-General's establishment, has considerably added to the burden of taxation borne by the people of the Commonwealth of Australia. Throughout the Commonwealth a strong feeling exists that the expenditure on government should be limited. In response to a general expression of public opinion to this effect, reductions have been made in the number of members of the State Houses of Parliament.

VIII. The desire to lessen the cost of government is not prompted by any diminution of loyalty to His Most Gracious Majesty the King. People of this State have been, and still

remain, intensely loyal to the Crown and Empire. Evidence of their devoted loyalty has never been lacking whenever an occasion has arisen for its manifestation.

IX. The subjects of His Majesty in South Australia aspire to be regarded not merely as citizens of the State and Commonwealth, but also as participators in the broader life of the Empire. With this end in view, they desire that such action should be taken by your Lordship as will allow them to occupy, within their own State, positions of the highest honor, trust, and responsibility, such as have in the past been held by able and worthy servants of the King from the Mother Country.

X. There are gentlemen in this State who have rendered distinguished service as Judges, Ministers of the Crown, and occupants of other high positions in the community, and who have given proof of their great ability and administrative skill. On many occasions, during the temporary absence of the Governor, such gentlemen have discharged vice-regal duties with conspicuous success.

XI. My Government most respectfully submit to your Lordship their view that there is no position of honor and trust in this State which should be regarded as beyond the reach of our most distinguished citizens.

XII. It would afford the utmost gratification to our people to know that His Majesty esteemed one of our citizens sufficiently worthy of His Majesty's confidence to merit appointment to the position of Governor of the State.

XIII. The extension of the arena of public usefulness for those who have rendered eminent services to the State would act as an additional stimulus to citizens to serve His Majesty with increased zeal and fidelity.

XIV. As His Excellency Sir George R. Le Hunte, K.C.M.G., will soon be leaving South Australia, having completed a successful term of office, may I be permitted to ask that before a new appointment to the office of Governor for this State is made your Lordship will give due consideration to the views which, on behalf of my Government, I now have the honor to place before you.

I have, &c.,
T. PRICE, Premier.

Lord Crewe replied as follows in a dispatch of October 9, 1908, addressed to the Governor :—

SIR,—I have the honour to acknowledge the receipt of your despatch, No. 44, of the 24th of August, enclosing

a letter from your Premier, in which he asks that your successor in the Government of South Australia may be a citizen of the State.

2. I wish to acknowledge in the first instance the courteous and friendly terms in which Mr. Price has embodied his views, implying, I am glad to think, a well deserved compliment to the present Governor. It is a subject on which I had the advantage of learning Mr. Price's opinions while he was in England, and I fully appreciate the strength of his convictions in this matter and the reasons which he gives in support of his proposal.

3. But the change which is suggested is a very far-reaching one—more so than, perhaps, appears at first sight; and it could not, I consider, be entertained in any case unless it is to be applied to all the Australian States, and not to one alone, and until public opinion in Australia is demonstrated to be overwhelmingly in its favour.

4. The proposal as presented to me is one which would leave the appointment of the Governor to be made, as now, by His Majesty the King; but His Majesty's choice would be confined to citizens of the State, and, though I understand that Mr. Price does not claim that the choice should be expressly made upon the advice of the responsible Ministry of the State, it is clear that the person selected would need to be one fully acceptable to the Ministry of the day. Governors, therefore, selected in this manner would be gentlemen closely identified with local interests and practically the nominees of the party in power when the governorship fell vacant.

5. When the Canadian Dominion was established, it was provided in the British North America Act that the federating provinces should be under Lieutenant-Governors appointed by the Governor-General in Council, and with salaries fixed and paid by the Dominion Parliament. But under the Commonwealth Act the States of Australia retain a more independent position and larger powers than the Canadian provinces, and the Governors are appointed, as before, by the Crown. From time to time under the present system the King's representative may well be, as has no doubt occasionally happened in the past, one who has either been born or has passed part of his life in the colony of which he is subsequently made governor, but it is of the essence of the system of appointment by the Crown that His Majesty shall not be fettered in his choice.

6. There is, no doubt, much to be said in favour of the

Canadian system under which the Central Government appoints provincial governors, and if the people of Australia were to desire to adopt a similar system His Majesty's Government would in all probability be disposed to advise His Majesty that the necessary steps should be taken to carry out their wishes.

7. So far, I understand there has been no indication that the States, whose contention is that they remain sovereign States, would desire that their prerogatives should be diminished, and the evidence of such sovereignty is in part secured by making the appointment of Governor in the same manner and on the same terms as prior to federation.

8. I am sending a copy of this despatch to the other State Governors and to the Governor-General.

This dispatch formed the subject of discussion in the Queensland Assembly in 1909, in the Victorian Assembly in 1910, and in the Assembly of Western Australia, where a member of the Labour party brought forward, on September 7, 1910, a motion to use Government House as a site for the University, with the idea also of terminating the appointment of a Governor from home. But it was agreed almost unanimously that the plan was not a desirable one, and the motion was rejected, it being felt that if anything were to be done it must, as suggested by Lord Crewe, be done by the State Governments acting together and approaching the Imperial Government. It is indeed clear that the change could only be made when the states have decided to abandon in some measure at least their independence. There are, moreover, obvious objections to the selection of the Chief Justice as Governor:[1] as head of the Executive he would have to exercise the prerogative of mercy, and though he would normally act on ministerial advice, yet it is clear that it would be impossible to treat the matter in anything like so satisfactory a manner as at present, when the Executive and the judiciary are normally independent. Nor is the force of this objection

[1] The Chief Justice also has local ties, and recently the Chief Justice of Tasmania was accused of misusing his position as administrator to obtain information of pecuniary value, though the charge was declared unfounded by the Commissioner who examined into it; see Hobart *Mercury*, May 14, 1910.

lessened by the fact that the Chief Justice has in the past frequently administered for long periods, for it has been usual in the larger Colonies at least to secure him exemption from other duties, and at any rate to let cases affecting the Crown in any way be heard before other judges.

§ 3. The Administration of the Government

The administration of the Government in the absence of the Governor, or in case of his incapacity, is usually delegated by the letters patent to the Lieutenant-Governor, if there is one, and if not to the Chief Justice of the Colony. As long as military forces were maintained in the Colonies in sufficient numbers to secure the presence there of an officer of standing, it was the custom (though not the earlier practice) to appoint the senior officer commanding the troops to administer, he being an Imperial officer and free from local ties, and the experiment answered remarkably well. Thus in Canada, until the removal of all but a small garrison rendered the practice impossible, the senior military officer repeatedly administered the Government.[1] The administration now—first in 1903—devolves on the Chief Justice or the senior judge in the absence of the former.[2] In Newfoundland, owing to the absence of troops, the Chief Justice administers. In the former South African Colonies, where military forces were kept, the senior officer administered, but on the foundation of the Union it was felt proper to entrust the administration in the first instance to the Chief Justice, who was also raised to the peerage as a token of appreciation of his great services to the Empire. In New Zealand the administrator is the Chief Justice since the disappearance of the garrison, and the same rule applies to the Australian States, except that other persons have from time to time been selected. Thus in the case of Queensland the President

[1] See Bourinot, *Constitution of Canada*, p. 51, n. 6. Before 1840 the Senior Executive Councillor used to act, as in Crown Colonies, where the Colonial Secretary is accustomed to administer.

[2] So Mr. Girouard acted in 1910, when Earl Grey and the Chief Justice were not available.

of the Legislative Council holds the post of Lieutenant-Governor: in Western Australia it is held by an ex-Chief Justice, while in the other four it is held by the Chief Justice, who in each case has been made Lieutenant-Governor, a post which carries with it merely an honorary position and style as long as the Governor is administering. In the case of the Commonwealth the plan has now been adopted of conferring a dormant commission on the two senior State Governors for the time being, with a preference for the Governor of New South Wales or Victoria on the ground of contiguity.

The Governor-General and the Governors alike are authorized, the former by letters patent under statute,[1] the latter by letters patent, to appoint deputies whose appointment is limited by the instruments appointing them, and whose existence does not hamper in any way the action of the Governor-General or Governor. In the case of brief absence from the Dominion of New Zealand, Newfoundland, or the States the Governors of the Dominion or Newfoundland or the States are not deemed to be absent so as to require the coming into force of the appointment of the Lieutenant-Governor or other person as administrator, if they have appointed deputies,[2] and the same rule used to apply to the Colonies in South Africa which had responsible government. Moreover, even in the case of such temporary absence the Governor is to be deemed to possess full power to perform all his functions, a curious position, and one which seems open to serious objection, as a Governor would seem *prima facie* to have power only within the limits of the territory of his Colony, and the assent to a Bill if given outside these limits might be deemed illegal.

The power of appointing deputies where not given by

[1] 30 Vict. c. 3, s. 14 (Canada); Constitution, s. 126 (Australia); 9 Edw. VII, c. 9, s. 11 (Union). In each case the mode of exercising the power is regulated by the letters patent. In all the provinces the Lieutenant-Governor is authorized to appoint deputies for specific purposes; apparently a legal power. See *Provincial Legislation*, 1867–95, p. 196.

[2] See, e.g., New Zealand Instructions, November 19, 1907, clauses ix and x.

statute has been considered to be of doubtful validity by so distinguished a lawyer as the Chief Justice of South Australia,[1] so that it cannot be said to be free from doubt. But it does seem quite within the powers of the Governor when he is authorized to do it by letters patent: it is clear that without such authority he could not do it.[2] There is no case where any act done by a deputy has been held to be invalid by the Courts, and this is a case where persistent practice would seem to answer adequately theoretic doubts as to the validity of acts so done.[3] On the other hand, the validity of acts done by a Governor when outside his Colony has not been determined in any case, and the custom has not yet had much time to establish itself as valid. It may also be noted that a deputy Governor, if he is trusted with the full control of the Government, may be an officer administering the Government within the meaning of the letters patent, and so may receive privileges, e.g. exemption from customs dues normally granted only to Governors.

§ 4. The Salary of the Governor

The salary of a Colonial Governor is paid in every case of the responsible-government Colonies by the Colony of which he is Governor. In every case also the amount is provided by a permanent Act, and is not voted annually. Moreover, it is established by law or custom that the salary of a Governor shall not be diminished during his tenure of office: if Parliament decides to reduce the amount it will take effect only when the new Governor comes into office. The practice was illustrated by the case of Sir Fowell Buxton,

[1] Cf. South Australia *Legislative Council Debates*, 1910, pp. 530 seq. A Bill to legalize the exercise of statutory powers by a deputy was passed in 1910 by South Australia, but was reserved.

[2] Forsyth, *Cases and Opinions on Constitutional Law*, p. 80.

[3] Moreover the Interpretation Acts of the Colonies constantly recognize the fact of the administration of the Government by persons appointed other than the Governor. The special grant of power in the case of a federation is due merely to the fact that the Crown could not constitute a federation without parliamentary sanction. For a case of a deputy, see *R.* v. *Amer*, 1 Cart. 718.

who was appointed to be Governor of South Australia. The salary was reduced before he actually took up office, but there had been notice given of the possibility of reduction, and though Mr. Chamberlain informed Sir F. Buxton that he was entitled to withdraw his acceptance of office he declined to avail himself of the permission.[1] Again, during the financial difficulties in Queensland during the drought a deduction was made from all official salaries: the Governor's salary was left untouched, but Sir Herbert Chermside generously surrendered a proportional part of his own free will until times should improve. As a matter of fact, however, the amount of the salary is comparatively unimportant compared with the question of allowances: for example, the official salary of the Governor of Victoria is £5,000, but no staff is provided; that of the Governor of South Australia is fixed at £4,000, but practically nothing else is paid, and he must, in addition to paying income tax, provide himself with a staff at his own expense, an attempt to increase the allowances failing in 1910. Or again, the Governor of Tasmania receives only £2,500 and an allowance of £250 for a private secretary, and the Labour party defeated an attempt in 1910 to grant an extra £500 for travelling. The practice as to upkeep of house and grounds varies very much from place to place and from ministry to ministry.[2] In the case of Canada the salary and large allowances have been sufficient to uphold the dignity of the office, and since an attempt in the very early days of responsible government in the Dominion there has been no serious project of reduction.[3] In the Commonwealth the attempt to secure in 1902 an increase of salary by way of an entertainment allowance for Lord Hopetoun resulted in the refusal of the Commonwealth

[1] See *Parl. Pap.*, C. 7910 (1895).

[2] New South Wales is particularly generous, Victoria much less so, as a result of the presence there of the Federal Government. Western Australia in 1910 increased the Governor's allowances. For South Australia, see *House of Assembly Debates*, 1910, p. 601; for Tasmania, *Mercury*, Nov. 1, 1910; for Queensland, *Debates*, cii. 209 seq.

[3] Canada *Sess. Pap.*, 1869, No. 73; Pope, *Sir John Macdonald*, ii. 15. The attempt lost Canada Lord Mayo as a Viceroy.

Parliament to sanction the proposal, and ended in the retirement of the Governor-General.[1] In Canada, the Commonwealth, and the Union the salary fixed is £10,000 a year; in New Zealand it is £5,000 with £2,000 allowances; in the others it varies from £5,000 in New South Wales and Victoria, £4,000 in South and Western Australia, £3,000 in Queensland, £2,750 in Tasmania, to $10,000 in Newfoundland. In all cases exemption from customs duties on official belongings is accorded.[2]

The different Dominions also vary in their treatment of the staff of the Governor-General or Governor. In the case of Canada an efficient official staff is provided, which is paid for by the Dominion Government, and the members of which are members of the Canadian Civil Service, but as long as they are employed in the Governor-General's office are under his sole control as regards their conduct of affairs. In addition there is a Secretary to the Governor-General, paid by Canada but chosen by the Governor-General himself, and changing with the different Governors-General. In the Commonwealth of Australia there is, besides the Governor-General's private secretary, who is not paid by the Government, an official private secretary, an officer of the Commonwealth Government, by whom he is paid, but under the control of the Governor-General, and that officer is provided with a clerical staff. Similar arrangements are made in the other Dominions and States, but the Governor is essentially left to deal with matters which come before him unaided save by the assistance which his private secretaries can render. The help given has been in at least three cases in recent years considerably increased by the selection of members of the Colonial Office for the task in Canada, Australia, and South Africa.

The Governor or officer administering is in every case entitled locally to the style of Excellency—a style also given to the Lieutenant-Governors by courtesy—and in the case

[1] Commonwealth *Parl. Pap.*, 1901, ii. 827, 833; Turner, *Australian Commonwealth*, pp. 37 seq. Cf. *Parliamentary Debates*, 1910, pp. 6675–86.

[2] In some cases legal arrangements exist as to payment of Governors on leave and acting officers, as in New Zealand (Act No. 22); in others, as in the Federations and Union, it is left to arrangement.

of the Federations and the Union the style is extended to his wife, while by local usage it often is given in other places. In the case of the Federations and the Union the style is also adopted in formal correspondence with the Governor-General, but not with Governors. The Governor as representative of the Sovereign is entitled to certain salutes from Imperial men-of-war, and receives various marks of distinction from local military forces, bands,[1] &c. He wears a special uniform, and is entitled to the respect due to a representative of the Crown.

There are various minor matters respecting Governors which may be noticed. In the first place, no Governor is allowed to accept presents as Governor without the permission in each case obtained of the Secretary of State.[2] This permission has been given as almost a matter of course [3] in the case of valedictory presents, but the practice is not without difficulties, and Lord Carrington, when Governor of New South Wales, discouraged it as applied to himself. On the other hand, it is sometimes difficult to refuse such presents, and though the Governor of Tasmania, Sir G. Strickland, in leaving the Colony in 1909 on transfer to Western Australia, intimated that he did not intend to apply to the Secretary of State for leave to accept presents, nevertheless one of some small value was given to his wife, who had rendered herself very popular in the state. The rule nowadays is of little consequence, but it was a different matter in the early days of self-government, when a Governor wielded a very great direct influence. The case of Governor Darling of Victoria, which will be referred to later in detail, shows how serious a position may develop from the practice of grants to the relations or families of Governors. Of late years a certain amount of trouble has been raised by the fact that Governors

[1] As to the right of the Canadian Lieutenant-Governors in this regard see Ontario *Sess. Pap.*, 1873, No. 67. [2] *Colonial Regulations*, Nos. 46, 47.

[3] e.g. Sir H. Rawson and Sir F. Bedford both received presentations on retiring from office, and the service of the former was extended for a year at the request of his ministers. Sir T. Carmichael on leaving Victoria in 1911 declined for himself and his wife any valuable presents.

have in one or two cases while in office interested themselves in businesses connected with their Colonies. In one case at least in Western Australia the result was that the Governor of the Colony was sued in a public court with other persons as a guarantor of a scheme, and the case went against him.[1] Recently a dispatch from the Secretary of State has indicated the disadvantages of such procedure in the case of Governors and ex-Governors.[2]

§ 5. Correspondence Rules

The rules as to correspondence have at times created a good deal of friction, but they now are settled on a reasonable basis.[3] It is definitely decided that in all cases the Secretary of State will expect that representations from any person in a Dominion shall come to him through the Governor. It was argued with great heat by the redoubtable Sir George Grey, when he settled, after his retirement, in New Zealand, that he was entitled to address the Secretary of State directly, but the Secretary of State repudiated that view, which had indeed been bitterly opposed by Sir G. Grey himself when acted on by Imperial military officers during the war of 1862–70; and the Colonial Regulations contain the fixed rule that communications must be sent through the Governor on pain, if not so sent, of being sent back to him for a report. The Governor has no power to hold back a communication to the Secretary of State, but must send it on with such report as seems necessary; if the matter relates to internal affairs, it will then be disposed of by referring the applicant to the Government with whose discretion the question rests. All answers are invariably sent through the Governor, the only person in the Colony whom the Secretary of State ever addresses officially, though the Secretary to the Imperial Conference has been authorized since 1907–8 to correspond direct on minor matters with the ministers of the Dominions who constitute the Conference.[4]

[1] *West Australian*, October 5, 1899. [2] *Parl. Pap.*, Cd. 3794 (1907).

[3] *Colonial Regulations*, chap. iv. Cf. New Zealand *Parl. Pap.*, 1880, A. 1, pp. 15–17, 26; A. 2, pp. 9, 37, 48. [4] *Parl. Pap.*, Cd. 3795 (1908).

The official rules as to correspondence are laid down in detail in the Colonial Office rules. They contain a classification of dispatches into public (which are numbered), confidential, and secret.[1] Of the two latter categories there are two kinds in a responsible-government Colony, those which are intended for ministers but deal with matters of military or naval policy, or foreign relations, or similar questions, personal and constitutional matters and so forth, which must not be published without prior communication with the Imperial Government. The degree of secrecy is illustrated by the use of 'secret' or 'confidential' respectively. Others of the secret dispatches are personal to the Governor; and such dispatches he can only disclose to ministers so far as is expressly or impliedly contained therein. The Governor's dispatches are likewise public, confidential, or secret, but the Secretary of State has the full right to publish all or any of these dispatches. In the new edition of the Colonial Regulations this practice is qualified by the express statement that he will usually consult the Governor ere he does so, and this but embodies the practice of years, and is obviously due in courtesy to the Governor and his Government. The power of publication at pleasure has never been applied, of course, to the confidential or secret communications of ministers to the Governor, but only to his dispatches.[2] Sir G. Grey distinguished himself by declining indignantly to receive a communication for the Secretary of State as confidential, one of the misdemeanours resulting in his recall, and indeed a gross violation of public decency.[3]

[1] *Colonial Regulations*, No. 173. There also are 'accounts' dispatches, which deal with matters emanating from the Accounts Department of the Colonial Office, 'Library' dispatches, and 'miscellaneous' dispatches, which emanate from the Chief Clerk's Department, and deal with honours, precedence, &c.

[2] Petitions to the King must (and very possibly the Governor might be liable to suit for disobeying the rule) be sent on with a report, and all such petitions are submitted to the King; *Colonial Regulations*, No. 214. The rules as to military correspondence in cases where there are Imperial troops in the Colony are given in Nos. 192–8.

[3] Rusden, *New Zealand*, ii. 355 seq.; *Parl. Pap.*, May 5, 1868.

CHAPTER II

THE POWERS OF THE GOVERNOR

§ 1. The Letters Patent

The appointment of a Governor is made by letters patent under the Great Seal, and the appointment is accompanied by royal instructions under the sign-manual and signet amplifying the letters patent. It is important to notice that the appointment is not an exercise of legislative authority. It is an act of the prerogative in its relation to matters of executive government. As an act of the prerogative it can be recalled by the Crown if the power is retained to recall it, probably even if the power is not retained. A very clear illustration of the distinction between the letters patent constituting the office of Governor and those constituting the Legislature is contained in the two sets of letters patent issued in 1906 for the Transvaal. The former are declared to be revocable, but the latter are not: the former deal with matters affecting the executive authority of the Governor, the latter deal with legislation. So also in the case of the instruments establishing the office of Governor of the Orange River Colony and the Legislature. In the case of Newfoundland again there is a distinction between the clauses of the commission which granted in 1832 a representative legislature and the clauses referring to the office of Governor; the latter clauses have often since been modified, while to restrict the former there was need of an Imperial Act.[1] The exercise of the royal power in the first case was not that

[1] See 5 & 6 Vict. c. 120 (exercised by instructions, May 4, 1855, confirming earlier instructions of 1842), enabling the Crown to impose a property qualification for members of the Legislature and to provide for a residential qualification of members and voters not to exceed two years, and to require that all money votes should be recommended by the Crown. This Act is made in part permanent by 10 & 11 Vict. c. 44.

of the prerogative of legislation properly so called, as in the case of a conquered or ceded Colony: it was the exercise of the right to set up in the Colonies by settlement a legislature on the English model, and it was a right which could not be exercised more than once, except perhaps to broaden the franchise set up.

In the older form in force until the seventies, the practice was to issue a commission to the Governor, which appointed him to his office, reconstituted the Legislature and Executive, and proceeded to give him all the directions necessary for guidance as Governor, and further details were added in instructions.[1] In the seventies in every case the old plan, which was very inconvenient, and as regards the formal reconstitution of the Legislature was meaningless and misleading, was abandoned, and permanent provision has been made for the office of Governor by letters patent and a permanent set of instructions has been issued, while the actual appointment of any individual to be Governor is made by a commission appointing him to the office defined in the letters patent and subject to the instructions. The instructions are, of course, liable to be supplemented by fresh instructions, and these may be given either in the form of instructions under the sign-manual and signet, or merely by dispatch from the Secretary of State; whether formally in the royal name or not seems indifferent, as the only authority which the Secretary of State has over a Governor is as the mouthpiece of the Crown. There is of course no legal obligation on the Governor to obey these individual instructions or those which are set out for his guidance in the Colonial Rules and Regulations: disobedience does not invalidate his acts; it is merely a question of his duty to his Sovereign, and as every Governor holds at pleasure the duty can be enforced by recall. As an Imperial officer the Governor is also subject to criticism in Parliament; but like every Colonial officer, he is assured

[1] There is no fundamental distinction as regards legal effect between these instruments when they deal with executive matters. For example, pardon is regulated in the Federations and the Union by the instructions. But letters patent are normally used when legislative result is intended.

of the support of the Secretary of State so long as he has acted within his instructions and in good faith.

In the case of the ordinary Colony or State no question has ever arisen as to the validity of the issuing of letters patent to define the duties of the Governor. Nor was the point raised by the Canadian Government when Mr. Blake [1] criticized very searchingly the commission and instructions of the Governor-General in 1876. But on the issue of the letters patent for the Governor-General of the Commonwealth their terms were criticized by several authorities, including Sir J. Quick [2] and Professor Harrison Moore, as being needless, as the power was already conferred upon the Governor-General by the Constitution. As a matter of fact, the attack on the letters patent as a whole was hardly valid, and has been in some measure modified by Professor Harrison Moore in the later edition of his work on the Commonwealth of Australia.[3] Clauses II, VI, and VII of the letters patent of October 29, 1900, were clearly required to delegate the keeping of the great seal to the Governor-General, to permit of his appointing deputies on the conditions laid down, and to allow of the appointment of an administrator of the Government. It is true that the powers of appointing officers,[4] of dismissing them, and of summoning, proroguing, and dissolving Parliament given by clauses III–V of the letters patent were somewhat unnecessary, being copied from the older Canadian model without regard to the exact terms of the Commonwealth Act, but they were innocuous; and of the royal instructions, the clauses regarding oaths were necessary to empower the Governor-General to impose the oaths in question, and that delegating the prerogative of pardon has not only shown the limitations of the power, but also avoided

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

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

[3] See *Commonwealth of Australia*,[2] pp. 300 seq.

[4] These powers are also in all cases (including Newfoundland) somewhat needless, for there are statutory powers as to appointments, usually giving them to the Governor in Council. But they are harmless, and could be used to supplement the statute and render appropriate appointments to the higher offices by instruments in the King's name.

serious doubt arising as to the power of the Governor-General to pardon at all, for the power may not be included in the general power of a Governor.[1] The reason, of course, why the instruments are not so necessary in the case of a Federation or a Union—for the same set of instruments has been issued for the Union of South Africa (excluding only the power of appointing or dismissing officers)—arises from the fact noted above that the Executive Government of a Federation is a matter which requires statutory creation, just as a Federation itself could not be created by the Crown.

§ 2. The Governor and the Prerogative

The exact extent of the power delegated to a Governor remains a matter of dispute, and the question has not been much enlightened by the cases in the Courts as to the Governor not being a Viceroy. The tendency of these decisions, it is held by Mr. Tarring in his *Law Relating to the Colonies*,[2] is to exempt the Governors of Colonies from liability to answer in civil actions for acts of state in the Courts both of the Governments and of England. In support of that view he seems to rely upon the case of *Musgrave* v. *Pulido*,[3] decided in the Privy Council in 1879: the case is so important for its actual decision, and in its bearing on the question of a Governor's power, that it may be set out in part:—

To an action of trespass brought against the appellant, Sir Anthony Musgrave, in the Supreme Court of Jamaica, for seizing and detaining at Kingston in Jamaica, a schooner called the 'Florence', of which the plaintiff was charterer, and which had, as alleged, put into the port of Kingston in distress and for repairs, the appellant pleaded the following plea:—

'The defendant, Sir Anthony Musgrave, by his attorney, comes and says that he ought not to be compelled to answer in this action, because he saith that at the time of the grievances alleged in the said declaration, and at the time of the commencement of this action, he was and still is

[1] Cf. 'The Pardoning Case', 23 S. C. R. 458, at p. 468 (per Strong C.J.).

[2] (3rd ed.) pp. 44 seq.

[3] 5 App. Cas. 102. Cf. *dicta* in 4 C. L. R. 789, at pp. 796, 805.

Captain-General and Governor-in-Chief of the island of Jamaica and its dependencies, and was and still is as such entitled to the privileges and exemptions appertaining to such office and to the holder thereof, and that the acts complained of in the said declaration were done by him as Governor of the said Island of Jamaica, and in the exercise of his reasonable discretion as such, and as acts of State; and this the defendant is ready to verify, wherefore he prays judgment if he ought to be compelled to answer in this action.'

The plaintiff demurred to this plea, and the present appeal is from the judgment of the Supreme Court allowing the demurrer, and ordering the appellant to answer further to the writ and declaration.

The plea is in form a dilatory plea, and does not profess to contain a defence in bar of the action. It was advisedly pleaded as a plea of privilege, with the object of raising the question of the immunity of the appellant as Governor from being impleaded and compelled to answer in the courts of the Colony. That this was so is plain not only from the form of the plea, but from an arrangement come to between the parties before the argument of the demurrer. In an interlocutory proceeding to set aside a judgment of *non pros.* as irregularly obtained, an order was made by consent 'that all pleas of the defendant, Sir Anthony Musgrave, except the plea of privilege by attorney, be struck out, together with replications and entry of judgment of *non pros.* with liberty to the plaintiff to demur, it being arranged that the demurrer be set down for hearing at the present term, and if a judgment *respondeat ouster* the defendant, Sir Anthony have liberty to plead not guilty by statutes.'

The decision of the Supreme Court was accordingly given upon the plea, as a plea of privilege, and altogether upon this aspect of it, the judgment being one of *respondeat ouster*.

Upon the hearing of the present appeal the Attorney-General, on the part of the appellant, whilst not giving up the plea in the shape in which it was pleaded, insisted that if it disclosed a good defence in substance to the action, as he contended it did, its form and the arrangement of the parties might be disregarded, and a general judgment given for the defendant; and, though under protest from the respondent's counsel, the discussion at their Lordships' bar was allowed to take the wider scope which the Attorney-General's contention introduced into the case.

If the plea is to be regarded as a plea of privilege only, and as claiming immunity to the Governor from liability to be sued in the courts of the Colony, their Lordships think that it cannot, in that aspect of it, be sustained.

The dictum attributed to Lord Mansfield in *Fabrigas* v. *Mostyn*,[1] that 'the Governor of a Colony is in the nature of a viceroy, and therefore locally during his government no civil or criminal action will lie against him; the reason is, because upon process he would be subject to imprisonment,' was dissented from and declared to be without legal foundation in the judgment of the Lords of the Judicial Committee delivered by Lord Brougham in the case of *Hill* v. *Bigge*.[2] In that appeal their Lordships were of opinion that the plea of the Lieutenant Governor of the Island of Trinidad to an action brought against him in the civil court of the island, claiming that whilst Lieutenant Governor he was not liable to be sued in that court, could not be sustained. The action was for a private debt contracted by the defendant in England before he became Governor, but the principle affirmed by the judgment is that the Governor of a Colony, under the commission usually issued by the Crown cannot claim, as a personal privilege, exemption from being sued in the courts of the Colony. The claim to such exemption is thus met :—'If it be said that the Governor of a Colony is quasi sovereign, the answer is, that he does not even represent the Sovereign generally, having only the functions delegated to him by the term of his commission, and being only the officer to execute the specific powers with which that commission clothes him.'

The defendant has sought to strengthen his claim of privilege by averring in his plea that the acts complained of were done by him 'as Governor', and 'as acts of State'. Their Lordships propose hereafter to consider the particular averments of this plea. It is enough here to say that it appears to them that if the Governor cannot claim exemption from being sued in the courts of the Colony in which he holds that office, as a personal privilege, simply from his being Governor, and is obliged to go further, his plea must then show by proper and sufficient averments that the acts complained of were acts of State policy within the limits of his commission, and were done by him as the servant of the Crown, so as to be, as they are sometimes shortly termed, acts of State. A plea, however, disclosing these facts would raise more than a question of personal exemption

[1] 1 Cowp. 161. [2] 3 Moo. P. C. 465.

from being sued, and would afford an answer to the action, not only in the courts of the Colony, but in all courts; and therefore it would seem to be a consequence of the decision in *Hill* v. *Bigge* that the question of personal privilege cannot practically arise, being merged in the larger one, whether the facts pleaded show that the acts complained of were really such acts of State as are not cognizable by any municipal court.

In the case of the *Nabob of the Carnatic* v. *the East India Company*,[1] Lord Thurlow said, that a plea pleaded in form to the jurisdiction of the court, but which denied the jurisdiction of all courts over the matter, was absurd; and that such a plea, if it meant anything, was a plea in bar.

In their Lordships' view, therefore, this plea, if it can be supported, must be sustained on the ground mainly relied upon by the Attorney-General, viz., that it discloses in substance a defence to the action.

Before adverting to the sufficiency of the averments in this plea, it will be convenient to refer to some decisions in which the position of governors of colonies has been considered. In the leading case of *Fabrigas* v. *Mostyn*, the action was brought against Mr. Mostyn, the Governor of Minorca, for imprisoning the plaintiff, and removing him by force from that island. The Governor's special plea of justification alleged that he was invested with all the powers, civil and military, belonging to the government of the island, that the plaintiff was guilty of a riot, and was endeavouring to raise a mutiny among the inhabitants, in breach of the peace, and that in order to preserve the peace and government of the island he was forced to banish the plaintiff from it. It then averred that the acts complained of were necessary for this object, and were done without undue violence. Upon the trial the Governor failed to prove this plea, and the plaintiff had a verdict. When the case came before the Court of Queen's Bench, upon a bill of exceptions to the ruling of the judge, Lord Mansfield said his great difficulty had been, after two arguments, to be able clearly to comprehend what the question was that was meant seriously to be argued. It seems, however, that the liability of the Governor to be sued was raised, and very fully discussed, one ground of objection being that he could not be sued in England for an act done in a country beyond the seas, and upon this question Lord Mansfield declared that the action would, to use his own phrase, 'most em-

[1] 1 Ves. Jr. 388.

phatically' lie against the Governor. His judgment proceeds to show, in a passage bearing materially on the point now under discussion, in what way a defence to such an action might be made. He says, 'If he has acted right according to the authority with which he is invested, he may lay it before the court by way of plea, and the court will exercise their judgment whether it is a sufficient justification or not. In this case, if the justification had been proved, the court might have considered it a sufficient answer; and if the nature of the case would have allowed of it, might have adjudged that the raising a mutiny was a good ground for such a proceeding.'

In the case of *Cameron* v. *Kyte*,[1] which came before this board on an appeal from the Colony of Berbice, the question was whether the Governor had authority to reduce a commission of 5 per cent. upon all sales in the Colony, granted to an officer called the Vendue master by the Dutch West India Company before the capitulation of the Colony to the British Crown. It was urged that the Governor was the King's representative exercising the general authority of the Crown, and, as such, had power to make the disputed reduction. It was, however, decided that the Governor did not hold the position or possess the authority sought to be attributed to him, and that the act in question was beyond his powers. In the judgment of this Committee, delivered by Baron Parke, it is said:—

'There being, therefore, no express authority from the Crown, the right to make such an order must, if it exist at all, be implied from the nature of the office of Governor. If a Governor had, by virtue of that appointment, the whole sovereignty of the Colony delegated to him as a viceroy, and represented the King in the government of that Colony, there would be good reason to contend that an act of sovereignty done by him would be valid and obligatory upon the subject living within his government, provided the act would be valid if done by the sovereign himself, though such act might not be in conformity with the instructions which the Governor had received for the regulation of his own conduct. The breach of those instructions might well be contended on this supposition to be matter resting between the sovereign and his deputy, rendering the latter liable to censure or punishment, but not affecting the validity of the act done. But if the Governor be an officer merely with a limited authority from the Crown, his assumption of an act of

[1] 3 Knapp, 332.

sovereign power, out of the limits of the authority so given to him, would be purely void, and the courts of the Colony over which he presided could not give it any legal effect. We think the office of Governor is of the latter description, for no authority or dictum has been cited before us to show that a governor can be considered as having delegation of the whole royal power in any colony, as between him and the subject, when it is not expressly given by his commission. And we are not aware that any commission to colonial governors conveys such an extensive authority.'

Again, it is said :—'All that we decide is that the simple act of the Governor alone, unauthorised by his commission, and not proved to be expressly or impliedly authorised by any instructions, is not equivalent to such an act done by the Crown itself.'

In the well-known case[1] of the action brought by Mr. Phillips against Mr. Eyre, the former Governor of Jamaica, for acts done by him, whilst he was governor, in suppressing an insurrection in that Colony, the question raised was, whether the Colonial Act of Indemnity was an answer to an action brought in England. That such an Act was thought to be necessary, and that it was alone relied on as a defence to the action, raises a strong presumption that it had been thought that the action might, but for this Act, have been maintained. It is to be observed, however, that the facts of the rebellion and of its suppression, were averred in the plea by way of introduction to the Act of Indemnity, and Mr. Justice Willes in delivering the judgment of the Exchequer Chamber, after saying that the court had discussed the validity of the defence upon the only question argued by counsel, viz., the effect of the Colonial Act, adds,[2]—'but we are not to be understood as thereby intimating that the plea might not be sustained upon more general grounds as showing that the acts complained of were incident to the enforcement of martial law.' It is to be noticed that the nature of those acts, and the occasion upon which they were committed, were shown by distinct averments in the plea.

It is apparent from these authorities 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 com-

[1] *Phillips* v. *Eyre*, 4 Q. B. 225; 6 Q. B. 1. [2] 6 Q. B. at p. 31.

mission, 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. It is unnecessary, on this demurrer, to consider how far a governor when acting within the limits of his authority, but mistakenly, is protected.

Two cases from Ireland were cited by the defendant's counsel, in which the Irish courts stayed proceedings in actions brought against the Lord Lieutenant of Ireland. In these cases the Lord Lieutenant appears to have been regarded as a viceroy. In both the facts were brought before the court, and in both it appeared that the acts complained of were political acts done by the Lord Lieutenant in his official capacity, and were assumed to be within the limits of the authority delegated to him by the Crown. The courts appear to have thought that under these circumstances no action would lie against the Lord Lieutenant in Ireland, and upon the facts brought to their notice it may well be that no action would have lain against him anywhere. (*Tandy* v. *Earl of Westmoreland*,[1] and *Luby* v. *Lord Wodehouse*.[2])

Several cases were cited during the argument of actions brought against the East India Company and the Secretary of State for India, in which questions have arisen whether the acts of the Indian Government were or were not acts of sovereignty or state, and so beyond the cognizance of the municipal courts. The East India Company, though exercising (under limits) delegated sovereign power, was subject to the jurisdiction of the municipal courts in India, and it will be found from the decisions that many acts of the Indian Government, though in some sense they may be designated 'acts of State', have been declared to be within the cognizance of those courts. Thus in the *Rajah of Tanjore's* case[3] the question to be decided was thus stated

[1] 27 St. Tr. 1246.

[2] 17 Ir. C. L. R. 618. Cf. *Sullivan* v. *Spencer*, Ir. R. 6 C. L. 173.

[3] 13 Moo. P. C. 22.

by Lord Kingsdown in giving the judgment of the Committee: —'What is the real character of the act done in this case? Was it a seizure by arbitrary power on behalf of the Crown of Great Britain of the dominion and property of a neighbouring State, an act not affecting to justify itself on the grounds of municipal law, or was it in whole or in part a possession taken by the Crown under colour of legal title of the property of the late Rajah, in trust for those who by law might be entitled to it? If it were the latter, the defence set up, of course, has no foundation.' This Committee, in deciding the questions thus raised, held that the seizure was of the former character, and therefore not cognizable by a municipal court. The answer of the East India Company in this case did not rest on the simple assertion that the seizure was an act of State, but set out the circumstances under which the Rajah's property was taken. After referring to the treaties made with the Rajah, it averred that in entering into those treaties, and in treating the sovereignty and territories of Tanjore as lapsed to the East India Company in trust for the Crown, the Company acted in their public political capacity, and in exercise of the powers (referring at length to them) committed to them in trust for the Crown of Great Britain, and that all the acts set forth in the answer 'were acts and matters of State'.

In the case of *Forester and others* v. *the Secretary of State for India*, in which the judgment of this Committee was delivered on the 11th May 1872, a defence of the same nature as that in the last-mentioned case was set up; but the decision there was on this point against the Secretary of State. In this suit also the answer set out the facts which were relied on to show that the action of the Government complained of was a political act of State.

As far as their Lordships are aware, it will be found that in all the suits brought against the Government of India, whether in this country or in India, the pleas and answers of the Government have shown, with more or less particularity, the nature and character of the acts complained of, and the grounds on which, as being political acts of the sovereign power, they were not cognizable by the courts.

None of these cases help the present plea. On the contrary, it appears from them not only that the facts were laid before the courts, but that the courts entertained jurisdiction to inquire into the nature of the acts complained of, and it was only when it was established that they bore the character of political acts of State that it was decided they could not

take further cognizance of them. It is to be observed that the sovereign authority conferred upon the East India Company appears in Acts of Parliament, and therefore, without being pleaded, the courts would have judicial notice of it.

Coming to the present plea, we find that, after stating that the defendant was Captain-General and Governor-in-Chief of the Island of Jamaica, the only averments in it are, that the acts complained of were done by him as governor of the island, and in the exercise of his reasonable discretion as such, and as acts of State. There is no attempt to show the occasion on which the seizure of the plaintiff's ship was made, nor the grounds on which that seizure, which is not in itself of the nature of an act of State, became and was such an act. The plea does not aver, even generally, that the seizure was an act which the defendant was empowered to do as Governor, nor even that it was an act of State. It would have been contended at the trial, if issue had been taken, that it would satisfy the averments of this plea to prove that the defendant assumed to make the seizure as Governor, and assumed to do it as an act of State, without showing that the act itself was an act of State, properly so called, and was within the limits of his authority. It was said that the plea should be construed as requiring, by implication, proof of these matters; but having regard to its nature and form as a plea of privilege, this cannot properly be held to be its meaning. Their Lordships cannot but think it was designedly pleaded in its present shape. It was a preliminary plea intended to raise the question whether the Governor, if acting *de facto* as such, and doing an act that he assumed and deemed to be an act of State, could be called on to show in the courts of the Colony that the seizure complained of was really an act of State, of the nature and class of those which, as governor acting on behalf of the Crown, he had authority to do. The object of the plea plainly was to stop the court from entering upon such an inquiry; but upon the construction now sought to be given to it, this object would, from the first, have been frustrated, if issue had been taken, for the court must then have gone into the very inquiry which it was the manifest purpose of the plea to avert. It appears to their Lordships that the plaintiff could not have safely taken issue on it. He would have been met at the trial by the objection that it was a plea of privilege, pleaded as a preliminary plea to the jurisdiction, and neither was, nor was intended to be, an answer to the action.

It was contended that, under 'The Supreme Court Procedure Law, 1872,' of the Colony, which provides that defects in form shall be disregarded, and that, on demurrer, the court shall give judgment according to the very right of the cause, the judgment should now be given for the defendant; but their Lordships think, for the reasons above given, that upon this ambiguous and defective plea a proper and final judgment on the right of the cause cannot be pronounced.

In the result, their Lordships must humbly advise Her Majesty to affirm the judgment of the court below, and with costs.

It is hard to see exactly how Mr. Tarring deduces this conclusion from the judgement in question. What the case decided would appear to be that the attempt by the Governor to set himself up as a Viceroy, i. e. as one against whom no action at all for his official conduct can be brought, failed. The Viceroy of Ireland is clearly in that position: that is to say, an action against him for any official act will be stayed by the court on application, without examining the colour of the act in question. The privilege is based clearly on the fact that the Lord-Lieutenant is really *in loco regis*: he is no more answerable for his actions than the King himself, and presumably any action must be taken against some subordinate. The position of the Lord-Lieutenant was apparently not finally thought out by the Judicial Committee, but with regard to the case before them they show clearly that a Governor cannot expect to be exempt from jurisdiction unless he shows that he has acted in accordance with law. But it also seems clearly established by the words in that case, following the case of *Cameron* v. *Kyte*, that the Governor has not the full power of the Crown, and that even lawful acts done under the authority of the Governor may be illegal if he has not the requisite delegation of power. For example, it was not decided, or indeed clearly brought forward, in the case of Pulido whether the act might have been regarded as an act of State against a foreigner; in that event it would probably have been held that, had it been ratified by the Crown even *ex post facto*, it would have been valid, for that

is the only case in which an act of State can be successfully alleged as a defence in English law.[1] But probably it would not have been valid had there been no authority from the Crown, on the ground that the Governor is not in possession of all the royal authority, but only of such part as is expressly or impliedly entrusted to him. The Governor in fact can legally do, not what the Crown can do, but what the Crown has entrusted to him, or what is vested in him by legislation.

But the real question is how much the Crown must be deemed to have vested in him of the prerogative. The answer can only be that given by Mr. Higinbotham,[2] all the power necessary for the conduct of the Executive Government of the Colony, and the only criterion must be found in that idea. In the case of the Commonwealth it is expressly provided in the Constitution[3] that the executive power of the Commonwealth is exercisable by the Governor-General as the representative of the Sovereign, and extends to the maintenance of the Constitution and the laws of the Commonwealth. The *British North America Act*[4] and the Union of South Africa Act[5] also result in the bestowal of a wide executive authority on the Governor-General. Nor is it

[1] Cf. Harrison Moore, *Act of State in English Law.*

[2] Cf. chap. iii, § 3; Lefroy, *Law Quarterly Review*, 1899, p. 283; views of Ontario Government in *Sess. Pap.*, 1888, No. 37, pp. 20–22; 22 O. R. 222; 19 O. A. R. 31.

[3] S. 61. In a British Colony, and probably even in the Federations, it is impossible to hold that there can be drawn any line between executive and legislative powers in so far as to prevent the Legislature exercising any power by statute; cf. Lefroy, *Legislative Power in Canada*, pp. 88 seq.; Ontario *Sess. Pap.*, 1888, No. 37; Clark, *Australian Constitutional Law*, pp. 33–6.

[4] 30 Vict. c. 3, s. 9. Cf. s. 10, which implies the same result as s. 61 of the Commonwealth Constitution.

[5] 9 Edw. VII, c. 9, s. 8. This clause permits the Crown to act in person, while the Canadian Act only applies to the Crown, and does not in s. 9 mention the Governor-General. How far the Crown could delegate its power in the case of Canada to persons other than the Governor-General is hardly worth considering. Ceremonial visits like that of the Duke of York to open the Commonwealth Parliament in 1901, and of the Duke of Connaught to open the Parliament of South Africa in 1910, do not count.

otherwise with the letters patent creating the office of Governor in the other Dominions and States; they purport to authorize, empower, and command the said 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 Colony. It is, no doubt, not an ideal way of describing the duties of an office, but it is not unusual in English state documents to find that the substance is left to be expressed in some vague and general manner, leaving the content to be gathered from official usage, and that official usage shows clearly that the Governor possesses the whole executive authority of the Colony so far as that authority is needful in a Colony. As usual, the constitution laws in the case of the Federations and the Union express clearly what is left vague in the case of the ordinary Colony, where the prerogative and local laws are the source of the authority. When this is realized, we are able to lay the spectre of the reserve power of the Governor, which seems to owe its authority to Todd, who wrote in the second edition of his work on *Parliamentary Government in the British Colonies*[1]:—

A constitutional Governor is not merely the source and warrant of all executive authority within his jurisdiction; he is also the pledge and safeguard against all abuse of power by whomsoever it may be proposed or manifested, and to this end he is entrusted with the maintenance of certain rights, and the performance of certain duties which are essential to the welfare of the whole community. And while he may not encroach upon the rights and privileges of other portions of the body politic, he is equally bound to preserve inviolate those which appertain to his own office; for they are a trust which he holds in the name and on behalf of the Crown for the benefit of the people.

These are vague words and may well mean little more than what we have stated above, but they seem to be the source of the statement in Sir H. Jenkyns's *British Rule and Jurisdiction beyond the Seas*,[2] that 'there is no doubt that a Governor will always be held to have had all the power necessary for

[1] p. 36. [2] p. 103.

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.' If this means, as it seems to mean, that it will exempt a Governor from legal liability because he has acted with reason and on good faith in an emergency, it goes a great deal too far, especially if it is thought that there is any special sanctity in the position of the Governor. The facts are clearly that, as the executive head of the Colony, the Governor has the responsibility for the maintenance of the government thrown upon him in especial measure, and that he will therefore be judged in his actions according to the duties which were imposed upon him. How far his actions will be held to have been reasonable will depend on circumstances, and will be weighed on the principles laid down in *R.* v. *Pinney*[1] and *Phillips* v. *Eyre*,[2] and the Governor will normally require the protection of the act of indemnity, which saved Eyre from serious difficulties. The view that the Colonial Governor has the full executive authority needed for the government of the Colony has now received the support of Professor Harrison Moore,[3] and seems the only satisfactory theory of the Governor's position and attributes.

§ 3. The Limitations of the Powers of the Governor

It is difficult to say exactly what prerogatives are excluded from the grant in the letters patent. It may be taken as certain that the prerogative of coinage is not included. The King has a right to coin money by the prerogative, and to settle questions of legal tender and so forth, and this prerogative not being, properly speaking, a legislative action, has been and can be exercised in Colonies possessing representative institutions,[4] which of course could not be the

[1] 3 St. Tr. (N. S.) 11. Cf. *Parl. Pap.*, C. 7234, pp. 9–12; Cd. 1662.

[2] 6 Q. B. 1.

[3] *Commonwealth of Australia*,[2] pp. 300 seq.; cf. Quick and Garran, *Constitution of Commonwealth*, pp. 389, 390; Clark, *Australian Constitutional Law*, pp. 63, 64.

[4] Chalmers, *Colonial Currency*, pp. 38 seq.

case if the prerogative were legislative. As a rule, however, the prerogative is now exercised under the Imperial *Coinage Act* of 1870, and has become a statutory power which has been exercised in self-governing Dominions like Canada and the Commonwealth.[1] But there is no record of the grant of the prerogative to a Governor, nor can it safely be assumed that he ever has possessed it.

Nor can a Governor grant royal charters of incorporation.[2] That again is a prerogative right of the Crown which is not a legislative act, and which has been used to create several banks doing business in the Dominions, besides other financial companies. Such a charter gives the bank a status in England and, subject to local law, in the Colony. Charters are still issued from time to time in renewal of old charters granted to such banks, e. g. in 1911 to the Bank of British North America.[3] But as in the case of coinage, it is recognized that the charter can only confer privileges so far as they are in accordance with the law of the land. It is presumed that as the charter power is a prerogative right the power to issue a charter would render its clauses valid except when they ran counter to a positive enactment, and not merely when they conflicted with the common law, if such conflict existed. Charters, moreover, sometimes purport to repeal clauses of Acts passed in the Colonies, but it is certain that such claims are empty, except when authorized by legislation, as they sometimes are, as in the case of the Canadian Loan Corporation. On the other hand, charters may have validity throughout the Empire if so expressed, and if, for example, a charter laid down certain rules which were contrary to rules laid down by an Act in one Colony, the charter might still have effect elsewhere. The system is, however, now antiquated, and charters are, as a rule, issued only with the consent of the Colonial Government concerned to great national undertakings, like universities or leagues of nurses,

[1] It is regulated now by local Acts in these Dominions.

[2] He has done so in the past, e. g. in New Brunswick; see Hannay, i. 151.

[3] The disuse of the prerogative as to a Colony believed in by Nesbitt J., 36 S. C. R. 206, at p. 213, is hardly real.

which desire to have the advantage of the royal approval as conveyed by the grant of a charter. The prerogative, though thus it cannot be said to be dead, is not one which can possibly be exercised by a Governor.

Again, the Governor has no right to confer honours of any sort, and the Privy Council has denied that the power can be so delegated, save by statute.[1] The bestowal of honours can clearly not, on any reasonable theory, be regarded as a necessary part of a Colonial administration, and there is no instance where the power to confer any honour has been recognized. The rule has been extended to the case of a medal intended merely to be a local reward issued for services in New Zealand, though there the matter was arranged by the *ex post facto* approval of the Crown to the grant being conveyed to the Governor.[2] It is true that the Governor is given by the *Colonial Regulations*, confirming various instructions by dispatch and otherwise, a limited right to regulate precedence in the absence of authoritative instructions, but the general rules of precedence emanate from the Sovereign.

Moreover, the Governor or Governor-General is not entitled to perform the act of investiture of a man with an order granted by the Crown without special permission from the Crown. This permission has been given from time to time to the Governor-General of Canada and the Governor-General of the Commonwealth, and since 1910 to the Governor-General of the Union of South Africa.[3] But though these officers have been authorized by letters patent of 1902 to invest officers upon whom the two highest classes of the C.M.G. have been conferred, they have not received authority to dub a man a knight; this must either be done by

[1] *Attorney-General for Dominion of Canada* v. *Attorney-General for Province of Ontario*, [1898] A. C. 247, at p. 252.

[2] See *Parl. Pap.*, C. 83, pp. 42, 190.

[3] The Duke of Connaught on opening the Union Parliament in South Africa in 1910 invested several recipients of honours. In 1879 the Marquess of Lorne was permitted on May 24 to invest six members of the Canadian Government with the insignia of K.C.M.G., a then unprecedented occurrence in a Colony. For the present practice elsewhere see New Zealand *Parl. Pap.*, 1904, A. 2, p. 7.

the Sovereign in person, or the honour must be conferred by letters patent.

Again, it is doubtful what rights the Governor has as against aliens, that is, whether he can perform against them acts of State: the matter might have been determined in the case of *Musgrave* v. *Pulido*,[1] had the question been presented in proper form to the Court. It was again discussed by the full Court of Victoria in the case of *Toy* v. *Musgrove*,[2] which involved the question whether the Governor had a delegation of the right of the Crown, which was assumed to exist, to exclude aliens by virtue of the prerogative; this was held to be the case by the Chief Justice and one other judge, but four judges could not see any ground for the view, and the case was decided by the Privy Council,[3] as too often in most important constitutional cases, on grounds which excluded any decision on this exact point. But whatever may be the case with regard to the prerogative of excluding aliens,—and the doubtfulness of the existence of the prerogative combined with the doubtfulness of its delegation seems to render appeal to it infinitely dangerous—there still remains the general question whether a Governor can commit an act of State, or whether his act must be ratified by the Crown. It seems most probable that even a Governor cannot commit such an act, but the matter cannot yet be said to be free from doubt. Only, if he did so, it is certain that the act could be ratified *ex post facto*,[4] and if the Colonial Government desired so to act it would obviously be wise that the action should be that of the Governor.

It has been held by the Chief Justice of South Australia that the Governor has not without express words the right of declaring a ferry[5]; whether this is sound law or not, it would be difficult to conjecture. The matter is fortunately hardly one of any consequence; the grant of ferries by the prerogative is obsolete.

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

[4] *Buron* v. *Denman*, 2 Ex. 167. See below, pp. 134, 169.

[5] *Dewar* v. *Smith*, 1900, S. A. L. R. 38, at p. 41. Cf. *in re international and interprovincial ferries*, 36 S. C. R. 206.

§ 4. The Appointment of King's Counsel

If the view is accepted that the Governor has the whole executive power and nothing more or less, so far as it is needed for colonial government, then it becomes easier to understand the decision of the great case of the appointment of Queen's Counsel which agitated legal circles in Canada for years.[1] On January 4, 1872, the Governor-General of Canada inquired from the Imperial Government whether since confederation the Governor-General was alone entitled to appoint Queen's Counsel in Canada, or whether the power was also possessed by the Lieutenant-Governors, and whether a provincial legislature was in a position to pass an Act empowering the Lieutenant-Governor to appoint Queen's Counsel, and how the question of precedence should be settled. Lord Kimberley, after consulting the law officers, replied on February 1, that the Governor-General had the power to appoint Queen's Counsel, and that the Lieutenant-Governor had no such right, but that the Lieutenant-Governor could be given the power by statute, and might determine thus the right of precedence in provincial Courts between the counsel with appointments from the Governor-General and those with merely provincial appointments. But despite this correspondence, which he seems not to have known, the Lieutenant-Governor of Ontario on the advice of his ministers decided to appoint certain counsel, and the appointments were notified in the official gazette of the province. The Dominion Government then decided to point out that there was great doubt regarding the soundness of the appointment of these gentlemen, and agreed to issue new commissions by the Governor-General, appointing them Queen's Counsel for Ontario. Naturally Ontario objected to this procedure, and said that they would legislate, while the Dominion Government recommended that a friendly

[1] Elsewhere there was also doubt, as in Victoria, and the local appointment of Queen's Counsel in New Zealand dates only from 1903. But it is now universally practised. It began in Victoria in 1863; see Morris, *Memoir of George Higinbotham*, pp. 81, 82.

arrangement should be made between the province and the federation under which the counsel appointed under the prerogative by the Governor-General, and under statute by the provincial Lieutenant-Governors, should be mutually recognized.[1] This plan was agreed to, and an Act of Ontario was passed in 1872 authorizing the appointment of Queen's Counsel, and another Act authorizing the grant of precedence by the Lieutenant-Governor.[2] Then Quebec legislated at the end of 1872,[3] and Nova Scotia in 1874,[4] while the Governor-General in December 1872 created several Ontario Queen's Counsel, and in April 1873 created others for Quebec, New Brunswick, and British Columbia. Some gentlemen received double patents under the provincial Acts and under the Dominion prerogative grant. The matter came before the Supreme Court of Canada in the case of *Ritchie* v. *Lenoir*. The Nova Scotia Act of 1874, c. 20, had authorized the appointment of Queen's Counsel, and c. 21 had authorized the Lieutenant-Governor to grant precedence, and by an order under this Act, Mr. Ritchie, who held a patent of 1872 from the Governor-General, lost his precedence. He argued that the two Acts were invalid, and that in any case the Act of 1874 could not be made retrospective to override the patent of 1872. On the first point the Supreme Court of the Province [5] was against him, but they upheld his contention on the second. From this judgement Lenoir appealed, but the Supreme Court of Canada [6] held that the Act was *ultra vires*, and that, as the Crown did not form part of the Legislature or Executive of the province, the Governor-General alone could exercise this prerogative right. The Court treated the whole matter as the conferring of a right of dignity, a power which could only be conferred by the Sovereign under the sign-manual, or be exercised

[1] Canada *Sess. Pap.*, 1873, No. 50. The view of the Imperial Government as to the grant of marriage licences was precisely similar; see *Provincial Legislation*, 1867–95, pp. 655, 658.

[2] 36 Vict. cc. 3 and 4.

[3] 36 Vict. c. 13.

[4] 37 Vict. cc. 20 and 21.

[5] 2 R. & C. 450. Cf. Canada *Sess. Pap.*, 1877, No. 86, pp. 25–43.

[6] *Lenoir* v. *Ritchie*, 3 S. C. R. 575. Cf. Lefroy, *Legislative Power in Canada*, pp. 87–9.

by her direct representative, the Governor-General. 'This admirable judgement,' wrote Todd[1] in 1880, 'entirely accords with the constitutional doctrine propounded at the beginning of this section, which reserves to the Sovereign, or to her direct and immediate representative, the administration of the prerogative of honour.'

It does not seem to have occurred to the Court or to Mr. Todd to find the ground for the exercise of the right of conferring an honour which justified the Governor-General in doing so. It seems to have been assumed that he had the right, and the decision of the case remained for years prevalent in Canada. But the whole doctrine received a rude shock from the decision of the Privy Council in the case of *The Liquidators of the Maritime Bank of Canada* v. *The Receiver-General of New Brunswick*,[2] which abolished effectively the theory that the Lieutenant-Governor was not a representative of the Crown or the Legislature able to affect royal prerogatives. This was followed in due course by the reversal of the principle of the decision in the case of *Lenoir* v. *Ritchie* by the Privy Council.[3] They held that c. 173 of the *Revised Statutes* of Ontario, which authorized the Lieutenant-Governor to confer precedence and appoint Queen's Counsel in the province was *intra vires* in view of the powers of the Provincial Legislature under s. 92 of the *British North America Act*, to alter the constitution of the province, to provide as to provincial officers, and to arrange judicial matters. The essence of the decision was that the act was that of appointing officers, and that accordingly the power of the Federal Government was that of appointing federal officers, that of the Provincial Governments of appointing non-federal officers. Both powers could therefore seem to be within the powers of the executive head of the Government: neither has more power than the other, but the one is for federal purposes and the other for

[1] *Parliamentary Government in the British Colonies*, p. 246 (ed. 2, p. 337).

[2] [1892] A. C. 437. See also Ontario *Sess. Pap.*, 1888, No. 37.

[3] *Attorney-General for Dominion of Canada* v. *Attorney-General for Province of Ontario*, [1898] A. C. 247.

provincial purposes. It would probably be a mistake to suppose that the passing of any Act was necessary to enable the Lieutenant-Governors to appoint Queen's Counsel: it is clear that the Lieutenant-Governors must have themselves all the powers of the Provincial Executives: they are not, as the decisions of the Privy Council have shown, mere creatures of the Dominion Government: they continue, as indeed is declared expressly in the Dominion Constitution, the Executive Government of the old provinces before confederation minus the powers surrendered by federation: but the Crown is as much part of the Provincial Government as it is of the Federal; and conversely, while the power of the Governor-General to create officers for Canada is undoubted, on the other hand it is equally clear that such officers must be federal officers, not merely provincial.[1]

§ 5. The Alteration of Seals

A case which was mixed up with the case of the right to create Queen's Counsel shows that the Governor would have no right, save through the delegation in the letters patent, to keep and use the Great Seal of the Colony. The great seals themselves are directed by the Crown[2] and approved by the King personally, being engraved as a rule in this country. When the Dominion of Canada was formed the old seals of the provinces which federated were deemed to be no longer appropriate, and accordingly, not only was a design for a new seal approved and appointed to be used in the Dominion by a royal warrant, which was sent out to Canada by the Duke of Buckingham and Chandos on October 14, 1868, but next year the Secretary of State sent out, in a dispatch of May 8, five seals for the use of the federation and the four provinces, with a warrant under the sign-manual requiring their use,

[1] All the provinces regulate King's Counsel and precedence; see the several *Revised Statutes* and British Columbia Act, 1900, c. 31; Prince Edward Island Act, 1898, c. 11; Saskatchewan Act, 1907, c. 20; Alberta Act, 1907, c. 21.

[2] The Governor even now is not appointed to alter the seals; all the seals for the new reigns of King Edward VII and George V were approved by the Crown, of course in accordance with the wishes of the Dominions.

and directing that the old seals should be returned to be defaced as usual by the Crown in Council.[1] In reply to this dispatch the Governor-General, on July 2, sent to the Secretary of State a memorandum from the Canadian Minister of Justice, who argued that in the case of the provinces the proper authority to change the seal was, under s. 136 of the *British North America Act*, the Lieutenant-Governor in Council: he pointed out that the Lieutenant-Governors were no longer appointed by the Crown, but by the Governor-General, and suggested that the direct action of the Crown was not strictly correct. In replying on August 23, the Secretary of State insisted that the right of the Crown to direct what seals were to be used in the provinces was as clear as its right in connexion with the seal of the Dominion, which had not been challenged, and he added that s. 136 merely applied to the cases of Ontario and Quebec. That section provided that until altered by the Lieutenant-Governor in Council the great seals of Ontario and Quebec were to remain the same as those used formerly in the Provinces of Upper and Lower Canada respectively. The Secretary of State suggested that this clause merely showed the method in which the change was to take place, and did not limit the royal prerogative to appoint and direct the seals which were to be used in those provinces, while in the other provinces the right was clear. If, however, the clause was to be read as giving the sole right to the Lieutenant-Governors of the provinces to alter the great seals, the same power should be conferred by legislation on the Lieutenant-Governors of the other two provinces then forming the union. This authority could be given either by provincial or by federal Act. In compliance with this dispatch the Dominion Government sent, on November 16, 1869, the great seals to Nova Scotia and New Brunswick, with instructions to adopt the new seals for use in the provinces. In the case of Ontario and Quebec the new seals were sent with the correspondence, so that the provinces could have the option of adopting the new seals under the statutory power

[1] See Canada *Sess. Pap.*, 1877, No. 86.

of the Lieutenant-Governor if they so desired. Nova Scotia, however, on receiving the seal, seemed not to admire its appearance, for they pressed to be allowed to retain the old one, and while readily admitting the right of the Crown to issue the warrant appointing the new seal, they requested the Federal Government to forward to the Imperial Government a memorial asking to be allowed to keep the old seal, and to pass Acts authorizing the use of the old seal and empowering the Lieutenant-Governor in Council to alter the seal from time to time. The Federal Government did not apparently take any action on this protest or appeal, but let the matter drop, a practice not unusual in the Dominion.

The result was further trouble; the Supreme Court of Nova Scotia in the case of *Ritchie* v. *Lenoir*,[1] among other things, delivered itself of the dictum that the patents of the Queen's Counsel appointed by the Lieutenant-Governor of Nova Scotia under the Acts of 1874, cc. 20 and 21, giving him power to appoint Queen's Counsel and regulate their precedence, were invalid because they were sealed with the old seal, and that the new seal after its delivery to the Lieutenant-Governor in accordance with the royal warrant of May 7, 1869, became the only lawful seal in the province. The Provincial Government therefore asked the Federal Government to forward to the Queen an address praying for an Imperial Act to solve the difficulty. But before this request could be acted upon, the Secretary of State sent to the Government of the Dominion a dispatch of March 29, 1877, which stated that in the opinion of the law officers of the Crown the directions contained in the royal warrant of May 7, 1869, were directory and not imperative, and that though the disobedience of the order was improper, it did not invalidate Acts done with the old seal unless and until the new seal was formally adopted and the old seal sent for cancellation. But they thought that the best way would be for the Dominion Parliament to pass legislation disposing of the matter. By an Act, 40 Vict. c. 3, the Dominion Parliament proceeded to act on this dispatch, and authorized the

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

Lieutenant-Governors of each province in Council to alter the great seal from time to time, and also authorized *ex post facto* the use of the great seal of Nova Scotia as existing at the union, until so altered by the Lieutenant-Governor. On the other hand, the Legislature of Nova Scotia, by two Acts of the same year, 40 Vict. cc. 1 and 2, empowered the Lieutenant-Governor to use the great seal and validated all Acts under the old seal from 1869 to the date of change when it took place. The Dominion Government let the statutes remain in force, though they considered that they should not have been passed before the passing of the Dominion legislation, a strained view, as the right of the Dominion Parliament to legislate was by no means clear.[1]

It is certain that the case was confused by all parties. In the doctrine which is clearly correct the Lieutenant-Governors are representatives of the Crown for provincial purposes, and the Crown is part of the Provincial Legislatures. The Governor-General is a representative for federal purposes and the Parliament for federal purposes. The Governor-General had no delegation of the prerogative as regards seals without special words, nor had the Lieutenant-Governor, and the grant of a seal to the Governor-General by the Crown was clearly legal: on the other hand, the grant of seals by the Crown by royal warrant to the provinces generally was equally correct. But the attempt to treat Ontario and Quebec in this way was illegal, and no doubt originated in a slip. It was found necessary to make special provision in this as in other matters for the case of Ontario and Quebec, because they were being separated again after union and could not well use the seal of the union, and so provision was made for the use of the old seals of Upper and Lower Canada until otherwise appointed by the Lieutenant-Governors in Council. That clearly took away the prerogative to appoint other

[1] The Constitution Acts of Manitoba (33 Vict. c. 3), Alberta (4 & 5 Edw. VII. c. 3), and Saskatchewan (4 & 5 Edw. VII. c. 42) empower the Lieutenant-Governors to alter the seals, but that power is given under a different power altogether, that of creating provinces. The matter is now regulated by provincial legislation in the other provinces.

seals: it is true that there are no express words fettering the prerogative, but the enactment is very clear; it deals with a matter normally regulated by prerogative and deliberately ignores the prerogative, and gives a new and unexpected power to the Lieutenant-Governors of the provinces. It was therefore a mistake to address the same warrant to these provinces as to Nova Scotia and New Brunswick. It would have been better to suggest to these provinces the adoption of the new seals, and this was indeed ultimately done. Again, the decision of the Dominion Parliament to legislate seems to have been clearly wrong: it was no doubt influenced by a doctrine then prevalent in Canada, and asserted by the Supreme Court in the case of *Lenoir* v. *Ritchie*,[1] that the Provincial Parliaments could not touch the royal prerogatives at all, as the Crown had no part in the legislation of these provinces. But in point of fact the Dominion Parliament had no right to legislate on the topic at all, and the only power which could legislate was the Legislature of Nova Scotia or, of course, the Imperial Parliament.

The existing letters patent for the Dominions and the states expressly authorize the Governor to keep the great seal and use it for sealing whatever he may have to seal under the Colonial law or practice with it. He is not authorized to change the seal, and this is done by the Crown. In the case of the Commonwealth and the Union the Governor-General was authorized to use his private seal until such time as a Commonwealth or Union seal was provided. In the case of the states the Governors were authorized to use the old Colonial seals until there were new state seals provided. A new seal was provided, of course, for the Union of South Africa, but the Dominion of New Zealand did not have a new seal on the occasion of the elevation of the Colony to the rank of a Dominion. New seals are also issued on each demise of the Crown.[2]

It may be argued from this case that the fact that a subject is specially mentioned in the letters patent shows that it is

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

[2] See for the form, New Zealand *Parl. Pap.*, 1904, A. 2, pp. 8, 9.

one which would not be included in the usual grant of power to a Colonial Governor, except for express words. But this argument would be erroneous, because the letters patent are not historically such instruments as can be relied upon for giving indications of deliberate views of law on such a point. They are, historically, revised versions of documents which were used in days of Crown Colony administration, and the idea in setting forth the rights of the Governor was mainly to secure that he did not exercise more of the executive power than he was wanted to do, and therefore the present form of these instruments does not shed light on a distinction between executive authority and the delegation of special prerogatives. For example, all the letters patent confer on the Governor the power of appointing and dismissing officers. These clauses are certainly not necessary to confer the right even in cases where, like Tasmania or the Cape, no special provision is made in the matter in the Constitution Acts. In the Crown Colony letters patent they are inserted to limit and define, by the further conditions there added, the power of dismissal, and in the early days of responsible government, indeed sometimes right down to the days of the issue of permanent letters patent after 1875, the power of dismissal was hampered by directions as to the procedure to be adopted so as to secure that each case was fully investigated, just as it still is under the Crown Colony régime. Nowadays when they are merely formal they are otiose, and in this regard the letters patent are hardly needed.

§ 6. The Prerogative of Mercy

A different problem is presented by the letters patent conferring the power to pardon. Is the power to pardon a prerogative which is carried by a grant of executive authority generally? There is unhappily no real case on the subject which is quite in point. The matter is one of those which have been considered at great length in Canada in connexion with the power of the Lieutenant-Governors to pardon offences against the laws of the provinces. The power of pardon in Canada generally was beyond question conferred on the

Governor-General by the letters patent or instructions down to 1905. But did that power carry with it the sole right in Canada to pardon offences, including offences against the laws of the provinces? It was the intention of the Imperial Government to effect this end, for they declined to accept No. 44 of the Quebec resolutions, which gave the power to the Lieutenant-Governors, and, on the analogy of the cases of the appointment of Queen's Counsel, the reply in Canada was for a time that pardons could be conferred only by one who had a delegation of the royal prerogative, and that in Canada the only person who had such a delegation was the Governor-General.[1] This view was supported by the terms of the instructions down to 1905. Further, as the Crown was not, in the view of the Canadian authorities or Courts, a part of the Provincial Legislatures, the Dominion Parliament alone could confer the prerogative of pardoning if any legislature were to do so. This view was naturally no longer tenable after the decisions of the Privy Council in the case of *The Maritime Bank of Canada* v. *The Receiver-General of New Brunswick*,[2] and it was accordingly held, not only by the Courts of Ontario[3] but also by the Supreme Court of Canada, that the Provincial Act of Ontario which authorized the Lieutenant-Governor to pardon offences against the laws of the provinces was perfectly valid and a good exercise of power.[4] But it is clear that the Courts held that the power must be granted by some authority, either by the prerogative or by legislation. With this decision, as with the decision in the case of the appointment of Queen's Counsel, is bound up the fact that the Dominion Parliament could not legislate on the topic,

[1] Cf. Canada *Sess. Pap.*, 1869, No. 16; 1875, No. 11. [2] [1892] A. C. 437.

[3] 22 O. R. 222; 19 O. A. R. 31. See Blake, *The Executive Power Case*, Toronto, 1892, Ontario *Sess. Pap.*, 1888, No. 37, where the power is claimed as inherent in the Lieutenant-Governor and Lefroy, *Legislative Power in Canada*, pp. 130–4.

[4] 23 S. C. R. 458, where in view of the exact wording the validity of the Act is upheld, but it is not admitted that the power to pardon would else exist. The Provincial Acts (e.g. Ontario, 1910, c. 3) all enact it, but also enact that the power so conferred is not to be deemed necessarily not otherwise to appertain.

as it is one clearly concerning the constitution of the province, and such legislation is reserved for the exclusive control of the Provincial Legislatures by the *British North America Act*, 1867. Yet it must remain doubtful whether the power of pardon might not be assumed to exist in the case of its accidental omission: it is a regular part of the British Constitution as exercisable by the executive power: if not absolutely indispensable, it is yet almost inseparably connected with the legislative power, and it seems that it might be held by the Courts to exist independently of statute, or of express delegation. The case is not, however, likely to come before the Courts, for the power is regularly delegated by letters patent in the Colonies: in the case of the Commonwealth the power expressly applies, as in the case of Canada since 1905, to offences against the laws of the Commonwealth, leaving to the state Governors the power of pardoning offences against the laws of the states, or offences for which trial may take place in the states (excluding no doubt offences against Commonwealth laws as such, though this is not clearly expressed). In Canada the provinces have all by local legislation given the Lieutenant-Governors power of pardon, and in the dependency of Papua the Lieutenant-Governor is given the power by a Commonwealth Act of 1905, so that a legal decision of the question is most improbable. It is of interest to note that it was held by the law officers of the Crown [1] that the Superintendent of British Honduras had no delegation of the prerogative of mercy, and that, for what it is worth, tells against the view that the power to pardon can be claimed without express warrant of delegation or law.

§ 7. Other Prerogatives

There are other prerogatives which quite clearly cannot be claimed for a Governor. He does not possess the right to proclaim war or peace,[2] though, of course, he could take steps

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

[2] He used to be ordered on no account to declare war; see Canada *Sess. Pap.*, 1906, No. 18, p. 83. But there are cases of the issue of letters of marque; Hannay, *New Brunswick*, i. 322; contra Haliburton, *Nova Scotia*, ii. 311.

whenever necessary to repel an invasion of the territory of the colony of which he was Governor. Nor, again, does he possess the power of making treaties without special authority, which has been sometimes accorded, especially in the case of the Governors of the Cape and the Transvaal. Nor, of course, has he ever had the prerogative of creating legislative bodies, or any prerogatives which are obviously annexed to the Crown, and could not be applicable to a Colonial Governor in any conceivable circumstances. Without special delegation he could not, it seems, create Courts, but this power has often been given by the Crown. But what he has is great enough for all purposes: he has all the vast executive authority which must be possessed by any person who has to administer a Colony or a Dominion. In many matters the Governor or Governor in Council is legally empowered by statute to do all sorts of executive actions which are deemed too considerable to allow of their being properly disposed of merely by being delegated to a minister or department. The practice of delegating to the Governor or Governor in Council respectively rests on no principle, and varies from Colony to Colony, from Act to Act, but the difference in wording is unimportant.

In some cases indeed it has been argued that the term Governor denotes personal responsibility. This was held by Sir W. Manning on January 20, 1869,[1] as regards *The Volunteer Force Act*, 1867, of New South Wales. He laid it down that the Governor was given a position as Commander-in-Chief, that as such he was bound to accept responsibility, and that ministerial advice was neither desirable nor constitutional. The only result was, of course, that the Governor became involved in attacks on his action in connexion with a dismissal under the Act, and Sir H. Robinson warmly deprecated thus being exposed to a personal responsibility for such acts.[2] The untenable nature of the distinction of Governor in Council and Governor has been shown by Mr. Justice Clark [3]

[1] Clark, *Australian Constitutional Law*, pp. 262 seq.

[2] *Parl. Pap.*, C. 1202, pp. 53, 54.

[3] Op. cit., pp. 252–91; cf. Quick and Garran, *Constitution of Commonwealth*, p. 701.

from Australian Acts. The rule of ministerial responsibility is made absolute in the Tasmanian *Interpretation Act*, 1906, and the Union *Interpretation Act*, 1910, following the Cape by declaring that Governor means Governor in Council.

Doubt may arise in such cases as the exercise of such prerogatives as that of ordering the seizure of enemy vessels in ports on the outbreak of war or otherwise, the grant of days of grace, and the exercise with regard to neutral vessels of the *droit de prince*. Moreover, the question was discussed at great length in the case of *Chun Teeong Toy*,[1] whether or not a Governor by virtue of his commission could perform an act of State. The Chief Justice of the Supreme Court of Victoria held that he could not do so in virtue of his commission,[2] and Kerferd J.[3] agreed with him in this view, though they held that in this case he could exercise the prerogative[4] of excluding an alien, but the majority[5] of the Court decided against that contention; and though the decision of the majority was reversed on appeal to the Privy Council,[6] nevertheless it was reversed on other grounds, and the Privy Council expressed no opinion on this particular issue. It is important to note that in this case the Chief Justice indicated as matters which did not fall within the prerogatives necessary for Colonial Government, prerogatives relating to war and peace and the conduct of foreign affairs, which would cover such cases as the *droit de prince*. Such prerogatives are regarded by Sir J. Quick and Mr. Garran[7] as being without the sphere which is attributed even to the

[1] 14 V. L. R. 349.

[2] 14 V. L. R. 349, at pp. 376, 377.

[3] 14 V. L. R. 349, at pp. 406, 407.

[4] Which probably has long since ceased to exist (even in extradition cases it is obsolete; see *Brown* v. *Lizars*, 2 C. L. R. 837; *Hazelton* v. *Potter*, 5 C. L. R. 445).

[5] Williams J., at pp. 413, 414; Holroyd J., at pp. 430, 431; a'Beckett J., at p. 435; Wrendforsley J., at pp. 442, 443.

[6] [1891] A. C. 272, on the ground that there was no statutory obligation to accept payment for the Chinese and then to admit him, and generally that an alien has no right enforceable by action to enter British territory.

[7] *Constitution of Commonwealth*, p. 391, following Higinbotham C. J., in 14 V. L. R. 349, at p. 380.

Governor-General of Australia, by the vesting in him under the Constitution, ss. 2 and 61, of the Executive Government of the Commonwealth, and the same view appears to have been held by Mr. Justice Clark.[1] It would be a mistake to suppose that there is any difference in the delegation of the executive powers in the cases of the Governors-General of the Federations and the Union and the delegation of the Governors of Colonies and States. The former delegation takes place by statute, but it is no more full and effectual than in the latter case, save in so far as the powers necessary for the Executive Government of a federation with larger legislative powers than those of a simple Colony may exceed the powers of the Governors of simple Colonies.

It should, however, be noted that an act of State can be ratified *ex post facto*, and possibly thus a Governor could be enabled to perform one,[2] though this case has not yet, it seems, occurred.

§ 8. The Liability of a Governor to Suit

The legal cases which decide that the Governor has none of the privileges of a Viceroy have been quoted above for the most part in the judgement of the Privy Council in the case of *Musgrave* v. *Pulido*. A Governor may be sued in the Courts of the Colony over which he is Governor for private debts, whether contracted in the Colony or outside.[3] He may be sued also for acts done in his official position as Governor.[4] In both cases also he may be sued in England subject to the ordinary principles of private international law.[5] The case is neatly exem-

Australian Constitutional Law, p. 66.

[2] See the judgements on the Victoria case, 14 V. L. R. 349, though those of a'Beckett and Holroyd JJ. are doubtful even of that. See pp. 120, 169.

[3] *Hill* v. *Bigge*, 3 Moo. P. C. 465. This overrides *Harvey* v. *Lord Aylmer*, 1 Stuart, 542, decided on the strength of the dictum in *Fabrigas* v. *Mostyn*, that a Governor could not be sued in his own Colony; see Wheeler, *Confederation Law*, p. 10.

[4] *Musgrave* v. *Pulido*, 5 App. Cas. 102.

[5] *Fabrigas* v. *Mostyn*, 20 St. Tr. 81; *Glynn* v. *Houston*, 2 M. & G. 337; *Wall* v. *Macnamara*, cited in 1 T. R. 536. Cf. Forsyth, *Cases and Opinions on Constitutional Law*, p. 84.

plified by the case of *Phillips* v. *Eyre*,[1] which arose out of Governor Eyre's action in putting down with needless violence the revolt of the negroes of Jamaica. The Governor pleaded in his defence the passing of an Act of Indemnity in the Colony to which he himself had assented, and the Court upheld the contention, though efforts were made to establish that he was not entitled to rely upon an Act which he himself had secured the passing of.

In the case of a self-governing Colony the responsibility of the Governor for his official actions may no doubt seem anomalous. In the case of the Crown in the United Kingdom the position is simple, because it is clear that the legal maxim that the King can do no wrong results in the transference of responsibility to his real advisers. The responsibility of the Governor might, it may be argued, be thrown upon his advisers. But the rule of law grew up at a time when the Governor of a Colony was, to all intents and purposes, the Executive, and when he was responsible, as he still is in a Crown Colony, for the administration. In 1869 therefore the Government of New Zealand desired the repeal of those Acts so far as they concerned a self-governing Colony.[2]

This was then not accepted, and even now it would hardly be possible to insist on ministerial responsibility unless the doctrine of complete ministerial responsibility for all actions were established as in England, and that is not yet true, and probably never can be true of a Colony so long as it remains such.

There are certain difficulties about the doctrine which show themselves occasionally in practice. When, for example, the Governor of South Australia was served with a mandamus in a matter arising out of a Commonwealth election, to which reference will be made below, he was not supplied with counsel or legal advice by the Commonwealth, and had to rely on the kindness of his ministers, who hardly had any direct interest in the proceeding and who might have refused to pay, thus involving the Governor in a serious difficulty, for the Imperial Government would certainly have

[1] 4 Q. B. 225; 6 Q. B. 1.

[2] See *Parl. Pap.*, H. C. 307, 1869, p. 400; C. 83, pp. 33, 191.

been loath to pay. But it is in respect of the criminal liability of a Governor that the position is most anomalous. Under the Imperial Act 11 & 12 Will. III. c. 12, it is provided that if any Governor oppresses any of His Majesty's subjects beyond the seas, or is guilty of any other crime or offence contrary to English law or to the local law, he can be tried by the Court of King's Bench in England or before Commissioners in any county assigned by the commission. This law was extended by 42 Geo. III. c. 85 to all persons employed civilly or in a military capacity abroad, guilty of any offence in their employment. The only place of trial there allowed is the King's Bench in England, and the Act has been held not to apply to felonies,[1] as the procedure therein laid down, by information, is that appropriate only to misdemeanours, a decision which certainly deprived the Act of most of its value. These statutes were both discussed in the famous case of *The Queen* v. *Eyre*,[2] when it was sought to bring Governor Eyre to justice in England for his exploits in Jamaica. The Queen's Bench were asked to issue a mandamus to a metropolitan magistrate to hear the evidence which was alleged against Eyre, with a view to his being committed to stand his trial. The Court decided that the case was one in which an indictment could legally be offered in England, and that the magisterial proceedings directed by the Act, 11 & 12 Vict. c. 42, were appropriate, but Eyre escaped conviction, the Grand Jury, despite an eloquent charge by Cockburn C. J., ignoring the indictment presented against him, a decision due rather to party feeling than cool judgement.[3] Proceedings under the second Act were also taken in the case of General Picton, who was charged with allowing the torture of Luisa Calderon in the island of Trinidad, but the case was adjourned, and General Picton's death at Waterloo prevented the giving of a decision which would have been against him, but would, it is said, have ended only in a small sentence.[4]

More important, perhaps, than these musty relics of

[1] *Rex* v. *Shawe*, 5 M. & S. 403.
[2] 3 Q. B. 487.
[3] On his conduct, cf. Forsyth, op. cit., pp. 551 seq.
[4] 30 St. Tr. 225.

antiquity is the fact that the *Offences against the Person Act*, 1861, provides for the trial of any person, being a British subject, who has been guilty anywhere of manslaughter or murder, in England if he is found there. This Act has not yet been put successfully in operation against a Colonial Governor, but under its predecessor, the Act 33 Henry VIII. c. 23, Governor Wall was proceeded against in 1802 for having caused the murder of a soldier by excessive flogging in the island of Goree; being convicted he was sentenced to death and the sentence was actually executed, despite the fact that nineteen years had expired since the action, and despite the fact that, though the Governor was certainly guilty of conduct very inhumane, he had evidently had no intention of causing death.[1] Now no Act of Indemnity passed by a Colonial Legislature would appear to avail to save a man from the consequences of putting a man to death or committing manslaughter outside England: if the act was murder, it remains murder despite the Act of Indemnity. The actual difficulty may be seen if a Governor authorizes the proclamation of martial law and the execution under that law of some persons takes place and its legality is questioned. In the Colony he will be held free from blame by the Indemnity Act not merely civilly but criminally; but though the Indemnity Act has avail civilly under the principles of private international law,[2] it will have no effect criminally: this is clear,[3] though at first sight absurd, but the provision of the Imperial Act was intended to cover the cases of duelling abroad, which formerly prevailed. Duelling is in many countries, perhaps even in India, not murder, even if it is illegal, and therefore the Courts have not adopted the doctrine that one country can prevent deeds done in it being unlawful in another. Of course, in point of fact the difficulty could be got over: the Attorney-General could offer a *nolle prosequi*, or, if he felt unable to do so, the criminal could

[1] 28 St. Tr. 51. Cf. Campbell, *Lives of the Chief Justices*, iii. 149; Kenny, *Criminal Law*, pp. 127, 410.

[2] *Phillips* v. *Eyre*, 4 Q. B. 225; 6 Q. B. 1; Dicey, *Conflict of Laws*,[2] p. 652 seq.

[3] Cf. opinion of James and Stephen in Forsyth, op. cit., p. 563.

receive a pardon after conviction, but it is a striking case of the difficulty which a Governor may incur if he acts on the advice of ministers in a manner which is criminal. In a recent case in Natal in 1906 the magistrate declined to issue process against the Governor of Natal.[1]

§ 9. The Governor's Liability to Mandamus

The question of the liability of the Governor of a state to the issue of a mandamus was decided in the case of *The King* v. *The Governor of the State of South Australia*,[2] which came in 1907 before the High Court of the Commonwealth.

The question arose out of a disputed return for an election of senators for the State of South Australia, at the end of 1906. Of the three candidates who were returned at the election, the election of one was declared by the High Court, as a Court of Disputed Returns, to be void, and accordingly on July 2, 1907, the Governor forwarded a message to the Legislative Council and the Legislative Assembly of the state, informing them of the vacancy in the representation of the state in the Senate, and saying that he was advised that the vacancy should be filled by the Houses of Parliament sitting together, as laid down by s. 15 of the Commonwealth Constitution for the case when the place of a senator had become vacant before the expiration of his time of office.

It was contended by supporters of the unseated senator, Mr. Vardon, that a fresh election should be held, and that the appointment should not be made by the Houses of Parliament; but despite the protest, the Houses of Parliament at a joint sitting on the 11th of July elected Mr. J. V. O'Loghlin to fill the vacancy. An order *nisi* for a mandamus to the Governor was then granted by the High Court on the ground that a new election ought to have been held,

[1] Cf. *Parl. Pap.*, Cd. 4403, p. 129.

[2] 4 C. L. R. 1497. Curiously enough, the Court of British Guiana in 1907 had the same issue before it in the shape of an attempt to mandamus a Governor to grant a certain concession in respect of rubber-bearing lands. It inclined to think a mandamus would lie, but held that the law gave the Governor an absolute discretion, and so did not decide the point.

and it was the duty of the Governor to cause a writ to be issued for a new election. It was contended before the High Court that it was impossible to issue a mandamus in this case, and the decision of the High Court was in favour of this contention. The Court pointed out that under the constitutions of the states it was provided that upon a dissolution of the House of Assembly the writs for a General Election were to be issued by the Governor, but it had never been suggested that if the Governor failed to issue the writs a mandamus would lie from a State Court to compel him to do so. There was always a remedy in such a case, but it was to be sought from the direct intervention of the Sovereign and not by recourse to a court of law.

The case of an election of the Senate was not quite analogous. It was conceivable that the Executive Government of a state for the time being might desire that no senator should be chosen to fill a particular vacancy. If they advised the Governor to abstain from taking any action to fill it, and refused to afford him the necessary administrative facilities, and he accordingly did nothing, it might be that he would have failed in his duty, but if so it was clear that the duty would be one which he owed to the State collectively. It was not easy to see how in such a case he could perform the duty without dismissing his ministers and finding others, and that power was manifestly one the exercise of which could not be reviewed by any authority but the Sovereign. The duty, therefore, was one of the duties which the constitutional head of a state owed to the state (and in the case of a Governor, but in a slightly different sense, to the Sovereign), and its performance must be enforced in the manner appropriate to the case of such duties. Instances of such duties, duties of imperfect obligation, were familiar to students of constitutional law.

Apart altogether from these considerations, they thought that a mandamus would not lie to a Governor of a state to compel him to do an act in his capacity of Governor. There was, of course, no British precedent for such a writ. Reference had been made to the cases in which it had been held that

an action would lie against a Colonial Governor for wrongful acts done by him. But it by no means followed that because a Governor was liable to an action for a wrongful act done by him to the prejudice of an individual, he was liable to be commanded by a mandamus to repair an omission to do a lawful act. It was settled law that a mandamus would not lie against an officer of the Crown to compel him to do an act which he ought to do as agent for the Crown, unless he also omitted a separate duty to the individual seeking the remedy. They did not think that a Governor of a state in the issue of a writ for the election of a senator was acting as agent for the Sovereign in this sense, since the duty imposed by the constitution was imposed by statute law and not by delegation from the Sovereign himself. But it was a duty cast upon him as head of the state, and the same reasons which prevented a court of law from ordering the Sovereign to perform a constitutional duty were applicable to cases where it was alleged that the constitutional head of a state had by his omission failed in the performance of a duty imposed upon him as such head of a state.

A further case of an attempt to obtain a mandamus against a Governor arose in the case of *Horwitz* v. *Connor*,[1] decided by the High Court in 1908. Horwitz had been sentenced to a term of imprisonment with hard labour, and he claimed that he was entitled to his release from jail by virtue of s. 540 of the Victoria *Crimes Act*, 1890, pursuant to which regulations had been made by the Governor in Council for the remission of sentences under which a prisoner, on earning a certain number of marks in proportion to the length of his sentence, might have a portion of the sentence remitted. He applied for a writ of Habeas Corpus to the Supreme Court of Victoria, but on the return of the writ the full Court held that he was not entitled to be released, and discharged the writ.

The Court decided that the power given to the Governor in Council by s. 540 of the *Crimes Act*, 1890, was a discretionary power to make regulations, and to mitigate or

[1] 6 C. L. R. 39.

remit the term of punishment in accordance with such regulations.

The Governor in Council had power to remit the term of imprisonment of the applicant; he had not done so, and the most that the High Court could be asked to do would be to issue a mandamus to the Governor in Council to consider the matter. But no mandamus lay to the Governor in Council,[1] and no court had jurisdiction to review the discretion of the Governor in Council in the exercise of the prerogative of mercy.

The rule is obviously reasonable and sensible, though a certain anomaly is possible. If a statute throws upon a minister a certain duty, a mandamus will lie to him, if he has a special duty towards members of the public as well as a duty to the Crown. But in a similar case, if the Governor or the Governor in Council were specified as the person to perform the duty there would be no redress by mandamus. The difficulties of endeavouring to enforce the action of a Government by mandamus are too obvious to need discussion: if a duty is imposed on the Governor or the Governor in Council, it must be assumed that the intention is to reserve the performance of the duty for the deliberate action of the Government as a political entity, and to remove the matter from the arbitration of the Courts. Where the line is to be drawn cannot, of course, be settled by anything save the will of the Parliament.

§ 10. Petitions of Right

Here may be mentioned another prerogative of the Crown which is not delegated to the Governor by the letters patent, and which cannot be exercised by him unless under statute. It is a rule of law that the Crown and its servants cannot be sued on official contracts. It is recognized that these

[1] So in Canada the same doctrine has been applied even to a Lieutenant-Governor by Taschereau J. in *Church* v. *Middlemiss*, 21 L. C. J., at p. 319, and by Papineau J. in *Molson* v. *Chapleau*, 6 L. N., at p. 224. See Lefroy, *Legislative Power in Canada*, pp. 95–7; and cf. *Hamburg America Packet Co.* v. *The King*, 33 S. C. R. 252; *in re Sooka Nand Verma*, 7 W. A. L. R. 225.

contracts are entered into not on the faith of the agent but on the public faith, and it has been decided in Haldimand's case[1] that the Governor is one of those servants against whom it is impossible to succeed in any action on a Government contract. Nor has the Governor the power of granting a fiat to a petition of right, as has the Sovereign in this country. It is to be presumed that it is considered that the prerogative is needless for the safe government of the country, and this is probably the case. But the result is very inconvenient, and has caused some feeling of friction between the Imperial and the Colonial Governments, especially that of Western Australia. For as the Governor cannot grant a fiat, if a petition of right is presented it must be sent home for submission to the Secretary of State, who takes the advice of the law officers of the Crown, and in accordance with their advice, which is given wholly as a matter of law in accordance with the invariable practice in this country to grant a fiat if a colourable case of contract or the withholding of property is disclosed, the petition is or is not submitted to the King with the advice to issue the fiat: if the fiat is issued the writ is endorsed 'Let Right be done in the Supreme Court of the Colony of ————', and the petition so endorsed is returned to the petitioner, who proceeds then with his action in the Courts.

It was naturally contended at the Colonial Conference of 1897 by the Premiers then present, that in such a case the advice of the local Government should govern the question of the grant or the refusal of a fiat.[2] It was suggested that, granting the appropriateness of the granting of a fiat being submitted to the Sovereign, yet it was a derogation from the principles of responsible government that a fiat should be granted on any advice other than that of the responsible

[1] *Macbeath* v. *Haldimand*, 1 T. R. 172. *Palmer* v. *Hutchinson*, 6 App. Cas. 619; *Dunn* v. *Macdonald*, [1897] 1 Q. B. 555. In cases of tort no fiat can be granted, as there is no liability of the Crown; a doctrine followed in Canada, see *R.* v. *Macfarlane*, 7 S. C. R. 216; *R.* v. *Mackay*, 8 S. C. R. 1.

[2] Cf. Harrison Moore, *Commonwealth of Australia*,[2] p. 165. There was a New South Wales case in 1863, a South Australia case in 1894, and a series in Western Australia from 1897 to 1909.

minister of the Crown in the Colony. The view was, however, rejected by the Secretary of State on the advice of the law officers of the Crown.

It is hard to see any useful purpose served by this relic of ancient times. It would be easy for the Colonies to bar the right by appropriate legislation, but that has never yet been done and so the practice remains in force, though cases are rare. It is somewhat strange that none of the Colonies should have taken so easy a step. All have some sort of provision in force for dealing with claims against the State, and all of them extend that provision a good deal beyond the limits within which the petition of right lies in the United Kingdom, but that leaves the prerogative untouched, and in the case of Western Australia some at least of the petitions have been due to the fact that the time-limit appointed by the Act has expired, while against the common-law right time does not run.

There is a difficult question[1] whether the prerogative runs in cases of those Colonies in which, like the Province of Quebec, the Cape, Natal, the Transvaal, and the Orange River Colony before union, and the Crown Colonies of Mauritius, Ceylon, St. Lucia, and Trinidad, the law of the land is not English law. It has often been held that the petition does not lie, and the opinion can quote in its favour the view that the right is one of common law, and therefore cannot exist except under the common law. But it should be noted that the right is no more or less than the right of the Sovereign to waive the right of refusing to be sued in his own court,

[1] See Code, *Petition of Right*, p. 36. Robertson, *Civil Proceedings by and against the Crown*, p. 340, is wrong in denying the right to fiat a petition against a Colonial Government; the thing has been often done as mentioned above, and is one sign of the unity of the Crown in the Empire; cf. *Williams* v. *Howarth*, [1905] A. C. 551, and below, Part VIII, chap. i. The Canadian Supreme Court seems to have held the view that in the Province of Canada no petition of right could have been brought because there was no means of getting a royal fiat; see 36 S. C. R., at p. 34. But it is difficult to see how it could have been refused if asked for at home, and the court did not take the point of the differing law of Upper and Lower Canada; indeed the case goes expressly on the similarity of practice between the two Canadas.

and it would be strange if any system of law denied the Sovereign that privilege. Moreover, the royal prerogative is certainly the same everywhere, except where it has been lessened by appropriate legislation—the immunity is not by legislation—and therefore the prerogative to waive immunity from suit seems to be one which would everywhere be in force. Moreover, there is no case reported where the view that the prerogative does not exist in these Colonies has been established. In point of fact, in the case of Ceylon and the Mauritius cases are brought by usage, which the Privy Council has approved in the case of Ceylon, against the Colonial Government direct without a fiat of any kind, while in the case of the Transvaal and the Orange River Colony Acts were passed very soon after the organization of civil government to confer a right of suit much larger than the common-law right, as is usual in the Colonies, which mostly accept within limits responsibility for torts in connexion with railway and other such undertakings. An Act was passed in the Cape (No. 37 of 1888), and also in Natal (No. 14 of 1894) as soon as there was any demand, and those Acts deal also with torts, so that no argument can be drawn from the passing of Acts to the denial of a common-law right before the Acts were passed. The Transvaal and the Orange River Colony legislation, and the other Acts are consolidated as Act No. 1 of 1910 of the Union. In the case of Canada and the Commonwealth similar Acts have been passed, and that of Canada applies to cases arising in Quebec also.[1]

It appears clear that the Acts which are passed refer only to the Crown in its capacity as the Crown in the Colony.[2] If the Crown is to be sued in its capacity as the Imperial Crown then a fiat would in every case be necessary, and

[1] Whether the prerogative would have applied to claims against these Governments without these Acts has not been determined in any case, but *prima facie* it would. There is also a Quebec Act regarding local petitions of right; cf. *Reg.* v. *Demers*, [1900] A. C. 103.

[2] But in theory the King could grant a fiat for a trial in a Colonial court of such a case; cf. Robertson, op. cit., p. 381. The Cape and Natal rules of court forbade suing an Imperial officer without the sanction of the court for any debt due on public account. Cf. 3 S. C. 55; 21 S. C. 393.

a fiat could no doubt be granted in every case. But a fiat could also certainly be granted, and the case heard in England. On the other hand, it does not seem that a fiat could be granted for the hearing in England of a case against the Crown in its Colonial capacity.[1]

This case illustrates the fact that the Crown possesses in the Colonies all its English prerogatives, save in so far as they are diminished by legislation expressly or tacitly necessarily excluding them, even if they cannot be exercised by the Governor. This has been laid down in express terms by the Privy Council in the case of *The Liquidators of the Maritime Bank of Canada* v. *The Receiver General of New Brunswick*.[2] Thus it has been held that in a Colony the right to a felon's goods attaches,[3] the priority in bankruptcy[4] and

[1] See *Holmes* v. *The Queen* (1861), 31 L. J. Ch. 58; *Palmer* v. *Hutchinson* (1881), 6 App. Cas. 619; *Frith* v. *The Queen* (1872), 7 Ex. 365. The first case is cited with approval by the High Court in *Strachan* v. *The Commonwealth*, 4 C. L. R. 455, at p. 463. Dinuzulu's case is hardly an exception, for the Imperial Government assumed that it was liable for the debt; *Parl. Pap.*, Cd. 4194, p. 115.

Similarly, the Crown is exempt from having its vessels seized for damage done or for liability for salvage (see *Young* v. *S.S. Scotia*, [1903] A. C. 501). If any action is brought which does not fall within the terms of a statute, it must fail (*Colonial Government* v. *Makuza*, 27 N. L. R. 493; *Methuen* v. *Colonial Government*, 17 N. L. R. 31; *Binda* v. *Attorney-General*, 5 S. C. 284, all cases of claims in tort). A fiat is granted under the Colonial Acts as a rule of course (as in Canada: see Mr. Aylesworth in House of Commons, May 15, 1909 and December 15, 1909, *Debates*, xcii. 6751; xciii. 1554–6), and the Government will give effect to the decision loyally. Cf. also *Rex* v. *Fisher*, [1903] A. C. 158, at p. 167, where it was held in a case of petition of right that it was no answer to a claim that no appropriation was included in an Act.

[2] [1892] A. C. 437.

[3] Cf. *in re Bateman's Trust*, 15 Eq. 355. This was of course prior to 1870, when by 33 & 34 Vict. c. 23 forfeiture for felony was abolished in England. It has also been abolished in the Colonies.

[4] *New South Wales Taxation Commissioners* v. *Palmer*, [1907] A. C. 179; *Attorney-General of New South Wales* v. *Curator of Intestate Estates*, [1907] A. C. 519. These overrule *in re Baynes*, 9 Queens. L. J. 33; *Clarkson* v. *Attorney-General of Canada*, 15 O. R. 632; 16 O. A. R. 202, and the opinion in 1900 S. A. L. R. 11. The Imperial Bankruptcy Act, 46 & 47 Vict. c. 52, bars the prerogative by its express terms.

company liquidation,[1] the exemption from liability for salvage by a ship by an action *in rem* or otherwise.[2] So all the lands are held ultimately from the Crown, and the Crown is entitled to all lands which are unoccupied and to escheats,[3] treasure trove, and intestate estates. But all these prerogatives may be affected by local legislation.[4] A prerogative to extradite criminals probably does not exist in either England or, therefore, in the Colonies.[5]

[1] *In re Oriental Bank Corporation, ex parte the Crown*, 28 Ch. D. 643.

[2] *Young* v. *S.S. Scotia*, [1903] A. C. 501.

[3] Cf. *The Falkland Islands Company* v. *The Queen*, 2 Moo. P. C. (N. S.) 266, and see Forsyth, *Cases and Opinions on Constitutional Law*, pp. 176 seq. The prerogative right to gold and silver mines applies generally, and that to escheats is also applicable (see *Attorney-General of Ontario* v. *Mercer*, 8 App. Cas. 767). That to sturgeons and whales and swans is not asserted in the Colonies so far as I know, though as to sturgeons it has been recognized recently in fact in England; cf. *Baldick* v. *Jackson*, 30 N. Z. L. R. 343, when the statute 17 Edw. II. c. 2 as to whales was held not to apply to New Zealand.

[4] *Exchange Bank of Canada* v. *Reg.*, 11 App. Cas. 157, followed in Mauritius by *Colonial Government* v. *Laborde*, 1902, Mauritius Decisions, 20. It rests on the Civil Code of Quebec, s. 1994, taken with Civil Procedure Code, s. 611. See also *Attorney-General* v. *Black* (1828), Stuart, 324; *Monk* v. *Ouimet* (1875), 19 L. C. J. 75; *Attorney-General* v. *Judah*, 7 L. N. 147; Lefroy, *Legislative Power in Canada*, p. 182.

[5] For the right are dicta in *Mure* v. *Kaye*, 4 Taunt. 35 and *East India Co.* v. *Campbell*, 1 Ves. 246, and it was argued that it existed in the Commonwealth case of *Brown* v. *Lizars*, 2 C. L. R. 837. The Court denied the right in accordance with Clarke, *Extradition*,[4] pp. 23, 24; *Encyclopaedia of the Laws of England*, v. 267, 268.

CHAPTER III

THE GOVERNOR AND MINISTERS

§ 1. The Governor and the Executive Council

In a Crown Colony the Governor in effect constitutes the Executive Government: he is indeed surrounded with a Council, and he is often required by law to do certain things in Council: moreover, he is expected by constitutional practice and by the royal instructions to deal with much business in Council, and as a matter of fact the business of the Colony is in large measure so disposed of, by discussion and consideration of questions raised in the several departments. But the Governor is entitled to overrule, and does readily overrule if he thinks it desirable, his Executive Council, and the responsibility for decision rests upon him, in so far as he is not able by reference home to throw it upon the Secretary of State.

The matter is far otherwise in a self-governing Dominion or State. There the Governor occupies a position nearly the reverse of that occupied by him in a Crown Colony. The ministers govern while the Governor looks on,[1] is the popular conception of responsible government, and the idea has been given additional force by utterances of so distinguished a man as the late Mr. Goldwin Smith. 'A Governor is now politically a cipher,' he wrote; 'he holds a petty court and bids champagne flow under his roof, receives civic addresses and makes flattering replies, but he has lost all power not only of initiation but of salutary control.' This was written no doubt under the influence of the dis-

[1] Cf. Lord Lansdowne in House of Lords, April 10, 1905; Col. Seely in House of Commons, June 29, 1910; Cape *Parl. Pap.*, 1878, A. 2, p. 14; *Parl. Pap.*, C. 911, pp. 18, 19, 26; C. 3382, p. 268; 7 W. A. L. R. 230; *Norton* v. *Fulton*, 39 S. C. R. 202; [1908] A. C. 451; Dilke, *Problems of Greater Britain*, i. 295, 296; Transvaal *Legislative Council Debates*, 1907, p. 135.

appointment felt by some people in Canada at the failure of Lord Dufferin to dismiss the Ministry of Sir John Macdonald when it became discredited by the Pacific Railway scandals in 1873, and at the grant of a dissolution in 1891 to him purely for party advantage; but it is neither a wise nor a just utterance. No doubt there is a tendency in the great work of Todd [1] to see too much of the other side of the case, to present the Governor as a benevolent genius presiding over the destinies of the country and exercising the same sort of influence that, on his theory, was exercised by the Sovereign in the Mother Country. But not only was that theory of the action of the Sovereign hardly in accordance with the facts, but the Governor can never hope to attain that dignity of position which gives a Sovereign a claim to the respectful attention of even the ministers who lead the Imperial House of Commons and control the destinies of the Empire. None the less, there are many important functions yet in the hands of the Governor, and he may exercise an influence over the Colony of which he is Governor much greater than is suspected by outsiders who do not realize the working of the Government. Of course this is essentially a matter of individual character. If a Governor prefers to allow political matters to go on with his formal concurrence, he may do so; in many cases the difference will not be obvious, and the loss may not be great. On the other hand, it must be remembered that a Governor is entitled to take the same close interest in political events as the Sovereign in this country, that he is entitled to the fullest confidence of his ministers, that he is entitled to be informed at once of any important decisions taken by his Cabinet, and that he has the right to discuss with the utmost freedom any such proposals. He can point out objections, he can give advice, he can deprecate measures, he can secure important alterations, but always at the price

[1] *Parliamentary Government in the Colonies*, ed. 1, 1880. He was conscious of the probable criticism (pp. ix, x), but he overestimated similarly the position of the Crown in England, and he did not accept the distinction now so clear between the Crown in the United Kingdom, which must always act on advice except in a very narrow sphere, and the Governor; cf. Lowell, *Government of England*, i. 37–50; Anson, *Law of the Constitution*[3], II, i, 37 seq.

of remaining behind the scenes. If he remains a full term of office he can gain more and more the confidence of Governments and increase his influence. Moreover, that influence will normally be for good, for he stands above lesser party feeling, and he is member of a community which has greater interests and produces greater men than can be expected from a Dominion in the present stage of development. Moreover, besides the field of politics he has all the fields of arts, science, literature, open to him, and of recent Governors it may suffice to name Sir William Macgregor as one who at once dealt with great success with a difficult position in Newfoundland and earned a reputation for learning of much depth and variety,[1] while Sir Thomas Carmichael distinguished himself no less by his tact and political skill than by continuing in Victoria his entomological studies. The influence of the Governor-Generals of Canada has been varied and lasting: in their own ways, men like Lord Dufferin, Lord Lansdowne, Lord Aberdeen, Lord Minto, and Lord Grey impressed themselves on the national life.[2] But these considerations are matters in which definite statement is impossible: they may be sufficient to show how very far from the true view Mr. Goldwin Smith's statement must be deemed to have been.

It must be noted that the Governor of a self-governing Dominion is, like his Crown Colony brother, legally by no means in the hands of his ministers. It is true that in the case of the Federations and of the Union he is advised in his duties by an Executive Council created by statute: the same remark applies to the Provinces of Ontario and Quebec, where the creation of such councils by statute was rendered necessary by the division of the Province of Canada into these provinces. On the other hand, the Executive Councils

[1] He was appointed Chancellor of the new University of Queensland in 1910, and has since been unceasing in work for its advancement.

[2] Lord Grey's tour to Hudson Bay is an indication of one side of a modern Governor's activity in the interests of his Government and the Dominion. Similarly Lord Dufferin greatly aided his Government in their dealings with British Columbia in connexion with the Pacific Railway by his tour to the West.

of Nova Scotia, New Brunswick, and Prince Edward Island, and of British Columbia, are continuations in statutory form of the old Executive Councils which existed under the royal letters patent before the creation of the Dominion. In the case of Manitoba, Alberta, and Saskatchewan again, the Executive Councils necessarily exist under the Dominion Acts constituting the provinces, and are confirmed by Provincial Acts, as the practice of issuing letters patent for creating such Councils has never been adopted by the Governor-General of Canada, and, indeed, it is obviously more convenient to do it by the Act of Constitution. But in the six States of the Commonwealth, in the Dominion of New Zealand, in the four Colonies of the Cape, Natal, the Transvaal, and the Orange River Colony before the Union, and in Newfoundland, the Executive Council owes its existence to the royal letters patent constituting the office of Governor. Now many acts are assigned by law to the Governor in Council and many to the Governor, who by his instructions is required to consult his Council in the execution of such acts just as much as in the execution of acts which he does not by law perform in Council, and some again are entrusted to his ministers. In none of these cases can it be said that the Governor must act under ministerial advice: apart altogether from the fact that in law he could in every single case swamp his Council with nominee members, and so carry his measure—which is a mere legal possibility, and is not, of course, ever done, though it remains a conceivable power in an emergency—he is never bound to accept the advice of his ministers. He cannot indeed do many things without their advice, for it is provided by law, either in the Constitution Acts or in the Interpretation Acts, or by authoritative usage, that a Governor in Council must act on the advice of the Council,[1] that is, of the majority of

[1] In the Tasmania *Interpretation Act*, 1906, s. 12, Governor is defined to mean the Governor acting with the advice of his Executive Council. This carries the matter to its furthest, and is not convenient, but see Cape Act No, 5 of 1883; Union of South Africa *Interpretation Act*, 1910. Cf. 30 Vict. c. 3, ss. 12 and 66; Constitution, s. 63 (Australia); 9 Edw. VII. c. 9, s. 13 (South Africa).

the Council, and so he cannot perform any act in Council without a majority, but he can always refuse to act, and so can force his ministers to give way on the point at issue or to resign their posts. Even in the case of a ministerial act he can forbid the minister to perform any action on pain of dismissal, so that legally a Governor is far removed from being a figurehead.

The relation of the Governor to his Executive Council has been the subject of much discussion, and the principles laid down are of such interest as to justify the consideration of two of the views expressed at length. It may first, however, be useful to set out the relations in typical cases as laid down in the letters patent and instructions. In the case of Newfoundland, the only Colony which still, under self-government, bears the name with pride, it is provided in Clause II of the letters patent of March 28, 1876, as follows :—

And we do hereby declare our pleasure that there shall be an Executive Council in our said Colony, and that the said Council shall consist of such persons as are now or may at any time be declared by any law enacted by the Legislature of our said Colony to be members of our said Council, and of such other persons as our said Governor shall from time to time in our name and on our behalf, but subject to any law as aforesaid, appoint under the public seal to be members of our said Council.

There is no substantial difference in the enactments for the other Colonies where the Executive Council is constituted by letters patent, but in the other cases, those of the six States of the Commonwealth, New Zealand, and formerly of the four South African Colonies, the wording of the last portion of the clause was slightly altered so as to read in the case of New Zealand : ' and of such other persons as the Governor shall from time to time in our name and on our behalf, but subject to any law as aforesaid, appoint under the public seal of the Dominion to be members of the Executive Council of the Dominion.' This section appears to contemplate the possibility of a law which forbade the adding more than a certain number of members to the

Council, but at any rate there is no example of any law yet having been passed,[1] and the position, therefore, is not affected by the words in question. In the case of the Federations and of the Union the question of the constitution of an Executive Council does not appear at all, the matter being dealt with in the Constitution Acts, where the Executive Council is constituted by the Acts, though the number of members is not limited or defined in any way.[2]

The relation of the Governor to ministers is more precisely indicated, not in the letters patent, but in the royal instructions. The oldest form is still illustrated by the case of Newfoundland, where the relative portion of the instructions of March 28, 1876, runs as follows :—[3]

III. And We do require Our said Governor to communicate forthwith to Our Executive Council for Our said Colony these Our Instructions, and likewise all such others from time to time as he shall find convenient for Our Service to be imparted to them.

IV. And We do hereby direct and enjoin that Our said Executive Council shall not proceed to the despatch of business unless duly summoned by authority of Our said Governor, and unless three Members at the least (exclusive of himself or the Member presiding) be present and assisting throughout the whole of the meetings at which any such business shall be despatched.

[1] In Nova Scotia the number of the Executive Council is limited to nine by *Revised Statutes*, 1900, c. 9, s. 1 ; and in New Brunswick by the effect of the letters patent of November 2, 1861, to the same number; and in British Columbia, by an Act (c. 12) of 1908, to seven (now, by an Act of 1911, eight). But these are provinces, and there is no parallel now in the case of the States and Dominions. But the members need not be in the Legislature so far as the law is concerned.

[2] 30 Vict. c. 3, s. 11 (Canada); Constitution, s. 62 (Australia); 9 Edw. VII. c. 9, s. 12 (South Africa). The Executive Councils in Ontario and Quebec are constituted by the *British North America Act*, confirmed by the local Acts; by Provincial Acts in Nova Scotia, New Brunswick, and British Columbia; by the old letters patent in Prince Edward Island; those in Manitoba, Saskatchewan, and Alberta by the Constitution Acts of 1870 and 1905 of Canada, and by local Acts. See p. 63.

[3] Cf. the instructions of May 4, 1855. The form is much the same in the still older instructions, e. g. those to Lord Sydenham of August 30, 1840 (Canada *Scss. Pap.*, 1906, No. 18, p. 116).

V. And We do further direct and enjoin that Our said Governor do attend and preside at the meetings of Our said Executive Council, unless when prevented by some necessary or reasonable cause; and that in his absence such Member as may be appointed by him in that behalf, or, in the absence of any such Member, the Senior Member of the said Executive Council actually present shall preside at all such meetings, the seniority of the Members of the Council being regulated according to the order of their respective appointments as Members of Our said Council.

VI. And we do further direct and enjoin that a full and exact Journal or Minute be kept of all the deliberations, acts, proceedings, votes, and resolutions of Our said Executive Council, and that at each meeting of the said Council the Minutes of the last meeting be read over, confirmed, or amended, as the case may require, before proceeding to the despatch of any other business. And We do further direct that twice in each year a full transcript of all the Minutes of the said Council for the preceding half year be transmitted to Us through one of our Principal Secretaries of State.

VII. And We do further direct and enjoin that, in the execution of the powers and authorities committed to Our said Governor by Our said Letters Patent, he shall in all cases consult with Our said Executive Council, excepting only in cases which may be of such a nature that, in his judgment, Our service would sustain material prejudice by consulting Our Council thereupon, or when the matters to be decided shall be too unimportant to require their advice, or too urgent to admit of their advice being given by the time within which it may be necessary for him to act in respect of any such matters. Provided that in all such urgent cases he shall subsequently, and at the earliest practicable period, communicate to the said Executive Council the measures which he may so have adopted, with the reasons thereof.

VIII. And We do authorize Our said Governor, in his discretion, and if it shall in any case appear right, to act in the exercise of the power committed to him by Our said Letters Patent, in opposition to the advice which may in any such cases be given to him by the Members of Our said Executive Council. Provided, nevertheless, that in every such case he shall fully report to Us by the first convenient opportunity such proceeding with the grounds and reasons thereof.

The terms of the Newfoundland instructions are decidedly

antiquated in form. They are, however, the same as the terms of the former Cape instructions. In the case of the instructions of 1892 and 1900 to the Australian States, which agree in substance with those of New Zealand, a much milder form is adopted, which removes the suggestion that the Governor is to act without the advice of his Council in urgent or trivial cases, or in cases when consultation would be prejudicial to the Colony, provisions borrowed from the system of Crown Colony administration, which are now antiquated and absurd. It was the presence of this clause, among other things, in the instructions of the Governor of New Zealand which induced his legal adviser in 1854 to doubt whether it was possible or intended to introduce full responsible government within the Colony; yet the new form was only introduced in New Zealand and the States in 1892. In the case of the Transvaal in 1906, and the Orange River Colony in 1907, the same terms were adopted as in the case of the Australian States, and the same terms appeared also in the Natal instructions of 1893. But in the Natal instructions it was provided that this rule should not apply to the powers of the Governor as Supreme Chief, but that in the exercise of such powers, other, of course, than those vested in the Governor in Council by law, he should acquaint his ministers with his proposed action, and as far as possible arrange with them the course of action he intended to adopt, but the ultimate decision in every case must rest with the Governor. There was no similar provision in the instructions for the Transvaal, and the Orange River Colony, no doubt because the result of these instructions had been practically of no effect, but it was provided by law in the letters patent creating the Legislature that the Governor should exercise over the natives all power and authority vested in him as paramount chief, and the use of the term 'Governor' in that clause as contrasted with the use of the term 'Governor in Council' in the next clause, relative to the holding, if thought fit, of meetings of the natives, was evidently intended to insist upon the personal action of the Governor, if he thought it necessary so to act.

The following extract from the instructions to the Governor

of New South Wales, dated October 29, 1900, illustrates the form normal in such case :—

III. The Governor shall forthwith communicate these Our instructions to the Executive Council, and likewise all such others from time to time as he shall find convenient for Our service to impart to them.

IV. The Governor shall attend and preside at the meetings of the Executive Council, unless prevented by some necessary or reasonable cause, and in his absence such member as may be appointed by him in that behalf, or in the absence of such member the senior member of the Executive Council actually present shall preside ; the seniority of the members of the said Council being regulated according to the order of their respective appointments as members thereof.

V. The Executive Council shall not proceed to the despatch of business unless duly summoned by authority of the Governor nor unless two members at the least (exclusive of the Governor or of the member presiding) be present and assisting throughout the whole of the meetings at which any such business shall be despatched.

VI. 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 cause 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 upon the Minutes of the Council the grounds of any advice or opinion that he may give upon the question.

In the case of Canada there is no provision for any Executive Council in the letters patent, and the instructions are all but silent on the topic : they contain indeed since 1878 only the sapient clause :—

And we do require Our said Governor-General to communicate forthwith to the Privy Council for Our said Dominion these Our instructions, and likewise all such others from time to time as he shall find convenient for Our service to be imparted to them.

The same mode has been followed in the case of the Commonwealth in 1900, and the Union of South Africa in 1910.

One of the powers which are conferred upon the Governor

in the letters patent has the peculiarity that though it is almost invariably inserted it is practically never used. It is omitted since 1878 in the case of Canada, the local law making adequate provision, also in the case of the Commonwealth, which had no lands in 1901, and the Union of South Africa; in the latter case, no doubt, mainly from the fact that the model which was followed was that which had been laid down in the two cases of the Federations. It is the power to make land grants. The power was an important one in the old times when the power to grant land was valuable, and was exercised under instructions from the Secretary of State, but the whole field was gradually covered by legislation, and the power became otiose and needless: accordingly in the case of Canada it was omitted on the suggestion of Mr. Blake in the letters patent issued in 1878. The right has received discussion in the Courts in a New Zealand case,[1] but in that Dominion now the land is all disposed of under statutory authority.

There is some difficulty as to the clause in the letters patent which occurs in nearly all, authorizing the Governor to exercise the powers of the Crown as to summoning, dissolving, and proroguing the Legislatures. In the case of Newfoundland (as in that of Nova Scotia, New Brunswick, and Prince Edward Island before union) there is included also a clause empowering the Governor to make laws with the advice and consent of the legislative bodies, while the numbers of the Council are provided for and their method of appointment. In the case of New South Wales, Queensland, and New Zealand, and formerly in the Colony of Natal, in addition to the powers of summoning, proroguing, and dissolving, are given powers of appointing members to the nominee Legislative Councils, and in the case of the Cape, as in the case of Newfoundland, the power conferred included the power to make laws with the Legislature. The powers of summoning, proroguing and dissolving are also given in the case of the Federations and of the Union. They were not

[1] *The Queen* v. *Clarke*, 7 Moo. P. C. 77; Rusden, *New Zealand*, i. 480; cf. the South Australia case, *The Queen* v. *Hughes*, 1 P. C. 81.

given in the case of the Transvaal and the Orange River Colony because the powers were given in express words in the letters patent constituting the Legislature. It is difficult to think that the words are really needed, but no exception was taken to them by Mr. Blake in 1876 as regards the Dominion, though they have been criticized severely as regards the Commonwealth,[1] as being needless and useless. It is true that the provisions seem purposeless in so far as they grant powers already conceded by law, and it is difficult to see much purpose served by their inclusion.

Some of the clauses are peculiarly objectionable as they stand. For example, it was absurd to empower the Governor of the Cape to make laws with the aid of the two houses: he was given that power by the royal Order in Council of May 23, 1850, and this power has never since been capable of revocation by the Crown, so that to include it in letters patent, the power to revoke which is expressly reserved, is not desirable. So again it has never been open to the Crown, since the commission granted to the Governor in 1832 constituting a legislature for Newfoundland, to revoke the power of legislation given to that body, and the inclusion of the power in the letters patent of Newfoundland is open to objection as they also are liable to change. On the other hand, the provision as to the constitution of the Council in those letters patent is legitimate, for there is no provision of law or constitutional rule providing for the number. In the other cases, as, for example, that of New Zealand, where the powers in question are all given by the Constitution Act to the Governor, the repetition of them is only meaningless.

Other clauses are no longer inserted in the instruments, such as those, formerly normal, delegating to the Governor the power of granting marriage licences, probate of wills, letters of administration, the custody of idiots, and so forth. All these matters are regulated by local law, and the grant of prerogative powers is neither requisite nor useful,[2] and Mr. Blake's advice in favour of their removal was properly

[1] See Harrison Moore, *Commonwealth of Australia*[2], pp. 300 seq.; cf. Canada *Sess. Pap.*, 1877, No. 13. See above, p. 104.

[2] Under the *Foreign Marriages Act*, 1892, the Governor has a statutory

followed. The questions were of some interest in Canada, for on federation the question was raised who could grant marriage licences, and was decided in favour of the Governor-General by Sir J. Macdonald and the law officers of the Crown.[1] But the latter advised that the power to regulate the grant of licences lay in the Provincial Legislatures, and they all so legislated and removed difficulties. Similarly the right to appoint to benefices, formerly given to the Lieutenant-Governors of the Provinces and to the Governor-General of Canada, was claimed for the Governor-General,[2] and exercised by him until disposed of by Provincial Acts, while the break-up of the old position of the Church generally terminated the grant of powers in this regard of Governors.

§ 2. The Views of Mr. Blake

The simplification of letters patent and instructions alike in the case of Canada, to which reference has been made above, was due in the main to the action of Mr. Blake, then Minister of Justice in the Canadian Government. In 1875 Lord Carnarvon addressed to the Governor-General of Canada a dispatch explaining the reasons which had evoked a desire to remodel the practice of issuing letters patent. Hitherto it had been the custom to do so on the appointment of each Governor, including in his commission, which passed under the great seal, all the machinery of the Governor's office. It took time to secure the passing of an instrument under the great seal, and in the meantime a temporary commission used to be given under the sign-manual allowing him to act under the commission of his predecessor. This was obviously inconvenient besides being of doubtful legal validity,[3] and therefore it was decided to issue in all cases

power which in responsible-government Colonies he does not exercise with regard to marriages. These powers remained in the Australian letters patent until 1900. But they did not occur in the New Zealand letters patent, or in those of Newfoundland or the South African Colonies.

[1] See *Provincial Legislation*, 1867–95, pp. 407 seq.

[2] In a New Brunswick case in 1869.

[3] See Canada *Sess. Pap.*, 1877, No. 13, which gives an account of Mr. Blake's visit in 1876 to England and his conference with the Secretary of

permanent letters patent and instructions, leaving the Governor merely to receive a commission referring to the letters patent and instructions. A draft of those suggested for Canada was enclosed and suggestions for amendment asked. The form proposed was not a happy one: it was a common form for any Colony including in the letters patent provision for an Executive Council, grants of land, appointments of judges and other officers, pardons, dismissals of officers, appointments of deputies, summoning, proroguing and dissolving Parliament, and the granting of marriage licences, of letters of administration, probates of wills, and the care of idiots and lunatics and their estates. The instructions contained provisions for the Executive Council, including the duty of the Governor presiding, the keeping of minutes, and the duty of consulting, which was based on the Newfoundland form, with power to differ, and requiring consultation only if the matter was not urgent or not trivial, and if consultation would not be prejudicial to the service. Then clauses forbade the mixing up of different matters in one law, gave a list of reserved Bills, instructed him as to sending home journals and seeing as to laws having marginal abstracts, regulated the power of pardon, and required the Governor to promote religion and education among the natives, and to send home a blue-book. The sending of such a form was in many ways foolish, for it was clearly a Crown Colony form, and was quite at variance with the form issued even to Lord Dufferin in 1872, but the criticisms which were made upon it resulted in the removal of the numerous antiquated forms presented by it.

But the most important part of the representation of the Minister of Justice was his criticism on the clauses relating

State. Later, on the request of the Opposition after Sir J. Macdonald's Government took office, the further correspondence was made public in Canada; see *Sess. Pap.*, 1879, No. 181. Permanent letters patent were first issued for Canada on Oct. 5, 1878; Newfoundland, March 26, 1876; New South Wales, April 29, 1879; Victoria, Feb. 21, 1879; Queensland, April 13, 1877; South Australia, April 28, 1877; Western Australia, Aug. 25, 1890; Tasmania, June 17, 1880; New Zealand, Feb. 21, 1879; Cape, Feb. 26, 1877; Natal, July 20, 1893.

to the powers of the Governor-General to act in connexion with his Council. The instructions to Lord Dufferin contemplated that he should summon the Council, and empowered him as follows :—

If in any case you see sufficient cause to dissent from the opinion of the major part or of the whole of our said Privy Council so present it shall be competent for you to execute the powers and authorities vested in you by our said commission and by these our instructions in opposition to such their opinion, it being nevertheless our pleasure that in every case it shall be competent to any member of our said Privy Council to record at length on the minutes of our said Council the grounds and reasons of any advice or opinion he may give upon any question brought under the consideration of our Council.

The next clause but one required the keeping of exact minutes of the Council, and the confirmation of the minutes. In the new draft Clause V provided for the Governor-General presiding at Council meetings ; Clause VI for the keeping of minutes ; Clause VII for consultation except in urgent or trivial cases, and in urgent cases for subsequent communication of his action ; Clause VIII, the power to act in the exercise of the power committed to him by the said commission, in opposition to the advice which might in any such case be given to him by the members of the said Executive Council, but requiring in such cases a report of his action with the grounds and the reason thereof.

On these clauses the minister commented as follows :—

Clause 5. This Clause corresponds with the existing clause 6 ; but it contains a new provision, directing and enjoining the Governor to attend and preside at the meetings of the Council, unless when prevented by some necessary or reasonable cause.

The practice for a very great number of years has been that the business of Council is done in the absence of the Governor. On very exceptional occasions the Governor may preside, but these would occur only at intervals of years and would probably be for the purpose of taking a formal decision on some extraordinary occasion, and not for deliberation.

The mode in which the business is done is by a report to the Governor of the recommendations of the Council sitting as a Committee, sent to the Governor for his con-

sideration, discussed where necessary between the Governor and the first minister, and becoming operative upon being marked 'approved' by the Governor. This system is in accordance with constitutional principle, and is found very convenient in practice. It would be a violation of such principle and extremely embarrassing to all parties in practice that the Governor should attend and preside at the deliberations of Council, and it would be inexpedient to lay down such a rule unless it is intended to be observed.

The sub-committee think the proposed change objectionable.

Clause 6. This is identical with the existing clause 7. In practice the minutes of proceedings of Council are not read over and confirmed. These proceedings are extremely voluminous, a very large part of the public business which is transacted in England by departmental action being managed here through Council. In the majority of cases the minutes have been in the interval approved by the Governor and acted on. It might be as well under the circumstances to omit the words providing for this procedure.

Clause 7. This clause is new and does not appear suited to Canada. By it in the execution of the powers committed to the Governor, it is provided that he shall consult with the Council, except in cases in which in his judgment Her Majesty's service would sustain material prejudice by consulting the Council thereupon, or when the matters to be decided shall be too unimportant to require their advice, or too urgent to admit of their advice being given in time.

According to the accepted view of our Government it is the rule that the Governor should act under advice, and it would be contrary to this view now to propose fresh additions to his individual power of action and by consequence fresh limitations to the powers and responsibilities of his advisers.

Clause 8. This clause corresponds with the existing clause 5 authorising the Governor to act under certain limitations in opposition to advice, but changes to some extent its provisions.

The language of the present instructions appears less objectionable than that of the proposed substitute, excepting the new proviso, which seems proper. The existing clause gives the power 'in case the Governor sees sufficient reason to dissent,' the proposed clause gives it, 'in the Governor's discretion and if it shall appear right,' language which may possibly bear a wider interpretation as to the grant of a power of which a free people are naturally jealous.

In so far as it may be intended by the clause to vest in the Governor the full constitutional powers which Her Majesty if she were ruling personally instead of through his agency could exercise, it is of course perfectly correct. The Governor-General has an undoubted right to refuse compliance 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 is wider and seems to authorise action in opposition to the advice not merely of a particular set of ministers but of any ministers.

Notwithstanding the generality of the language there are but few cases in which it is possible to exercise such a power; for as a rule the Governor does and must act through the agency of ministers, and ministers must be responsible for such action.

As to cases not falling within this limitation the sub-committee assume that the power in question is to be exercised only in the rare instances in which, owing to the existence of substantial Imperial as distinguished from Canadian interests, it is considered that full freedom of action is not vested in the Canadian people. In all other cases the sub-committee assume that the Governor is as of course to act on the advice of responsible ministers.

The sub-committee have not attempted to formulate with absolute precision the indicated limitations, but the general sense in which according to their view the clause should be framed and understood will, they trust, sufficiently appear from their observations.

The same principle, that the Governor-General should be a constitutional monarch, he carried out in his views on the question of pardon: he could not admit that the Governor-General was at liberty to use his personal discretion at all, except conceivably in cases where Imperial interests were concerned, and even then he deprecated any reference to the power of deviating from ministerial advice. So in the legislative sphere he wished the Governor-General to be allowed full freedom of assent to all Canadian Acts, leaving them to be disallowed if the Imperial Government took exception to them. His conception and that of the Government of Canada of the day was that the whole Government

should be that of an independent kingdom save only in the cases, contemplated as very few, where the Imperial Government should intervene as a result of the fact that Canada was not an Imperial power but a dependency. But such cases must be allowed to be dealt with as and when they arose, while nothing should be put on formal record to diminish the constitutional Government of Canada. And where Imperial interests were not involved there should be full ministerial responsibility just as in the United Kingdom. It is interesting to see how far we have travelled from Lord John Russell's views in 1839, when this claim for full responsible government he entirely repudiated even in internal affairs, thinking that even in these matters the Governor must retain a certain independence in the Imperial interest. It is most interesting to see how clearly Mr. Blake, like his predecessor, saw that the whole principle of the Imperial Government was entire and full ministerial responsibility: at the Colonial Conference of 1887, and still later, there were many Colonial statesmen who took the same wide view as was taken by Todd[1] of the powers of the Sovereign to refuse ministerial advice in England, regardless of the truth that the precedents they cited were all signs of the times when true responsible government had not yet been established in the country.

§ 3. The Views of Mr. Higinbotham

The views expressed by Mr. Blake in the case of Canada were adopted, but in a much more extreme and less reasonable form by the Chief Justice of Victoria, George Higinbotham.[2]

Mr. Higinbotham was convinced that the Colonial Office was determined to assert an illegal and improper interference in the affairs of the Colony. The first form in which, as

[1] *Parliamentary Government in the British Colonies*, chap. i. Cf. Gladstone, *Gleanings of Past Years*, i. 203–48. Gavan Duffy saw more clearly in 1873; see *Parl. Pap.*, H. C. 346, 1873, pp. 7, 8.

[2] See Morris, *Memoir of George Higinbotham*, pp. 209 seq.; Quick and Garran, *Constitution of Commonwealth*, pp. 394 seq.

a Judge, he encountered as he believed this incorrect attitude, arose out of the case of a murderer named Morgan. The royal instructions called upon the Governor to require the Judge who tried the case to make a written report, and, if he thought fit, to ask him to attend the Executive Council. Mr. Higinbotham was only willing to attend or furnish a report provided he was asked to do so by lawful authority, that is, by Her Majesty's Ministers for Victoria. The Judge's wishes were respected, and no reference to the royal instructions was given as a reason for requiring his attendance. His views, however, were more formally expressed in a letter to Sir Henry Holland, Secretary of State for the Colonies, dated February 28, 1887, in response to a request made through the Governor that he would state confidentially his opinion on the subject of the royal instructions given to the Governors of Victoria and other Australian Colonies. He insisted on pointing out to the Secretary of State that he was addressing him in his private capacity as an English politician interested in Colonial affairs, and not as the ministerial head of the Colonial Office. He added that his views were personal, and they were not generally accepted by, or known to, any considerable class of the population. He quoted a resolution which he had brought forward in 1869 to the effect—

'That the official communication of advice, suggestions, or instructions, by the Secretary of State for the Colonies to Her Majesty's representative in Victoria, on any subject whatsoever connected with the local government, except the giving or withholding of the Royal assent to or the reservation of Bills passed by the two Houses of the Victorian Parliament, is a practice not sanctioned by law, derogatory to the independence of the Queen's representative, and a violation both of the principles of the system of responsible government and of the constitutional rights of the people of this Colony.'

This resolution, though carried by forty votes to eighteen against the Government of Victoria, had not, he admitted,

[1] *Parliamentary Debates*, ix. 2670, 2671. For Mr. Higinbotham's speech on it, see Morris, pp. 160–89. Cf. below, p. 621.

been accepted later on. Moreover, he added that his condemnation, unqualified and severe, of the conduct of the Colonial Office was mainly directed against the permanent heads. He protested against the issue of the royal instructions to the Governor of Victoria. There had been, in his opinion, no change in the commission and instructions issued since 1850, although responsible government had been introduced in 1855. The Victorian Constitution Act gave power to the Crown, the Legislative Council, and the Legislative Assembly to make laws in and for Victoria in all cases whatsoever.

Ministers chosen by the representative of the Crown advise him in all things relating to the conduct of the ordinary domestic affairs of State and the executive administration of existing laws, with the single exception created by statute law of the giving or withholding of the royal assent to, or the reservation of, Bills. Questions involving Imperial interests, including the control of Her Majesty's military and naval forces, the questions affecting relations with foreign states, do not come within the purview of the Constitution Statute. As regards all such questions, the Governor is still an officer of the Imperial Government, and is bound to obey the instructions given to him either directly from the Crown or through the Secretary of State. With respect to the same questions and interests, Her Majesty's Ministers for Victoria cannot tender responsible advice. They may, if they think fit—they will, so long as rational and friendly relations exist between the two Governments—assist the Imperial officer by all means in their power to perform his duties to the Imperial Government. But with respect to local affairs, subject to the single exception above mentioned, the case is wholly different. The statute does not by express grant convey any powers or prerogatives to the Governor. But the creation by statute of the system of responsible government necessarily involves 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. Allow me to request your special attention to this point, that it is by virtue of the Constitution Acts themselves of the Australian Colonies—assuming those Acts to have created in each of the Colonies the system of responsible government—that the prerogatives and powers which are

necessary for carrying that system into effect and operation are transferred from the Sovereign, and are vested in the representative of the Sovereign. I am aware that it has been urged by those who have desired to uphold the Government by the Colonial Office of these Colonies, and who have therefore supported the Governor's instructions in their present form, that, although responsible government has been created in the Australian Colonies by the Imperial statutes, prerogatives and powers are from time to time conferred on the Governor by the Crown, according to its pleasure, by a separate instrument, and not by force of the Act of Parliament. If the policy which the Colonial Office has steadily pursued for the last thirty years has sprung from a real but mistaken belief in this doctrine, and not, as has been more probably conjectured, from the natural but very censurable desire of irresponsible subordinate officers to retain for their department by stratagem a power which they know has been taken away from it by law, it is to be deeply deplored that the Colonial Office has not during that long period sought competent legal advice upon a subject which concerns so nearly its own duties as well as the highest rights and interests of these Australian communities. As a legal proposition, I venture to affirm that the doctrine is wholly untenable and false. If it were true, all the Colonial Constitution Statutes would be a dead letter, and all public rights of these communities would depend not upon the grant of Parliament, but upon the will or caprice, exerted from day to day, of the Imperial Minister. Responsible government cannot exist unless some powers and prerogatives are vested in the representative of the Crown, for the exercise of which Ministers of the Crown, appointed by the Crown, are responsible to Parliament.

The representative of the Crown had vested in him by force of the Constitution Statute and by virtue of his appointment as Governor such powers and prerogatives of the Crown, and only such as were necessary in the conduct of the ordinary duties and functions of government, and the administration of the existing laws within the Colony. The Governor in his character of the Queen's representative, and exercising the powers and prerogatives of the Crown vested in him by statute, was legally independent of all external influence and authority, and could be lawfully guided

only by the advice of his responsible ministers. With the exception of the difference of historical origin, responsible government existing in Australia by statute and not by common law, its limitation to local affairs and the reservation of Bills, the analogy between the British and Colonial systems of government, and between the King and the Governor, was complete. He discussed in detail the letters patent and the instructions; he pointed out that the letters patent purported to vest certain authorities in the Governor which were already vested in him by the Constitution Statute, and to limit his action by instructions given under the sign-manual and signet, or through a Secretary of State, or by Order in Council, and such limitations were void and illegal. The duty laid down in Clause VI of the Instructions to consult an Executive Council was meaningless if it applied to the Executive Council, which in Victoria included ex-ministers, and if it meant the Cabinet the instruction was unmeaning and void. The duty of the Governor to consult his advisers did not spring from the royal instructions. If the clause referred to consulting them on Imperial matters this was an indirect instruction, offensive in form and without either legal authority or means of enforcement, to Her Majesty's Ministers for Victoria to do something which they were not required by their duties as Ministers of the Crown to do.

Clause VII of the instructions, which provided—'The Governor may act in the exercise of the powers and authorities granted to him by our said letters patent in opposition to the advice given to him by the members of the Executive Council, if he shall in any case deem it right to do so, but in any such case he shall fully report the matter to us by the first convenient opportunity, with the grounds and reasons of his action,' could only be characterized as a distinct denial of the existing public law of Victoria. As a direct instigation to Her Majesty's representative to violate that law it offered grave indignity and conveyed an unmistakable menace to him and his advisers.

He criticized with equal severity Clause XI of the Instruc-

tions with regard to the exercise of the prerogative of mercy, which was essentially necessary to the administration of criminal law. He called special attention to the instruction that the judge should be called upon for a written report[1] and that the Governor should grant or withhold a pardon in his own deliberate judgement.

He criticized also the provisions of Clauses VIII and X of the Instructions, which provided that laws should, as far as possible, deal with separate matters, and no perpetual clause be part of any temporary law, and that laws should have marginal abstracts and other minor details. He thought that these were ridiculous provisions and not suitable for inclusion.[2]

He referred to the attempts of the Colonial Office from 1864 to 1868 to check legislation in favour of a protective tariff. He also protested that the Colonial Office neglected its duty in that it did not assert sufficiently clearly its own duty to the Empire by refusing to recognize or permit any direct interference in international questions by the Government or by the people of any part of the Empire. A clear distinction should be drawn between the right of the Colonial Office to interfere in local affairs by indirect coercion or by control of the representative of the Crown, which should be officially and openly withdrawn, while the Imperial Government should assert its claims and its powers in Imperial matters. He added that the bestowal of honours upon Australian citizens on Imperial advice was not open to objection on constitutional or legal grounds, but he argued that life titles of the highest rank should be awarded in the Colonies by the representative of the Crown on the advice of Colonial advisers, and on the recommendation of both Houses of the Colonial Parliament.

The views which he expressed in the correspondence were also enunciated by him in the famous case of *Toy* v.

[1] This requirement was omitted in the new instructions of 1892.

[2] Also omitted in 1892; see Blackmore, *Constitution of South Australia*, pp. 146, 147; *Constitution of New Zealand*, pp. 186, 187. The instructions as to these points were only given by dispatch.

Musgrove.[1] In 1888 a British ship had arrived at Melbourne having on board about 268 Chinese emigrants, one of whom was Chun Teeong Toy. The number was in excess of that which, under the existing laws of Victoria, could be lawfully brought into the port. The Collector of Customs, Mr. Musgrove, was instructed by the Commissioner of Trade and Customs, a responsible minister, that no Chinese other than such as were British subjects should be allowed to enter Victoria. Chun Teeong Toy brought an action in the Supreme Court of Victoria claiming damages from Mr. Musgrove. In defence it was urged that the Court had no jurisdiction, as the acts of the officer were acts of State ratified by the responsible minister and by Her Majesty's Government of Victoria.[2] The second defence was that the acts were done in virtue of the power of the Crown to exclude aliens, that this power was vested in the Governor of Victoria to be exercised by him through Her Majesty's Ministers for Victoria. The Chief Justice's opinion was in favour of the defendant on the ground that the prerogative of excluding aliens was a prerogative of the Crown of England,[3] and that a power equivalent to the prerogative had been vested by law in the representative of the Crown in Victoria, and could be exercised by the Governor on the advice of his responsible ministers. He took occasion to express at full length his opinion on the subject of the constitutional rights of self-government belonging to the people of Victoria. In the course of his judgement his conclusions were summed up as follows :—[4]

I am of opinion, first, that the Constitution Act, as amended and limited by the Constitution Statute, is the only source and origin of the constitutional rights of self-government of the people of Victoria; secondly, that a

[1] (1888) 14 V. L. R. 349. Cf. Lefroy, *Legislative Power in Canada*, pp. 116 seq.; above, pp. 120, 134.

[2] All the judges rejected this defence, on the ground that the right to do an act of State did not belong *ex officio* to the Governor, and that there had been no ratification by a competent authority.

[3] This is practically certainly bad law as so put.

[4] 14 V. L. R. 349, at pp. 396, 397.

constitution, or complete system of government, as well as a constitution of the Houses of Legislature, was the design present to the minds of the framers of the Constitution Act, and that that design has found adequate, though obscure, legal expression in that Act; thirdly, that the two bodies created by the Constitution Act, the Government and the Parliament of Victoria, have been invested with co-ordinate and interrelated, but distinct functions, and are designed on the model of the Government and the Parliament of Great Britain to aid each other in establishing and maintaining plenary rights of self-government in internal affairs for the people of Victoria; fourthly, that the Executive Government of Victoria, consisting of the Ministers of the Crown, are responsible to the Parliament of Victoria for the exercise of all the powers vested by the Constitution Act in the Governor as the representative of the Crown in Victoria, and that they, and they alone, have the right to influence, guide, and control him in the exercise of his constitutional powers created by the Constitution Act; fifthly, that the Executive Government of Victoria possesses and exercises necessary functions under and by virtue of the Constitution Act,[1] similar to, and co-extensive, as regards the internal affairs of Victoria, with the functions possessed and exercised by the Imperial Government with regard to the internal affairs of Great Britain. Sixthly, that the Executive Government of Victoria, in the execution of the statutory powers of the Governor expressed and implied and in the exercise of its own functions, has a legal right and duty, subject to the approval of Parliament, and so far as may be consistent with the statute law and the provisions of treaties binding the Crown, the Government, and the Legislature of Victoria, to do all acts and to make all provisions that can be necessary and that are in its opinion necessary or expedient for the reasonable and proper administration of law, and the conduct of public affairs, and for the security, safety, or welfare of the people of Victoria.

The case in question was decided against the defendant

[1] He condemned as usurpations of authority the delegation by the letters patent of the power to appoint officers, given by 18 & 19 Vict. c. 55, sched. s. 37, to summon and prorogue Parliament, and dissolve the Assembly (ibid., s. 22), and the pardoning power which he believed to be inherent in the executive authority; see p. 382. It may be added that he also held in another case that there was no territorial limitation on the legislative capacity of the Parliament (see Part III, chap. ii).

by a majority of four judges to two, and accordingly an appeal was brought to the Privy Council, which decided that an alien had no legal right enforceable by action to enter Victoria, and therefore reversed the judgement of the Court below.[1] They also held that on the terms of the Act of 1881 regarding Chinese immigration the plaintiff had no case, for there was no obligation on the Collector of Customs to accept the money tendered when the ship had clearly violated the law by bringing more than the legal number—1 to 100 tons—of Chinese. But the points dealt with by the Chief Justice, which alone were of supreme interest to him, were not decided by the Judicial Committee.

Now there is much to be said for many of the contentions of the Chief Justice. In the first place, he was right in pointing out that part of the royal instructions contained matters too trivial to be included in instructions to a Governor. Moreover, they were not matters which he was really competent to decide. So advantage was taken of his advice to revise in 1892 the royal instructions to the Governors of the Australasian Colonies and also of Newfoundland, though the instructions were conveyed in a slightly different form in the shape of a dispatch. Moreover, the insistence laid by the Chief Justice on the fact that the Governor possesses the whole executive power of the Crown so far as is necessary for a Colonial Government is just and proper.[2] But it seems impossible to maintain the position that the Governor is a parallel to the Sovereign in constitutional monarchy, and that therefore he is obliged to act on the advice of his ministers in the same sense as that in which the King of the United Kingdom acts on the advice of his ministers. Nor is it possible to maintain the sharp distinction which the Chief Justice drew between the actions of the Governor as head of the Colonial Government and as an Imperial

[1] *Musgrove* v. *Chun Teeong Toy*, [1891] A. C. 272.

[2] Cf. 22 O. R. 222; 19 O. A. R. 31; Harrison Moore, *Commonwealth of Australia*,[2] pp. 300 seq.; Lefroy, *Law Quarterly Review*, 1899, p. 283; Ontario *Sess. Pap.*, 1888, No. 37, pp. 20–2; Clark, *Australian Constitutional Law*, pp. 63–5.

officer, or to maintain the separation which he endeavoured to assert of the responsibility of the Colonial Government in internal matters and the absolute control of the Imperial Government in external affairs.

As a matter of fact, the Governor in his twofold capacity as head of the Colonial Executive and representative of the Crown, and as an officer appointed by the Imperial Government, serves as a link between the Imperial and the Colonial Governments, and it is impossible to treat him as serving solely in either capacity. It is impossible to doubt the legality or the constitutionality of the Government receiving instructions from the Crown; the Chief Justice stated that if appointed to act as officer administering the Government in the absence of the Governor he would decline to send reports to the Secretary of State except such as he was asked by his ministers to furnish.[1] That he adopted that position, which was no doubt logical, is sufficient to show how unpractical were his views of the position of the Governor. On the one hand he emphasized almost unnecessarily the dependent character of a Colonial Government, while on the other hand he emphasized the independence of its administration. The separation of the two sides of its activities is impossible. A Colonial Government is part of the Empire, and must play its share in the external relations of the Empire, and on the other hand it cannot claim, owing to the fact that it is not a separate entity, the full development of ministerial responsibility which appertains to the Ministry in the United Kingdom, and which is enjoyed by the Executive Government of a Sovereign State in the full technical sense of the term.

§ 4. The Dual Position of the Governor

There is certainly this great advantage about the views of both Mr. Higinbotham and Mr. Blake that they distinguish clearly between the Governor in his post as head

[1] Accordingly he was not allowed to administer the Government at any time, special arrangements being made to avoid this contingency; see Dilke, *Problems of Greater Britain*, i. 233 seq.

of a responsible-government Colony or Dominion and the Governor acting as an Imperial officer in the Imperial interest. The distinction is fundamental, and must form the basis of all discussion of the matter if there is to be clearness of thought. It is true that it is not possible to accept the views of these two very able men as to the position of a Governor under responsible government as a mere formal officer in cases not involving Imperial interests, but it is a mistake to treat his actions in that capacity as being cases illustrating his position as an Imperial officer, which is what in effect Todd does; he is not, when he dissolves Parliament on ministerial advice or refuses to do so, acting in Imperial interests; he is acting in the interests of the Government of which he is head, and it is merely confusing to compare such action with action in opposition to ministers taken on Imperial grounds. In the former case he is responsible so far as the head of Government can be responsible to the people of the Colony; in the latter to the Crown at home, advised by the Ministry of the day. It is no doubt true that as the people in the Colony cannot dismiss him, it may be said that he is not responsible to them; it was in fact declared by the resolutions of September 3, 1841, which adopted responsible government in Canada, that the Governor was responsible to the Imperial authority alone, and it is quite obvious that it would not be reasonably practicable to secure that the formal tenure of the Governor should depend in any way upon more than one authority; it would then become possible for a Colonial Government to proceed to determine the tenure of office of a Governor who acted against their advice on Imperial grounds—for a distinction of power with regard to local and Imperial matters would be impossible in practice—and the Governor would therefore lose his value for the purposes of the Imperial Government. But it was recognized by Lord Durham in his pronouncement on responsible government that the Governor must learn only to look for support to the Imperial authorities where he acted in the Imperial interest. Again, it was attempted in the discussions preceding the adoption of the Australian

constitutions to lay down rules by which the Governor could be removed on votes of two-thirds majorities of either house. This attempt was not approved by the Imperial Government, and dropped, but it was only an attempt to recognize what is the rule, that a Governor who cannot work with ministers must be recalled, unless he has acted on Imperial grounds, and the dispute is not one between him and ministers, but between the Imperial and Colonial Governments.

As a matter of fact, the Governor is exposed to censure by his Parliament, and it would depend on the terms of the censure whether or not he was recalled by the Imperial Government. A man's usefulness need not by any means be gone because he has been censured. There are several instances of censure on record, both in respect of actions which were in effect Imperial and of actions which were Colonial. For example, in 1861 an attempt was made by the Legislature to censure Governor Sir W. Denison in New South Wales for his action in sealing a land grant himself when the Secretary declined to do so; he acted in accordance, or in supposed accordance, with his instructions from the Imperial Government, which until 1855 had had the ultimate control of the lands, and felt itself bound to make the grant alluded to, and the motion of censure was not actually carried.[1] In 1877 a vote of censure was passed by the New Zealand Parliament upon the Governor, Lord Normanby, because of his action in declining to appoint Mr. Wilson to membership of the Legislative Council when a vote of non-confidence in ministers was pending, on the ground that it was not proper for the Governor to take notice of a matter in agitation in the Lower House as a reason for refusing to accede to advice tendered by his ministers. The Governor then asked his ministers to advise him what reply he should return to the resolution passed by the Lower House, but they declined to advise him, and declined to accept his view that they should either resign and give him the chance of obtaining new ministers who would assist him or defend his action. Accordingly Lord Normanby sent home the correspondence,

[1] New South Wales *Legislative Assembly Votes*, i. 58, 416, 647–743.

and had the satisfaction of receiving a full approval of his conduct from the Secretary of State for the Colonies.[1] In 1877 the Lower House of the Parliament of Tasmania passed a vote of censure upon the Governor, Mr. Weld, for his conduct in granting his ministers a dissolution, but here again the Governor's conduct was upheld by the Secretary of State.[2] In the long controversy in South Africa which led to Sir Bartle Frere's dismissal of the Molteno Ministry, it was moved in the Assembly by Mr. Merriman,[3] that the Governor had exceeded his constitutional functions in insisting on the control of the Colonial forces being placed under the Imperial authorities, and that the action taken by the Governor had been prejudicial to the Colony and had delayed the termination of the rebellion. It was then ruled by the Speaker that it was 'contrary to constitutional principle and parliamentary practice to move any direct censure on His Excellency the Governor as the representative of the Sovereign, and it being held by the authorities on parliamentary government that the ministers in office are responsible for the actions of His Excellency the Governor'. The motion was therefore amended to avoid any direct censure, but it was not carried even in that form.[4] In 1875 Sir H. Robinson was the object of a vote of censure in Victoria because of the case of the liberation of a convict without advice, and was criticized for his action regarding the dismissal of a volunteer officer.[5]

In a very recent case in Queensland the speech from the Throne was replied to by an address in which regret was

[1] New Zealand *Parl. Pap.*, 1878, A. 1, p. 1; 2, p. 7; *Gazette*, June 21, 1878; Rusden, *New Zealand*, iii. 206–209.

[2] Tasmania *Legislative Council Journals*, 1877, Sess. 2, No. 45; Sess. 4, No. 19.

[3] Cf. Molteno, *Sir John Molteno*, ii. 383.

[4] Cape *House of Assembly Votes*, May 29, 1878; *Parl. Pap.*, C. 2144, pp. 196, 197. Cf. below, pp. 219, note 1, 234, 235.

[5] Cf. *Parl. Pap.*, C. 1202 and 1248. It was proposed in April 1866 to censure the Lieutenant-Governor of New Brunswick for his action in disagreeing with ministers (Pope, *Sir John Macdonald*, i. 297), and a vote of censure was passed on Lieutenant-Governor Doyle of Nova Scotia in 1868, which he insisted on the House expunging (ibid., i. 299).

expressed in strong but courteous terms at the action of the Governor in declining to accept the advice of the leader of the then Government to take steps to secure that the Upper House should yield to the wishes of the Lower House as regards legislation. The Governor refused, and on the resignation of the Ministry as a result of his action sent for Mr. Philp, the leader of the Opposition in the House, who took upon himself the formation of the Ministry, though the Lower House refused him its confidence and protested against being dissolved. The general elections went hopelessly against the new Government, which did not obtain more than a third of the House, and it had to resign, whereupon the new Government addressed a remonstrance to the Governor especially on the ground that his action had taken place without the grant of supply, and had hindered the progress of important public works which were needed for the development of the state. The Governor's action was very freely criticized in the House in the debate, as it had been in the country during the campaign, where some members turned the election into an onslaught upon His Excellency, but the Government had no desire to go further with the matter, and the Governor, in acknowledging the address, merely promised to send it on to the Secretary of State. This action terminated the matter, as no reply from the Secretary of State was ever published.[1] Similarly in 1908 an attempt was made to disapprove the action of the Governor of Victoria, Sir Thomas Carmichael, because of his decision in giving a dissolution in the previous year to Sir Thomas Bent. The Governor, at the request of the House, submitted to the Parliament a statement of the reasons for his action, and the matter then terminated. In none of these cases did the Governor seriously suffer in reputation from the attempted censure, but it is of course clear that had his action in any case been seriously at fault the Imperial Government would have terminated the employment of an officer whose utility would have been gone.

There are two cases in the Dominion of Canada where

[1] Queensland *Parliamentary Debates*, ci. 38 seq., 60 seq., 88 seq., 122 seq.

a Lieutenant-Governor has been recalled because of his disobedience to what the Dominion Government consider the rules of responsible government. In the first case, Mr. Luc Letellier was recalled in 1878 from the Province of Quebec because he had in the exercise of his discretion dismissed a Ministry which had still a majority in the Lower House, and summoned another Government, which on dissolution was only sustained by a narrow majority. He had been censured by the two Houses of the Dominion Parliament for his conduct by a strict party vote, as he was an adherent of the Liberal Ministry which was defeated by Sir John Macdonald.[1] Much later, in 1900, the Liberal Government of the day recalled one of its own supporters because he had dismissed a Ministry which had a majority, if an uneasy one, in the Legislature, and had ruled for some months with a Ministry of which only one member had a seat in the Legislature, which had no real following in the country, and which had delayed the holding of a session of the Legislature as long as possible so as to secure its position.[2]

Not only is the Governor open to criticism by the Colonial Parliament, but he is subject to it from the Imperial Parliament as well. Early in the history of responsible government the Lieutenant-Governor of Nova Scotia was condemned by a section in the Imperial Parliament for his action in permitting the retirement of the provincial Treasurer, as a result of the introduction of responsible government, without securing for him full compensation.[3] The principles of responsible government were then energetically supported by Earl Grey, and no censure was passed. The conduct of Sir C. Darling in the case of the Victorian disputes between the two Houses of Parliament in 1866 was very severely canvassed in Parliament,[4] and on March 25, 1879, a deliberate attempt was made by the Opposition in the Imperial Parliament to censure the Government and Sir Bartle Frere for his action in declaring war against the Zulu king without instructions

[1] *Parl. Pap.*, C. 2445. [2] Canada *Sess. Pap.*, 1900, No. 174.

[3] House of Lords, March 26, 1849; *Hansard*, ciii, 1262–89.

[4] House of Commons, March 20, 1866; *Hansard*, clxxxii. 621; cxci. 1976.

from the Royal Crown. The motion was negatived by a strict party vote, but Sir Bartle Frere was to some extent superseded by the appointment of Sir Garnet Wolseley to be High Commissioner in South-east Africa.[1]

In British Columbia in 1908 attempts were made to censure the conduct of the Lieutenant-Governor in 1907 in refusing assent to the Immigration Bill of the Provincial Legislature of that year, but the Speaker of the Assembly was successful in preventing a formal censure being recorded, though feeling ran very high.[2]

[1] *Hansard*, ccxliv. 1606, 1865. In 1906 Lord Milner's conduct was criticized in the House of Commons and eulogized in the House of Lords, but the action taken by him was as Governor of a Crown Colony. In 1910 attempted criticisms of Lord Grey's action in Canada were met in the Commons by the Under-Secretary of State.

[2] Cf. *Canadian Annual Review*, 1908, p. 537; British Columbia *Legislative Assembly Journals*, 1908, pp. 7, 21, 31.

CHAPTER IV

THE GOVERNOR AS HEAD OF THE DOMINION GOVERNMENT

§ 1. The Dissolution of the Lower House

We have seen that the Governor, as a rule, cannot act except with the aid of ministers; as was pointed out by Mr. Blake in the discussion of the royal instructions, the Governor must have some ministerial officers to assist him to act at all, and a Colonial Government can refuse him all assistance, even in so slight a matter as the mechanical means of carrying out an order. Of course, occasionally cases may happen where the Governor has the mechanical means of acting within himself; for example, the grant of a pardon needs, strictly speaking, no assistance from ministers;[1] the pardon would operate when signed by the Governor without need of further action, and would cause further imprisonment to be illegal, so that the friends of the imprisoned man could secure his release by habeas corpus, and the prisoner on securing his release could sue for damages for false imprisonment, if a Ministry were to go the length of trying to refuse to obey such a direction. Or again, sometimes the act required may be as simple as that of Sir W. Denison[2] in sealing a grant which the minister had refused to seal, for the Governor is the legal custodian of the seal as laid down in the letters patent. Or again, it may be merely the publication of a document such as the Royal Order in Council of September 1907 regarding the Newfoundland fisheries, which the Governor himself arranged to have published in the gazette of the Colony, both cases being cases of obedience to Imperial orders. But normally the Governor's attitude

[1] So in October 1864 Sir G. Grey offered a pardon to the rebels on his own responsibility, the Ministry resigning as a result; cf. *Parl. Pap.*, March 2, 1865, p. 4.

[2] New South Wales *Legislative Assembly Votes*, 1861, i. 58, 416, 647–743; Rusden, *Australia*, iii. 498, n. 2.

is passive; he refuses action, and thus forces ministers either to resign or give way.

But if ministers resign and do not give way—and of course normally over any matter of importance the Ministry is unable to give way, for its supporters would not approve such action—then the Governor must be prepared to find other advisers in every case where the action is taken as head of the Dominion Government and not under Imperial instructions. As was said to the Lieutenant-Governor of Nova Scotia in 1846,[1] it was impossible to carry on the Government of Canada except with the will of the people, and therefore, if the ministers whom the Governor has refused to accept have the ear of the people, he must yield or go, and a sensible Governor will, bearing this in mind, remember that his duty is only to appeal to the verdict of the people when he thinks that on the whole he will secure it—that is, when the Ministry are not really in touch with the wishes of the people. It is a complete mistake to suppose that the Governor is entitled to refuse advice because he does not approve the actions of his ministers and thinks that he may have a good chance of getting a majority for the Opposition if he refuses their advice: his duty is not to his own conscience, but to the people of the Dominion which he governs, and he should execute that duty independently of every other consideration.

The normal form of the refusal to accept ministerial advice is when a Ministry beaten in Parliament, or which is losing its hold on Parliament, asks for a dissolution in order that it may strengthen its hand in the country.[2] Now the Imperial practice in this regard is, of course, that the minister receives a dissolution when he asks for it. There is in favour of this view the most important authority, and the expressions of opinion which have been made on the other side from time to time are hardly authoritative. It is indeed clear that the refusal of a dissolution is much too dangerous a course for the Crown to take; it at once reduces the Crown, however

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

[2] A Governor cannot dissolve except on advice, if for no other reason than that he could not without advice arrange the machinery for a general election.

reluctantly, to be a partisan in a political struggle. In the case of a Governor this does not matter very seriously: he is only a temporary tenant of office, and his personality and popularity are not things of the highest moment; he may discredit the post of Governor and weaken the Imperial connexion, but these things can be put right by a tactful successor, and, truth to tell, both Governors and ministers, as self-government develops, seem to grow more used to work together; the Governor exercises more influence if less power than his predecessors in the sixties and seventies, and there are fewer of those claims, preposterous on both sides to an unimpassioned view, than then were rife. But the popularity of the Crown is only borne out by absolute ministerial responsibility; the loyalty of the country to the Crown must depend in political matters on the feeling that whatever is done is done not as a royal whim but at the will of a Ministry commanding influence in the country. Any other theory, however specious, is sure in the long run to lead to the degradation of the Crown, which owes its absolute security, as Lord John Russell pointed out in 1839, to its standing apart from all political strife.

The question of dissolution always, from the nature of the case, presents the Governor with a possibility of differing from his ministers with success; it necessarily implies the existence in the Colony of two parties, of which one is in possession of the Government, but the other has been successful in driving them to appeal to the people. The Governor has therefore a difficult task, not merely in deciding to refuse to accept ministerial advice but in deciding to accept it; for the fact that the prerogative is not expected as a matter of course to be used as the Ministry advises, prevents him from sheltering behind the advice of his ministers. If he acts on their advice he may easily find himself quite as unpopular as if he had refused to do so, and indeed the Governor is expected to do what is best for the country, a course by no means normally at all simple or easy.

There are two important facts which the Governor must consider in granting or refusing a dissolution. In the first

place, the duration of Colonial Parliaments is brief, and has never been so long as that of the Parliament of the United Kingdom, so that he must remember that if he refuses a dissolution it will not be long at the outside before the people can ratify his action or not. Then he must remember that the shortness of Parliament, and the important work which has to be done, render a dissolution to be avoided if possible, for the waste of time, expense, and dislocation of a general election, if less serious in themselves than the same features in this country, are equally important to a smaller community. Moreover, there is growing stronger and stronger the feeling, in Australia at least, that a dissolution does wrong to the members of Parliament, who thus are not merely put to trouble and expense, though election expenses are not on the English scale, but are put in jeopardy of losing their salaries, an important consideration in a place where the paid member is an institution. Then a second consideration is the question of supply; it cannot, of course, be made a *sine qua non* that a Ministry which desires a dissolution should obtain supply, for in that case the Lower House would be able to prevent itself being dissolved against its will, but it is an important consideration how far there will be funds legally available for public services. If there are not funds, of course, the Government simply has to spend on, trusting on an act of indemnity in the form of an *ex post facto* appropriation; but not only is there the lurking chance that the appropriation may not be granted, but there is always the difficulty that no Government without supply can do more than keep the routine services going, and in a young country a loss of time is more severe than in an older community.

The case of refusal of dissolution and the grant under circumstances of difficulty are almost innumerable, and many of them are interesting. One of the most important of the earlier cases is that of Governor-General Sir E. Head, of the united Province of Canada in August 1858, on the defeat of Mr. Macdonald's Ministry.[1] He sent on their resignation for

[1] Canada *Legislative Assembly Journals*, 1858, pp. 973–6, 1001; Pope, *Sir John Macdonald*, i. 188, 337–41; Goldwin Smith, *Canada*, pp. 136, 137.

Mr. Brown and Mr. Dorion, and suggested that Mr. Brown should form a Ministry. Mr. Brown did so, and then discussed with the Governor the question of dissolution. He was badly beaten at once in both Houses of the Legislature, and it was clear that he could only dissolve. But the Governor, in a long and reasoned memorandum, declined to grant a dissolution, on the ground that there seemed no reason to be sure that the Government could not be managed by the old administration without a dissolution; that a dissolution promised little prospect of change; that there was no reason to ascribe to the measures suggested by the new Ministry any special efficacy to deal with the troubles then affecting the two parts of the province, and that the time of harvest was inconvenient for an election. On learning the decision the administration resigned and the new ministers took their seats again, not being compelled to secure re-election, as there had been no substantial break in the tenure of their offices.[1] This, however, involved a curious 'double shuffle', ministers first accepting new offices so as to comply with the terms of the Act 20 Vict. c. 22, and then taking over their old offices, a proceeding naturally severely criticized in public, and the Act was later changed.

In 1860 the Lieutenant-Governor of Nova Scotia declined to grant ministers a dissolution after defeat in the House, and the case is interesting because he met in his defence the argument that the Governor is a mere figurehead. 'Mr. Johnston (the Premier),' he wrote, 'would place a Governor in the same position as the Queen, and the Council in the position of the Cabinet at home, forgetting entirely that the Governor is himself responsible to the Home Government, and that it is no excuse for him to say in answer to any charge against his administration of affairs, I did so by the advice of my Council.' His action was justified by the result, as the Opposition formed a successful administration.[2]

In 1877 the Governor of New South Wales sent home for

[1] 17 U. C. Q. B. 310; 8 U. C. C. P. 479.

[2] Nova Scotia *Assembly Journals*, 1860, App. pp. 11–46; 1861, App. No. 2.

advice as to his action in connexion with the grant of a dissolution when supply was not granted being made conditionally on supply being obtained. It had become systematic in the Colony to delay supply until sometimes months after the beginning of the financial year, and dissolutions were frequent. He had granted such dissolutions in March and August, reserving himself the right to reconsider the matter if temporary supply was not conceded by the Opposition.[1] The question was referred by Lord Carnarvon, the Secretary of State, to Sir T. Erskine May, who sympathized with the Governor in his desire to secure that supply should be granted, but who thought that there was objection to letting the Parliament know that he had granted a dissolution conditionally on the Government obtaining supply, since thus the Lower House could defeat the promise of a dissolution; he was therefore in favour of a definite consent or refusal after full discussion with ministers and consideration of the situation. Mr. Brand, the Speaker, thought that his action was sound in substance, and that it was very essential to check the most undesirable position which had grown up in the Colony, which hampered the Governor and interfered with the efficiency of administration, making the House master of its own dissolution by refusing to do more than pass supply from month to month. The improvement in methods was seen in 1878 on the resignation of the Farnell Ministry. The Governor asked Sir J. Robertson to take office; he did so, and asked Mr. Farnell to secure supply; the ex-Premier agreed, but the Assembly omitted any provision for the Exhibition then about to be held. Sir J. Robertson retired, and the Governor invited Mr. Farnell to resume office, but the Assembly would not agree to transact business while the Farnell administration was in office, so that the Governor sent for Sir H. Parkes, who succeeded in forming, with the aid of Sir J. Robertson, a Government. Supply was then, by the aid of Mr. Farnell, granted, thus following the English practice.[2]

[1] *Legislative Assembly Journals*, 1876–7, i. 179, 184–93.

[2] *Legislative Assembly Votes*, 1877–8, i. 451; Rusden, *Australia*, iii. 501, 502.

Special interest also attaches to the case of Lord Canterbury in Victoria, because of his large and varied experience in Parliamentary Government.[1] The Duffy Ministry asked him to dissolve when defeated, and represented that they should be given a dissolution, as a Ministry in England was given one. They also pointed out that they had not appealed to the country before, that the Parliament had been elected under the auspices of their opponents, that the country was likely to be with them if they appealed to it, and that it was improbable that there could be formed any stable administration from the existing Parliament. But the Governor refused to accept their advice: he was not fully prepared to accept their view of the English position, though it is pretty clear that he really agreed with them, but he dwelt upon the personal responsibility of a Governor, which was serious. He held that the country could well be managed by a Ministry chosen from the existing Parliament, and proceeded to choose one which held office with success. His action was criticized very bitterly by the outgoing Ministry, and it was certainly a hard case, for they had very good reason for their belief that they might very easily have won in the country.[2]

In Tasmania in 1877 the Governor, Mr. Weld, was asked for a dissolution by the Fysh Ministry, which after full consideration he gave. His ministers took the then unusual and very ill-advised course of laying before Parliament the memorandum in which he explained the position, with the result that the Assembly criticized the views of the Governor, a criticism to which he returned very wisely no reply, and he had the satisfaction of having his action upheld by the Secretary of State. In 1879 he had more troubles on his head, for Mr. Crowther, who had followed Mr. Giblin, Mr. Fysh's successor

[1] *Parl. Pap.*, H. C. 346, 1873. In 1875 the Acting Governor, Sir W. Stawell, refused a dissolution to Mr. Kerferd in August, and then later refused one to Mr. Berry, because he did not think that there were clear party lines on which the House and people could divide; see Morris, *Memoir of George Higinbotham*, pp. 194, 195; *Parliamentary Debates*, xxi. 942 seq., 1259 seq.

[2] Victoria *Legislative Assembly Votes*, 1872, No. 45.

[3] Tasmania *Legislative Council Journals*, 1877, Sess. 2, No. 45; Sess. 4, No. 19.

in the leadership of the party, asked for a dissolution on the ground that it was desirable to test the feeling of the country on the principles of direct taxation and a change of relations between the Houses. The Governor declined, as the House had been elected under their auspices, there was no clear line of division in the country on the topics suggested by the Government as being ripe for settlement, and there was no real prospect of any dissolution resulting in a clear verdict for a policy rather than for persons.[1]

In South Australia in 1871 the Governor accorded a dissolution to ministers on their being defeated in the Assembly by the casting vote of the Speaker, though both Houses passed addresses asking him not to dissolve; his action was clearly correct in the case of so close an issue, as a Ministry formed without a dissolution could not have had any stability.[2]

New Zealand, as usual, presents interesting features. In 1872 the Governor, Sir G. Bowen, declined to grant the Stafford Ministry a dissolution, because he saw no prospect of any result from such a dissolution, and he asked that the Government should be constructed on a wider basis, which was accomplished by the formation of an administration on October 11 under Mr. Waterhouse. But he quarrelled with Mr. Vogel and retired in March 1873; his successor, Mr. Fox, resigned after a month of office, but happily Mr. Vogel was successful in keeping a majority together for a time.[3] In 1877 the Grey Liberal Ministry asked the Governor, Lord Normanby, for a dissolution, because, having taken office in October on the defeat of their predecessors under Major Atkinson on a vote of confidence, they would have been defeated in the House before they had time to develop their policy, but for the casting vote of the Speaker. They

[1] Tasmania *Legislative Council Journals*, 1879, No. 66; Rusden, op. cit., iii. 481.

[2] South Australia *Legislative Council Journals*, 1871, p. 65; *House of Assembly Journals*, 1871, pp. 235, 237.

[3] New Zealand *Parl. Pap.*, 1873, A. 1, pp. 7–20; Rusden, *New Zealand*, iii. 38 seq. He retired in 1876 on his appointment as Agent-General, and was succeeded by Major Atkinson.

urged that they were entitled to a dissolution, as the House had been elected under the auspices of their rivals, and there was every prospect that an election would leave them in a substantial majority. The Governor declined, because he did not think there was any certainty of a change in the views of the country, there was no great question at issue, other arrangements were possible, and there was no grant of supply. He could not undertake to consider a dissolution unless supply were granted for three months. The Ministry then advanced the view that the power to dissolve was one resting on the Constitution Act, not on the prerogative, and therefore should be exercised on ministerial advice without regard to the grant of supply. The Governor rejoined that he had a clear discretion to dissolve under the Act, and that the royal instructions left him full discretion to refuse to dissolve despite ministers' advice, and he refused to dissolve. Ultimately Parliament was prorogued, the usual supplies having been voted.[1] A month later the Governor was again asked to dissolve, but he had now come to the conclusion that it was not necessary to do so, as the Premier could probably command a majority in the next Parliament. On the other hand, the Premier argued that the Governor was only a constitutional monarch, and must dissolve on advice. The matter was referred to the Secretary of State for the Colonies, who on February 15, 1878, definitely approved the views taken by the Governor of his rights and his duties, while emphasizing his duty to consider carefully the views of his ministers.[2] In July 1879 the Government, however, was defeated in the House on a motion of no confidence, and the new Governor consented to dissolve on condition that Parliament should be called as soon as possible. This was agreed to, but both Houses addressed the Governor to secure that there should be no delay in summoning them, and the Governor then asked for an assurance from the Premier that he would advise the House to be summoned early.[3] The assurance

[1] New Zealand *Parl. Pap.*, 1877, A. 7; 1878, A. 1, p. 3.

[2] Ibid., A. 2, p. 14; *Gazette*, 1878, pp. 911–14.

[3] Ibid., 1879, A. 1 and 2; Rusden, *New Zealand*, iii. 278 seq.

required was given, and Parliament when it met turned out the Government by two votes, and Mr. Hall[1] formed a Government. The Governor was not yet rid of his troubles, for the ex-Premier, who was in good and bad alike strenuous, revealed to the House that he had been compelled by the Governor, with the alternative of resignation, to take the step necessary to allow Mr. Hall to resign his place on the Legislative Council, of which he was a member, in order to become a candidate at the election for the Lower House. Fortunately the episode did the Governor no harm, for his action had been clearly in the right.[2]

There is also an interesting case that is worth mentioning as a sequel to the case of Mr. Letellier, which will be adduced below. Mr. Joly, who was called by Mr. Letellier to office, had never a strong hold of the Government. He was at last defeated by six votes in the Lower House, and the Upper House had already stopped the supplies, and so he asked in 1879 for a dissolution on the ground that he anticipated a majority from the country. The request was refused, on the ground that he had already had one dissolution, that he had never had a substantial majority, that there was no likelihood of the grant being effectual in returning his party in strength, and because the Legislature only lasted four years, and should not be frequently dissolved. The Lieutenant-Governor's action was upheld by the fact that Mr. Chapleau formed with ease a new Government.

The question of the power of the Governor to dissolve Parliament was raised by Sir F. Dillon Bell at the Colonial Conference of 1887 on behalf of New Zealand.[3] He admitted that there had been cases in the past where there had been undeniable advantages in the position of personal influence

[1] This was reconstructed under Mr. Whitaker in 1882, then reconstructed in 1883 under Major Atkinson, who was defeated in 1884, and after a dissolution resigned on defeat at the polls.

[2] New Zealand *Parliamentary Debates*, xxxii, 283–9, 387, 397, 579.

[3] See *Parl. Pap.*, C. 5091, pp. 555 seq. On the other hand, in favour of discretion as to dissolution, see Baker, *Constitution of South Australia*, p. xxv; Goldwin Smith, *Canada*, pp. 194, 195; and cf. Dilke, *Problems of Greater Britain*, i. 294, 295.

which was given to the Governor, for he could thus exercise a moderating influence over the strong spirit of partyism which might exist at any particular moment. But, on the other hand, the Government of New Zealand of the day were of opinion that whatever advantages that position of moderating influence and power conferred were more than counterbalanced by the effect that was produced in creating a political position on the part of the Governor which tended to the suspicion or rather the imputation of partisan feeling against him. It was not the fact that much want of confidence had been felt with regard to the personal qualifications or impartiality of the Governor himself, but the party, which was disappointed by his refusal, had launched imputations of partiality and partisanship against the Governor, and the Government of New Zealand thought that the Prime Ministers in the Colonies should be given the same position as the Prime Minister in England, that is to say, that the Governor should, unless there was some very extraordinary cause for interference, as a matter of course take the advice of his ministers for the time being as to the question of the dissolution of Parliament. Sir Graham Berry, who was a representative of Victoria, thought that the principle contended for by Sir F. Dillon Bell was right; that is to say, that a dissolution should be granted as a matter of course and not as a matter of favour, and that it should not be a personal matter on the part of the Governor, but a constitutional function, which he would exercise under advice exactly in the same way as he exercised all other functions. Mr. Service, also a representative of Victoria, dissented entirely from Sir Graham Berry's view, and expressed doubt as to whether the Queen granted a dissolution whenever asked for. Sir John Downer, on behalf of South Australia, thought that it was most undesirable to alter the existing custom, and he suggested that the practice in England was still the same as in the Colonies. Sir Samuel Griffith, representing Queensland, concurred in thinking that the change would be most undesirable. He had known cases in the Australian Colonies where the Governors were advised by ministers to dissolve

Parliament on the assumption that the advice would not be acceded to. In one case the advice was not taken, in the other it was—to the great dismay of the Government. This was specially a case in which there should be some superior and calmer authority to determine whether a dissolution were necessary or not. To adopt any other rule would introduce grave constitutional changes and would diminish to a very great extent one of the powers of the Crown. On the other hand, Sir William Fitzherbert, one of the representatives of New Zealand, was strongly of opinion that the responsibility of ministers in this respect should be complete. Sir Robert Wisdom, however, on behalf of New South Wales, considered that the proposal was quite improper; no inconvenience had attended the refusal of the Governor to accept advice except the inconvenience to the Ministry tendering the advice, and the public had never suffered so far as he knew by the refusal of the Governor to grant a dissolution; the opinion of Sir Ambrose Shea, on behalf of Newfoundland, was evidently against the idea, and no action was taken accordingly as the result of the discussion.

The year 1899 saw the curious feature of three refusals of dissolution of Parliament by Colonial Governors in Australia. On September 7, 1899, Mr. Reid was defeated on a vote arising out of a personal matter—the payment of an allowance to a commissioner—and asked Lord Beauchamp for a dissolution, which was not accorded, doubtless because there was no real public issue at stake and Mr. Lyne was ready and able to form a Ministry to carry on Mr. Reid's own plans. On November 28 Mr. Kingston was defeated in the South Australian House of Assembly, was refused by Lord Tennyson a dissolution, resigned, and was succeeded by Mr. Solomon, who, however, had to resign in a few days, when Sir F. Holder, treasurer in Mr. Kingston's Ministry, took office for a couple of years. On December 1 Sir G. Turner was defeated in the Victoria Legislative Assembly, and Lord Brassey refused him a dissolution, Mr. Allan McLean being sent for and holding office for nearly a year.[1]

[1] See Quick and Garran, *Constitution of Commonwealth*, p. 464; South

The principles which were laid down at the Colonial Conference have never been varied in any degree, and recent history affords many interesting examples of their being followed. In the case of the Commonwealth there have been three cases of the refusal of the Governor-General to grant a dissolution. In 1904 the Labour Ministry of the day was defeated on the question of the Conciliation and Arbitration Bill by a coalition of the party led by Mr. Deakin with that led by Mr. Reid. The Premier applied for a dissolution, thinking no doubt that it would be desirable to see if the country would not decide between the rival policies by sending back a strong Labour Party, even if it were not strong enough to control the Government. But the Governor-General declined to grant a dissolution, no doubt on the broad ground that the possibility of Parliamentary Government had by no means been exhausted.[1] This was obviously the case, for a Ministry, that of Mr. Reid and Mr. McLean, had been agreed upon to unite the followers of Mr. Reid and Mr. Deakin, and that Ministry held office until June–July 1905, when, the coalition having broken down, the Prime Minister was defeated at the opening of Parliament. Mr. Reid then applied for a dissolution, but again the Governor-General refused to grant one.[2] Matters had now been patched up again between the Labour Party and Mr. Deakin, who had acted together against Mr. Reid, until Mr. Reid and the Labour Party coalesced to defeat Mr. Deakin on the Conciliation and Arbitration Bill by extending its operation to railway employees, a proposal which was held to be *ultra vires* by the Commonwealth High Court in view of the fact that railways were state agencies, and as such could not be interfered with by the Commonwealth. Again, the new coalition Government—for though the Labour Party would not join the Ministry they supported it very steadily—was successful for a time, until, in view of the elections,

Australia *House of Assembly Debates*, 1899, pp. 917 seq. The ground of Mr. Kingston's failure was personal; Sir F. Holder entered federal politics in 1901, when Mr. Jenkins became Premier, an office which he held until 1905.

[1] Commonwealth *Parliamentary Debates*, 1904, p. 4625.

[2] Ibid., 1905, pp. 133, 134; Turner, *Australian Commonwealth*, pp. 97–100.

which were due in 1910, the Labour party withdrew formally its support from the Government, in order that it should be able to go before the country as a united party and fight the Government seats. This resulted in the retirement of Mr. Deakin, who, however, made no attack on the Labour Government until they declined, in the early part of 1909, to consent to the presentation of a *Dreadnought* to the Imperial Government at a time when feeling ran high in Australia, and when New Zealand had led the way by a munificent offer of support. Then they were turned out by a coalition between the supporters of Mr. Deakin and Mr. Cook, Mr. Reid having retired to make room for the possibility of fusion, which could not have been accomplished as long as he was in active political life. The Governor-General refused Mr. Fisher a dissolution, and Mr. Deakin took office.[1] The party, however, was completely defeated at the general elections and retired, and a Labour Government took its place in April 1910.

In the States of the Commonwealth there have recently been strong examples of the difficulties of a Governor's position. In South Australia, Mr. Price, the Premier, applied to the Governor in 1906 for a dissolution on the ground that he was anxious to take the steps necessary under the Constitution Act of 1901 to secure a penal dissolution of the Lower House with a view to coercing the Upper House, with which he was engaged in a bitter controversy over the right of franchise. The Governor was unwilling to dissolve a Parliament which had not long been in existence, and in which the Premier had only a small majority in the Lower House and was in a hopeless minority in the Upper House. He therefore declined to grant a dissolution except as a last resort, and tried to find if any member of the Lower House could form a Government. He soon found that this was impossible, and he therefore recalled Mr. Price and undertook to give him the dissolution for which he asked, and matters were settled with the Upper House in the direction of a con-

[1] Commonwealth *Parliamentary Debates*, 1909, p. 227. This is a case of special interest as it is very possible that a dissolution would have meant the return of the Government; cf. Turner, op. cit., p. 221.

cession as to the franchise, though not one so large as was desired by the Lower House. The action of the Governor was approved by the public press and by the people generally.[1]

In 1907 the Governor of Queensland was involved in a question of great difficulty also arising out of the relations of the two Houses. He was asked by his Premier, under circumstances which will be detailed elsewhere, to consent to swamp, if need be, the Upper House: he refused to do so, and the Premier resigned. He then sent for Mr. Philp, who was unable to obtain supply. The Lower House declared that it was willing and ready to go on with business, that important matters awaited disposal, and protested against a dissolution; but the Governor insisted on dissolving, with the result that Mr. Philp was badly beaten and the old Ministry reinstated, whereupon the House, at the instance of the new Ministry, passed an address regretting the Governor's action, but took no further step to proceed against him.[2] It is clear in this case that the Governor was not correct in thinking that there was a reasonable chance of the Government being successful at the elections, but he was probably influenced by the fact that the election would decide legitimately the fate of the Upper House. It did so, and in a curious manner, for the coalition by which Mr. Philp had been defeated, consisting of Labour and Kidstonites, rapidly dissolved, and Mr. Kidston, backed by his quondam enemies, proceeded to solve the relations of the Houses by arranging a Referendum Act[3] to decide in cases of disputes between the two Houses.

In the case of Victoria in 1908 the position was very peculiar. A very strong Government by sheer muddling frittered away its large majority, and shortly after seeming quite invincible found itself defeated in the Assembly. What ensued can best be set out in the memorandum of the facts made by the Governor and agreed to by the ex-Premier, which by the consent of the Governor was communicated to

[1] *House of Assembly Debates*, 1906, Sess. 2, pp. 524 seq.

[2] *Parliamentary Debates*, c. 1735 seq.; ci. 38 seq.; below, pp. 582 seq.

[3] Act No. 16 of 1908. See also *Parliamentary Debates*, ci. 361 seq., 566 seq., 606, 648 seq., 706, 717, 767, 801.

the Assembly in response to a request from the leader of the Labour party in the House on February 18, 1909.

On 3rd December the Government were beaten in the Legislative Assembly by a majority of twelve on a direct vote of no confidence.

The Premier reported this to me next day, and told me that the Cabinet were unanimous in desiring a dissolution, which he strongly advised me to give in the interest of the State.

He recognized that, especially on the matter of a proposed dissolution, the advice of a Premier who had lost the confidence of the House must be received with caution; but he was prepared to support his views by argument.

Two courses were open to me—to follow the Premier's advice and dissolve; or to reject his advice, ask him to tender his resignation, and endeavour to find a member of one of the two Houses to form an Administration.

My duty was to take the course which I thought most likely to meet with the approval of the constituencies.

The Assembly was elected in March, 1907. Its second session was expected to finish almost at once, and it could, in any case, only sit through one more session. It was quite possible, therefore, that it no longer represented the views of those who elected it.

On the other hand, members even of a comparatively old Parliament are not likely to declare their want of confidence in a Ministry without some reason for believing that popular feeling is with them.

Christmas and harvest time seemed to me a peculiarly unsuitable season in which to hold a general election; and there was much to be said for delay until recent legislation, enlarging the franchise, could take effect. I pointed this out to the Premier; he told me that Ministers knew that dissolution at that time would be unpopular, and that its unpopularity must do them harm in the constituencies; they nevertheless asked for it, which was, he claimed, proof that they had strong grounds for believing that the electors had full confidence in them.

In any case, I thought the importance of securing a true representation of the country ought to outweigh any inconvenience in the time chosen for an election.

The reasons which the Premier gave me for advising dissolution were three :—

(1) He believed that the Legislative Assembly, if it really had no confidence in the Government, did not represent the feelings of the country. He quoted recent by-elections as convincing indications of public feeling.

I felt that this belief, if well founded, was a strong argument for dissolution, and the by-elections which supported the Government certainly gave an air of probability to the Premier's contention.

(2) He pointed out that some of those who voted against the Ministry did so avowedly, not because they disbelieved in the policy of the Government, but because they thought that certain of his own past actions showed want of uprightness. They made accusations against him, the truth of which he indignantly denied; but he said that if these were grounds for declaring want of confidence in the Ministry, it was only fair to himself, to the Ministers who supported him, and to the country that the constituencies should be asked to pronounce their judgment.

I did not think this in itself a reason for granting a dissolution, though the case for one might be strengthened if dissolution gave the electors an opportunity to express their views on matters concerning the honour of their State.

(3) The Premier thought that if I did not follow his advice, I could only ask one of two men to form a Government—either Mr. Prendergast, the recognized leader of the Opposition, or Mr. Murray, who had moved the vote of no confidence. Either of these, he thought, would be willing to form a Ministry, and might for the moment succeed; but to ask either to do so would not be in the interest of the State, for he felt certain that no Government led by either of them would last for many days. He believed dissolution was in any case inevitable before long, and ought to be given to the Ministry which the country had placed in power with so large a majority in 1907.

I did not think that my choice was necessarily confined to one of these two gentlemen, nor did I think that the Premier's opinion that dissolution was inevitable was necessarily correct; but I felt that, if I should decide to dissolve Parliament, there was some reason in his claim to be allowed to appeal to the country whilst still in office.

I did not seriously consider whether I should look for a leader in the Legislative Council; for I believed that the Legislative Assembly would never accept as Premier one who was not a member of their own House.

The majority in favour of the vote of no confidence was made up of fifteen members of the Labour Party, who never had any confidence in Sir Thomas Bent's Ministry, and 22 former supporters who had lost confidence in it; but who, both at the last general election, and apparently still, were

opposed to the Labour Party. The 25 members who, by voting against the motion, showed their confidence in the Cabinet, were the most numerous section in the House. It was obvious that no leader could form a stable Government in the Assembly then existing unless he could command support from two of these sections. The Premier assured me that his supporters would continue to oppose the Labour Party, and were not likely to be friendly to those non-Labour members who had voted against him.

I carefully considered Mr. Prendergast's position as leader of the Opposition. The Labour Party, in their attitude to politics, claim to stand exactly as they did at the last election. Mr. Prendergast, therefore, with only fifteen followers, could not command the confidence of the House, unless there had been a change in the attitude of a considerable number of non-Labour members towards him. Of this there was no evidence. It would not have been fair to the Labour Party themselves to have asked their leader to form a Ministry, unless I was prepared to allow him to appeal at once to the electors. And, as I saw no sign that the constituencies, which had hitherto been so opposed to Mr. Prendergast's party as to return 50 members against it and only fifteen in its favour, would like an appeal made to the country by him, I did not feel justified in asking Mr. Prendergast to form an Administration.

I could find no evidence of Mr. Murray having ever been regarded as a leader in the House, and nothing had been disclosed in debate on his motion to show that anything had arisen to give him that position. The majority which supported him, though large, seemed to me entirely formed to carry that one motion; two of those who voted with him deliberately expressed doubt as to following him in anything else; some were well known to be hostile to the Labour Party, with whose representatives they then voted; others had shown by their speeches that they were divided among themselves on the land question, with which it was generally expected that the Government would shortly deal; and nothing showed that the Labour Party meant to give him further support.

In my opinion any Ministry formed at that moment by Mr. Murray could have had no real stability; and I saw nothing to lead me to think that he, rather than the present Ministry, ought to appeal to the country at a dissolution. Indeed, there was evidence to the contrary. Mr. Murray had said that one reason for his distrust of the Government

was dissatisfaction with the reconstruction of the Cabinet. A recent division, however, seemed to show that apart from the Labour representatives, there were only three members besides Mr. Murray who had been opposed to reconstruction; and several constituencies had expressed their opinion on it since it had taken place.

Within a few weeks before the vote of no confidence, four members joining the Ministry had appealed for re-election; one of these, a member of the Legislative Council, was returned unopposed; while of those belonging to the Legislative Assembly, two received majorities larger than they had at the last general election, and the remaining one, though his majority (789) was less than that which he had at the general election (852), could not be fairly said to have lost the confidence of his constituents.

The debate on the vote of no confidence had made me think that possibly the House as a whole desired a change of Premier rather than a change in the professed policy of the Government. If, therefore, general consensus of opinion among those who had been in the habit of supporting the Government had pointed to any leader as acceptable, I should have felt bound to consider whether I ought not to ask him to try to form a Government; but in spite of the fact that recent changes in the Cabinet must have directed public attention to those who develop the policy of the State, nothing seemed to indicate that there was any such leader.

To sum up, the evidence before me led me to believe that even if the constituencies, in spite of the recent by-elections which were the only clear indications of opinion, and which were in favour of the Government, did desire a change of Ministry, there was no proof that they wished for either Mr. Murray or Mr. Prendergast as Premier—that as there was no apparent probability of either of those gentlemen being able at that moment to form a stable Government, and as I knew of nothing entitling me to invite any one else to try to do so, I had no reasonable grounds for differing from the Premier's view that dissolution was inevitable; that a dissolution at Christmas time would not increase the popularity of the Government, and that, therefore, I should not give the Premier any unfair advantage if, in the absence of clear indications of desire in the country for any other definite leader, or for a policy other than that which his Government professed, I allowed him to appeal to the electors.

It was my duty to act in local matters on the advice of the Ministry, as expressed by the Premier, unless I was prepared

to find other advisers better able than they to conduct His Majesty's Government, or unless I felt that their advice was contrary to the feelings of the country. I did not believe that I could at that moment find such advisers, and I felt that if I refused to accept the advice of the Premier I should be doing so without reasonable certainty of my action being supported by the constituencies.

I therefore agreed to dissolve Parliament.

The Premier concurred with me in thinking that the new Parliament ought to meet with as little delay as possible. He assured me that, provided the elections took place before the end of the year, sufficient money was legally available to discharge the liabilities of the State without any further grant of supply.

I therefore dissolved Parliament at once to permit of its re-assembling on the earliest day which the Premier thought at all convenient.

The action of the Governor was not popular, because the members of Parliament did not like being sent back to their constituencies so soon after the last election, and the season of the year was not well suited for electioneering.[1] But a more serious matter came to light: the Auditor called attention in a report of December 30, 1908, to the fact that large sums were being expended not merely without parliamentary authority, but also without a warrant from the Governor. It appeared that the Treasurer, who was also Premier, gave instructions for the expenditure without regard to the legal difficulties of the position, because it was necessary to keep the state solvent. The matter was taken up on the assembling of Parliament,[2] when the ministers at once resigned as they were clearly in a minority, and the matter was entrusted to a commission for inquiry. But the commission mainly elicited the fact that financial irregularities on a large scale were usual, not that the ex-Premier had acted in any very improper way, bearing in mind the

[1] For criticisms of the Governor's action, see *Age*, December 7, 1908, January 19, 20, February 24, 1909; contra, *Argus*, December 26, 1908, February 24, 1909; and cf. Sydney *Bulletin*, December 17 and 24, 1908; Adelaide *Chronicle*, December 12, 1908, January 9, 1909.

[2] See *Parliamentary Debates*, 1909, pp. 9 seq., 330-3.

customs of his predecessors. The inquiry, however, clearly showed that the Governor had in no wise been to blame; he asked the minister as to supply and he received a satisfactory assurance, which was not, it seems, warranted by facts. He could not properly have taken any steps further to safeguard himself, and the precedent of the action of Sir Hercules Robinson in 1877, which was quoted as showing the extent of his duty, was fully carried out by him. The result of the election, which was claimed in some quarters as showing that he had acted wrongly in granting a dissolution, was no evidence, as the essential ground of his action was that there was no prospect of a strong Government without a dissolution, while after the dissolution he was enabled to secure a Ministry which has retained office until 1911, a considerable feat in view of the varied and contesting parties in the state and the absence of any great dividing lines.

In 1907 a very curious incident occurred in Western Australia. The Upper House rejected by two votes a Land Tax Bill, and ministers then asked the Governor for a dissolution. His action is shown by his speech on closing the third session of the sixth Parliament, on September 19, 1907:

I have to thank you for the earnest attention which you have given to your public duties, and regret that the labours of the Session have been brought to an abrupt and unexpected termination.

In view of the rejection by the Legislative Council of a Bill providing for the imposition of Taxation on the Unimproved Value of Land, my Advisers deemed it to be their duty to tender their resignation. Seeing, however, that the Government retains the full confidence of the Legislative Assembly, I did not feel justified in accepting the resignation, or in complying, under present circumstances, with a further request made for a Dissolution.

I am confident in the hope that the proposals which will be presented to you on reassembling will secure that favourable consideration which any Financial Measure, endorsed emphatically by that branch of the Legislature in which all Financial Measures must be initiated, demands, and which my Advisers consider to be of vital importance to the financial stability and development of the State.

Under these circumstances I desire to relieve you for a short

period from your duties, and accordingly declare this Parliament prorogued until Tuesday, the 8th day of October, then to meet for the despatch of business.

The result of his action was in every way satisfactory. The Upper House proved on the meeting of the Parliament more amenable to reason, and an Act was passed after concessions on both sides.

In Tasmania an interesting case of a dissolution being refused arose in 1904, when the Acting Governor was placed in the not very usual position of having to decide the issue in the absence of the Governor on leave; the circumstances are clearly and effectively set out in the memorandum which was addressed to the Premier on July 5 by the Chief Justice in his capacity as administrator of the Government :—

The Acting Governor this morning has received through the Premier the advice of Ministers that a dissolution of the House of Assembly should take place. The Acting Governor thereupon asked the Premier to state in writing the grounds upon which such advice was tendered, and has received the following reply from Mr. Propsting :—

'Your Excellency,—Following upon your request of this morning, I now have the honour to set out hereunder the grounds upon which I apply to Your Excellency for a dissolution of Parliament. The present Government assumed office on the 9th April, 1903, and met the House on the 18th August in the same year. I believe that two-thirds of the members of the House of Assembly were returned pledged to a reduction of expenditure, a reduction of the number of members, and the imposition of probate, or for a non-inquisitorial form of taxation, in substitution for the personal exertion provisions of the Income Tax Act. Bills to attain these objects were passed through the House of Assembly, and sent to the Legislative Council in the session of 1903, and were all rejected or amended in such a way that the House of Assembly could not accept them. Parliament prorogued on the 18th December, 1903, and was called together in March, 1904, when the principal taxation measure adopted by the House of Assembly in lieu of the provisions of the income tax referred to above was rejected by the Legislative Council. Parliament was thereupon prorogued, and met again on the 8th June, 1904, when a bill to provide for both Houses consulting their own electors in the case of continued differences between them was rejected by the Legislative Council. The House of Assembly then made a request to the Council for a free conference upon constitutional reform and financial measures, and this request was refused by the Legislative Council.

It is claimed by Legislative Councillors in the course of debate that the country is with them in their action, and it is upon that ground measures sent by the House of Assembly to the Council are rejected. I am of opinion that the country is with the House of Assembly, and this is demonstrated

by the majority held by the Government in that House, and I doubt whether any Ministry formed from those who are opposing the Government could carry on.

The reduced revenue returned and returnable from the Commonwealth necessitates a re-consideration of pledges given by members of the House of Assembly to the electors upon the question of taxation. A majority in that House are pledged to the repeal of the personal exertion provisions of the income tax.

If a dissolution is granted the Government would submit to the people a modification of the personal exertion clauses and of the occupancy tax, which was passed by the House of Assembly this year, but rejected by the Council.

Your Excellency is aware that Parliament has granted the Government supplies to the 30th of September next.

I have the honour to be,

Your Excellency,
Your most obedient servant,
(Signed) W. B. PROPSTING,
Premier.'

The position is a most unusual one. It is most unusual for Ministers to advise a dissolution when there has been no adverse vote against them.

Ministers assumed office in April last year, immediately after the general election, which had resulted in the pronounced defeat of the then existing Administration. The cardinal feature of their taxing policy was the repeal of the tax on incomes derived from personal exertion. They have on more than one occasion successfully carried through the House of Assembly a bill for its repeal, and the bulk of their proposals, especially those relating to taxation and finance, have been passed in this House by substantial majorities. There has been no vote of want of confidence passed in either branch of the Legislature, and presumably Ministers possess the confidence of that House to which constitutional usage accords the right of primarily determining their existence as an Administration. But Ministers are quite unable to obtain the sanction of the Legislative Council to their proposals, and repeated attempts to this end have failed conspicuously. A conference with the Legislative Council upon constitutional reform and financial questions has been requested quite recently by the Assembly, but the Legislative Council found itself unable to comply with the request, and the relations between the two Houses during the last few months have not facilitated the transaction of public business. The Premier within the last few days has informed Parliament of the falling off in the revenue, and has called attention to the disquieting financial outlook. He also has informed the Acting Governor that in consequence of the altered con-

ditions of the public finances, it will be impossible for him, in the interests of the State, to continue to recommend the abolition of a substantial part of the income tax, although some modification of its incidence is, in his opinion, desirable. He also is of opinion that additional taxation is necessary. Supplies have been granted for the period up to the 30th September next.

The public business of the country is at a standstill, there is a growing deficit and a decreasing revenue, and it is imperative that without unnecessary delay measures should be adopted by Parliament for adjusting the finances. In these circumstances the Acting Governor is advised to grant a dissolution.

The prerogative power of dissolving Parliament ought not to be exercised except for the benefit of the people. A dissolution is an appeal by Ministers to the people in the last resort to determine some question of policy, and in almost every case in which it is granted it is preceded by some adverse vote of the popular Chamber. In the present case there has been no adverse vote. Is there any question of policy on which Ministers can appeal? When the Government took office its policy was to repeal the personal exertion clauses of the income tax, but altered conditions have made that policy inexpedient, if not impossible, and Ministers can no longer pursue it. This brings Ministers substantially into accord with the view taken by the Legislative Council as regards the income tax, and presumably removes the difficulty created by the expressed intention of Ministers not to collect the tax. The Acting Governor thinks that this circumstance will go far to remove the difference of opinion between the two Houses as regards other taxation proposals, and will conduce to more harmonious relations. The financial condition of the country itself appears to have solved one great difficulty, and it is obvious that as there is no difference on this question, there is nothing to appeal to the country upon. The proposal for constitutional reform of the Legislative Council has been made a definite issue by Ministers, but it does not appear to the Acting Governor to be the paramount and pressing question now. It is to a great extent factitious, and has arisen out of the rejection of financial measures. The adjustment of the finances is now the supreme question, and the Acting-Governor is of opinion that the people of the State would so regard it. The altered financial conditions appear to necessitate a reconsideration of the position, and the submitting of new financial proposals

for meeting the exigencies of the State. On this question there can be no appeal to the people at present, because Ministers have not yet submitted to Parliament measures which they say are necessary. There is nothing to appeal upon. If such measures are submitted, they may receive approval, in which case a dissolution, costing some £1,200, would be an extravagant and avoidable error, especially at a time when rigid economy appears to be necessary. Moreover, the decision of the electors, to be of any value for future guidance, would have to be given on definite taxing proposals, and none have yet been formulated to meet the altered conditions. The form which the additional taxation said to be necessary is to take has not been disclosed. It is asked that the Assembly may be dissolved, in order that an appeal may be made to the country on a financial policy which not only has not been rejected by the Assembly, but has not been even submitted to it.

There only remains to be considered the existing relations between the two Houses. In addition to the reasons already stated, the Acting Governor does not think that this question has become so acute as to justify an appeal to the country in regard to it. One great difference of opinion, probably the one on which all others have mainly depended, has been removed, and as regards new proposals, there may be no difference, but if there is, a dissolution is not the only remedy. It by no means follows that another Administration could not be formed from the present Parliament which could submit proposals that would be acceptable, and which would bring the Houses into agreement.

The course of events has gone a long way to remove cause for disagreement, and if there exists any other method than dissolution to bring about a complete agreement, the Acting Governor thinks that it is his duty to use it. Extraordinary means need not be used to terminate a disagreement which is in a fair way of being terminated by ordinary means. It is not the duty of the Acting Governor to take sides with one branch of the Legislature against the other, or to criticize the action of either House. It is only when disputes between them transcend the lawful bounds of Parliamentary warfare and seem to be irreconcilable by any other means, that he is justified in the attempt to invoke the aid of the people to restore harmony by dissolving the popular Chamber.

With the exception of the question of constitutional reform of the Legislative Council, the Acting Governor fails to see

that there is any important political question upon which contending parties are directly at issue.

Existing difficulties may be disposed of without recourse to extreme remedies.

In considering the question of dissolution, the Acting Governor desires to pay the greatest attention to any representations that have been made to him by his constitutional advisers, but it is his duty to consider the question solely in reference to the general interests of the people, and not from a party standpoint. If he believes that a strong and efficient Administration can be formed that would command the confidence of the existing Assembly, and be able to carry on the public business, he ought not to resort to the 'extreme medicine' of the Constitution.

The present House of Assembly was elected only fifteen months ago. The law provides that a general election shall take place every three years, and it does not appear to the Acting Governor to be desirable that this period should be shortened without reasons of great gravity. A general election at the present time would not be beneficial to the public interest, for it would delay the consideration of the financial condition of the country, which apparently is so serious as to demand immediate attention, and it would prolong a period of political unrest which has become distasteful to the people.

The Acting Governor does not, upon a review of the position, consider that there is any sufficient ground for the dissolution of a comparatively young House of Assembly, at a time when the financial position of the State is suffering by the delay in passing necessary measures, and when it is reasonably probable that the present Parliament could furnish an Administration able to carry on the business of the country; and, also, the Acting Governor is not aware of any reason why an Administration possessing the confidence of the House of Assembly, and having supplies, should not proceed with the public business in the ordinary way.

In Tasmania again, in 1909, the new Governor, Sir Harry Barron, was confronted by a difficult position. When the ministers met the House of Assembly on October 21, the leader of the Opposition, Sir Elliott Lewis, gave notice of a motion of want of confidence. The House then adjourned to the next day, when after a debate which lasted till midnight, the Ministry was defeated by a majority of six, the

voting being sixteen to ten. The Premier then addressed to the Governor a memorandum asking that he might be granted a dissolution, but the dissolution was refused, and the Governor sent for the leader of the Opposition, who was able to form a fairly strong Government as compared with the Government of the Labour Party. The following is the text of the memorandum and the Governor's reply :—[1]

Mr. Earle presents his respectful compliments to his Excellency the Governor. In accordance with the commission recently entrusted to him by the Governor, Mr. Earle formed an Administration, which succeeded that of Sir Elliott Lewis. Ministers were duly sworn in on 20th inst., but at the first subsequent meeting of the House of Assembly on the 22nd inst., a vote of want of confidence in Ministers was moved by Sir Elliott Lewis, and carried by 16 votes to 10.

A brief retrospect of the recent political history of the State is necessary to permit of a proper understanding of the situation created by this adverse vote.

During the existence of the last Parliament the Government of the Hon. J. W. Evans held office at the period of the general elections, which took place in April last. Mr. Evans had occupied the position of Premier for nearly five years. There were at the election considerable electoral difficulties affecting Mr. Evans's Administration, and in respect of one important question it is highly probable, if not absolutely certain, that Mr. Evans would have suffered defeat if he had met the newly-elected Parliament. The settlement of the question fell to the lot of other Ministers.

Sixty candidates offered themselves for election. Of these, according to a careful analysis which Mr. Earle has made, 20 represented the views of the party which supports Mr. Earle—12 of these were returned. There were 23 who represented the opposite political view—14 were returned. Twelve candidates took a middle course, inclining in many respects towards the views propounded by Mr. Earle and his party, and only one was returned. Four of the remaining candidates cannot be classified, but their public declarations indicated that they were in sympathy with the political views of Mr. Earle. One other candidate was rejected.

It has been stated in Parliament by the Hon. A. E. Solomon (the Attorney-General in the last Administration) with evident truth, that Mr. Evans did not assume during

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

the election the authority usually exercised by a leader, and, as already stated, he did not meet the newly-elected Parliament in the capacity of a Minister of the Crown.

Mr. Evans continued to hold office for some time after the general elections, but shortly before the meeting of Parliament he called together those members of the House of Assembly (with one exception) who were not declared adherents of the party of which Mr. Earle was the recognized leader. One result of this conference was the resignation of Mr. Evans as Premier, in consequence of which Sir Elliott Lewis was entrusted with the duty of forming an Administration. This he succeeded in doing, assuming office as Premier on June 19. Mr. Evans, notwithstanding his long service as first Minister of the Crown, was not included in the Government, although Mr. Hean, the Minister for Lands in his Government, was reappointed to that office.

Under the circumstances already detailed it is evident that no member of the House of Assembly was elected as a declared supporter of Sir Elliott Lewis personally. The recent proceedings in Parliament show that no binding obligations existed to support him as a Parliamentary leader, although he was apparently requested to assume that position when Mr. Evans retired. Sir Elliott Lewis has had to encounter in the brief period of four months, since he assumed office as Premier, two votes of want of confidence proceeding from members who had taken part in the conference already referred to, and who were nominally supporters of his Government. The first adverse motion, declaring that the House disagreed with the financial proposals of the Government, was defeated (September 23), but very shortly after the defeat of this motion a prominent member on the Government side made a direct attack upon Sir Elliott Lewis's administration, and his motion declaring that the House had not confidence in the Government or in its proposals with regard to taxation was carried by 18 votes to 10. Upon this adverse vote Sir Elliot Lewis resigned, and Mr. Earle succeeded him as Premier. Mr. Earle was at once met, as before stated, by a vote of want of confidence and defeated.

From this retrospect it appears to Mr. Earle that he is fully warranted in asserting that the members who voted with Sir Elliott Lewis in support of his no-confidence motion, are united only for the purpose of defeating the present Government. It is one thing to unite for the purpose of attaining some definite object, but it is quite another to

work harmoniously together after the object aimed at has been attained.

Of the six members who within a week declared by their votes their want of confidence in two Administrations, one is an ex-Premier, who was passed over when Sir Elliott Lewis formed his Government, while one of his colleagues was retained in office : one generally credited, notwithstanding some assertions to the contrary, with aspirations to serve the State in high office, is the subject of the public declaration by Sir Elliott Lewis in the appendix to this memorandum ; one has on two occasions, by his vote, expressed his want of confidence in Sir Elliott Lewis ; and one was elected neither as a supporter of Mr. Evans nor of the party of which Sir Elliott Lewis is now the accredited leader.

Having regard to these circumstances, Mr. Earle submits to the Governor that in order to ascertain truly the state of parties in the House of Assembly it is necessary to look not at the most recent vote, but at that which brought about the downfall of the Lewis administration. That vote reveals the existence of the three parties. The party on which Sir Elliott Lewis can rely consists of eleven members : the party which supports Mr. Earle consists of twelve members ; the third party which voted in the majority, by which Sir Elliott Lewis was defeated, consists of six members. Mr. Earle begs to remind the Governor that the existing Parliament was elected under the auspices of Mr. Evans, and that inasmuch as the party associated with Sir Elliott Lewis was identified with the former Ministers, it is correct to say that Parliament was elected under the auspices of the opponents of Mr. Earle's Government.

Mr. Earle submits to the Governor that there does not exist in the present House of Assembly the material necessary to form a stable Government. In submitting this advice to the Governor it is pointed out that :—

(1) The present House of Assembly was not elected under the auspices of the present Government, but of their opponents.

(2) The vote of want of confidence in Mr. Earle's Government is a vote against a Government which has not already appealed to the country, and which, although brought into existence in consequence of the action of their opponents, has been denied an opportunity of stating their policy, or of attempting to carry on the business of the State.

(3) Ministers have reasonable grounds for believing that

the adverse vote against the Government would be reversed by a new Parliament.

(4) In the condition of parties there is no reasonable prospect of any Government obtaining sufficient support to enable them to conduct the public business in a satisfactory manner.

(5) The attempt to unite in a common party a number of members who were elected to represent varying policies is in effect a misrepresentation of the electors. And the records of Parliament show that the attempt had failed.

(6) The Lewis Administration was defeated in connexion with their financial proposals. Considerable dissatisfaction with existing methods of taxation was shown to exist during the elections, and Sir Elliott Lewis simply proposed to increase the present rates of taxation by 25 per cent. The policy of Mr. Earle's party is to remodel the system of taxation, including the repeal of the Taxation Act under which the Ability Tax is levied, and the Land Tax Act, 1905. Important proposals of finance have therefore arisen, which the House has shown a marked disability to deal with. The new proposals have never been before the electors, and it is highly desirable that whatever Government is to hold office should receive from the electors clear authority to deal with the question of finance on well-defined lines.

For these reasons Ministers think that a dissolution of Parliament at the present juncture would be in the general interests of the people of this State.

(Sgd.) J. EARLE, Premier.

The reply of the Governor to the above was as follows :—

To the Hon. the Premier of Tasmania :—

(1) The Governor, in coming to a conclusion on the request for a dissolution submitted to him by the Premier, fully realizes that the present House of Assembly was not elected under the auspices of his Ministry.

(2) It is equally true that the vote of want of confidence is against a Government which has not as such appealed to the country, but at the recent general election Mr. Earle's party was, it is presumed, a united one, and it apparently had every opportunity of declaring its policy to the electors, who, it must be assumed, voted to a considerable extent for or against that policy.

(3) In the opinion of the Governor nothing has occurred

to give him reasonable grounds for the belief that a dissolution would result in a working majority in favour of the present Ministers.

(4) As the two parties in Opposition have arranged a coalition, on what grounds it is not for the Governor to ascertain, there is a reasonable prospect of a sufficiently stable Government to carry on the Government of the State.

(5) No great question is now at issue which was not before the electors at the recent general elections.

(6) The Governor feels deeply his responsibility in having to give a decision on such a difficult question so soon after his arrival in the country, but his duty is to act in accordance with what he considers in the best interests and welfare of the people in the State. He regrets, therefore, that he feels compelled to decide against the advice of his Ministers, and refuses to burden the country with the expense and unrest of another general election after such a short interval of time. He must therefore give his decided opinion that a dissolution is undesirable.

(Sgd.) HARRY BARRON.

Government House, Hobart.
October 25, 1909.

The serious responsibility devolving upon a Governor by the discretion in matters of dissolution which he still retains is exemplified in a striking manner by the case of the Newfoundland elections in 1909.[1] There was then returned to Parliament an equal number of members, eighteen, on both sides in the House of Assembly, and a deadlock ensued. The first question would arise as to the selection of a Speaker. It was clear that when the Governor attended in person at the House and asked them to choose a Speaker, the House would be unable to obey his request. Sir Robert Bond then approached the Governor and asked that a dissolution should be granted, but the Governor declined to consent to do so. His action was obviously desirable in view of the fact that the country could ill afford the expense and trouble of a new election, and there was a chance that a new Premier

[1] *Canadian Annual Review*, 1909, pp. 36 seq. Cf. *Evening Telegram*, April 26 and 27, 1909; *Daily News*, April 27 and 28, 1909.

might be able to carry with him part of the following of Sir Robert Bond, if the latter insisted, as was probable, on resigning in view of the refusal of the Governor to accept his advice. Sir Robert resigned and the Governor then sent for the leader of the Opposition, Sir Edward Morris, who accepted office and proceeded to form a Government. But he was unable to detach any of Sir Robert Bond's following from him, or to elect a Speaker on the meeting of the House, and he was compelled to advise the Governor to dissolve the House. Naturally this action was strongly resented by Sir Robert Bond, who pointed out that he had been refused a dissolution in similar circumstances, and argued that, if it were necessary to dissolve, the Governor should recall him to office and permit him to have a dissolution. The Governor, however, adhered to the view that the dissolution which was clearly inevitable should be granted to Sir Edward Morris, and this was done with the result that the Premier was successful at the polls and came back at the head of a substantial majority.

It is clear that, though at first sight there seems to have been some hardship in the fact that Sir Robert Bond was refused a dissolution, the course followed was exactly in concordance with the law of the constitution. It was the duty of the Governor to exhaust every possible chance of forming a Government before he dissolved a House which had just met after a general election, in which both sides had placed their policy fully before the country, and which, therefore, must be deemed to show that neither party had a clear majority in the country. To give under these circumstances a dissolution to the Premier would have probably meant either a repetition of the first equality of numbers, or at best a slight majority for one or the other party, for the possession of the Government in the case of dissolution in Newfoundland has always been regarded as a great advantage in matters of politics. It was therefore fairly obvious that a dissolution granted to Sir Edward Morris would be likely to result in a substantial majority for his party, and thus secure a stable Government. Sir Robert

Bond also must be admitted to have been guilty of a serious error in tactics in not allowing the Government of Sir Edward Morris to elect a Speaker from their own number: that would have left them in a minority in the case of a vote of non-confidence, and then Sir R. Bond would have had a stronger claim to be recalled and given a dissolution: it is indeed uncertain whether the Governor would have in that case given him a dissolution, but at any rate the situation would have been much more favourable to him than it actually was.

In the case of the Cape the most important example of difference of opinion with ministers falls under another category and will be treated later. But an interesting example of the difficulties of a Colonial Premier was afforded by the circumstances in which Dr. Jameson found himself placed at the end of 1907. He had led the Government since 1904, when he displaced Sir Gordon Sprigg, but latterly his Ministry had, through internal dissension, lost more and more of weight. Finally, the defection of a member in the Upper House deprived him of control there: it was just possible to proceed with supply there by the President's casting vote, as long as the House was sitting and did not go into Committee, but once the House was in Committee nothing whatever could be done, and though the House, when out of Committee, could resolve that the Committee should proceed to dispose of the Bill, there was no means by which effect could be given to this resolution, and an effort to move to omit the Committee stage failed through the Opposition members staying away and leaving the House without a quorum. Eventually the Prime Minister was compelled to promise to ask for a dissolution, if he were granted supply, and the grant then was made and the Governor granted a dissolution. In such a case it is clear that the Governor had no alternative, as the parties were agreed that there must be a reference to the people which alone could settle the issue, and in point of fact the issue resulted in the decisive defeat of the Ministry and the return to power of Mr. Merriman.[1]

[1] *House of Assembly Debates*, 1907, p. 589; *Legislative Council Debates*, 1907, pp. 338–74 *passim*.

§ 2. Relation of the Governor to a Defeated Ministry

It is of course clear that a Ministry which has been defeated and is simply waiting to leave office, unless the country returns it to power, cannot be allowed to exercise the more important functions of Government. If they tried to do so, it would be the duty of the Governor to restrain them, and if need be to dismiss. The instances in which this principle has been laid down are numerous: for example, Sir John Young, in reporting in 1865 as to his refusal to create extra members of the Upper House of New South Wales at the request of his Ministry, noted the fact that as they had no real support in the country and were on the verge of a defeat he had declined their application, for that among other reasons.[1] Sir Hercules Robinson, in granting the request of Sir G. Grey for a dissolution in New Zealand in 1879, expressly laid stress on the fact that the Ministry must confine its activities to mere routine matters until it had appealed successfully to the people.[2] In 1877 the Marquess of Normanby declined to accept the advice of his ministers to add a member to the Legislative Council of New Zealand while a vote of censure was pending against them in the Lower House, and though on the victory of the Government in the debate he at once made the appointment, the protests of the Government were not accepted as valid by the Secretary of State to whom the incident was reported.[3] On the other hand, Lord Onslow, in 1891, on the defeat of the New Zealand Ministry, was nevertheless willing to create a limited number of members of the Upper House at the request of the Ministry. They desired to create eleven new members, and insisted that he must accept their advice or resignation. He, however, by negotiations induced them to

[1] *Parl. Pap.*, H. C. 198, 1893–4, pp. 75 seq.

[2] New Zealand *Parl. Pap.*, 1879, A. 1 and 2. But in 1869 the Governor made appointments to the Council, both during and after a debate on a vote of no confidence, which was carried.

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

accept the appointment of six, and to give an assurance that the appointments were not made on party grounds, but to strengthen the house. He admitted the precedent of Lord Normanby was against his action, but he instanced the action of Governments at home, and urged that it was better to leave the punishment for the mistaken advice of ministers in the hands of the people than to force a resignation of ministers. His action was approved by the Secretary of State, who, however, disclaimed any intention of approving the advice tendered by ministers, which, indeed, was not in harmony with Colonial as opposed to English practice in these matters.[1]

The classical case bearing on this point is that of Lord Aberdeen and Sir Charles Tupper in 1896. The Government of Sir John Macdonald fared somewhat badly after his death in 1891, and it was found necessary to recall Sir C. Tupper from England, and to put him at the head of affairs. But it was impossible to make good the mistaken policy of the Government in endeavouring to coerce Manitoba in the matter of the schools, and in the result the general elections went decisively against the party, and on July 4 the Governor-General found it necessary to address the following minute to the Prime Minister :—[2]

Until July the 7th as at present arranged, it is not likely that we shall know whether or not you deem the results of the General Election decisive against the Government, nor do I know to what extent these results may be modified by that date which you name as final in this regard.

After taking every means in my power to inform myself, it is impossible for me to ignore the probability that in the event of your deciding to meet Parliament the present Administration will fail to secure the support of the House of Commons.

This hypothesis seems to me to have important bearings.

In the first place, the business to be transacted by Parliament, though foreseen and not in character exceptional, is urgent. The supplies for the public service are already entirely exhausted. This contingency was in view when the date of the meeting of Parliament was fixed. It is in the public

[1] *Parl. Pap.*, H. C. 198, 1893–4, pp. 5 seq.

[2] Canada *Sess. Pap.*, 1896, Sess. 2, No. 7.

interest that Parliament shall meet on as early a day as possible, and be able to proceed to business forthwith.

Again, in regard to the various recommendations which in detail or by inference we discussed on Thursday, and in regard to all business which is not urgent and yet outside routine administrative requirements, the assumption that the Government has failed to secure the confidence of the electorate at the polls, leaves undiminished, indeed increases, the stringency of the limitations of an already somewhat peculiar position.

Let me explain my meaning. The circumstances are these :

The previous Administration (with Sir Mackenzie Bowell as Prime Minister), representing the views of the same political party and having a majority in both chambers, failed to pass its proposed legislation, and on the 25th of April Parliament expired by efflux of time, without having granted supplies for the public service beyond the 30th of June. Subsequently, when no Parliament was or could be, under the circumstances, in existence, the present Administration was formed. So far, therefore, as these are dependent upon the subsequent approval of Parliament, the acts of the present Administration are in an unusual degree provisional. And as the powers of an Administration undoubtedly full and unrestricted must surely always be used with discretion, their exercise would seem to be rightly limited, under such circumstances as the present, to the transaction of all necessary public business, while it is further a duty to avoid all acts which may embarrass the succeeding Government.

On this ground I would ask your further consideration of some of the recommendations which we discussed incidentally on Thursday. On this ground too, I felt obliged to withhold the expression of my acquiescence in your suggestion as to the appointment of Senators or Judges. (You have since then laid before me certain recommendations as to Senatorships which are vacant.)

These are life appointments, and with them, under such circumstances as the present, it would seem proper to leave all other life appointments, and the creation of all new offices and appointments, for the consideration of the incoming Ministers, unless always such a course is shown to be contrary to the public interest.

In the case of the Senate, which consists of seventy-eight members, it is to be noted also that there are said to be now no more than five Senators who are Liberals. And it may well be urged that to aggravate this inequality at the

present time would not only tend to embarrass the probable successor of this Government, but to increase the risk of friction between the two chambers of the Legislature.

In the case of Judges, I will only add that, bearing in mind the ordinary length of their tenure of office and also the long political predominance of one political party in the Dominion Parliament, the current deduction as to the complexion of the political opinions represented upon the Bench, whether baseless or well founded, is not unnatural.

As to the remaining recommendations which are before me, and generally as to other business of a similar nature, all seem to me to be subject to the same governing consideration. Whatever business can wait without detriment to the public interest, may properly do so.

There is a recommendation of a refund of money which requires the sanction of Parliament. Such recommendations will have to be placed before Parliament by the Ministers of the day; and you may perhaps consider that they may be left to be dealt with by these Ministers.

In Mr. Payne's case my special concern is indicated in the latter part of the Memorandum of the Governor General's Secretary of the 10th June where the question is asked whether this appointment is in accordance with the Statutes and Regulations which govern such cases, i.e. whether it infringes upon an existing law, under which circumstances, it, with any other cases of a similar kind if there be any such, cannot properly receive sanction.

I mention another case, viz. the recommendation of an officer to the post of Assistant Superintendent of the Cartridge Factory at Quebec. This position has been vacant for two years. It seems, therefore, desirable to reserve it, with any other similar recommendations as to vacancies of long duration for the consideration of the incoming Government, unless this course can be shown to be detrimental to the public interest.

One other matter remains to which you asked my attention yesterday, and which it may be convenient that I should mention here. I refer to your remarks on the Memoranda which I have from time to time forwarded for the consideration of Council. I have carefully considered these remarks, and my conclusions and observations are as follows:—

On referring to the books of the Governor General's office I find that the Memoranda sent by my predecessors are similar in form to those which I have caused to be sent. As to the recording of such communications, this has evidently been done in the past. My own experience certainly makes me

think that this is proper and desirable and contributes to continuity of Government. As to the accessibility of such papers to successive cabinets, it must be borne in mind that, whether specifically so described or not, all such papers are essentially confidential. Their contents are made known only to those who are bound by oath of secrecy, and they cannot be laid before Parliament except with the consent of the Governor-General. I fail, therefore, to see that there has lately been any departure from precedent or from practice in this matter.

These observations will indicate to you in the meantime the result of such consideration as I have so far been able to give to the business now before me.

Sir Charles Tupper replied on July 8. He explained the motives which had led to the suggested appointments, &c. He adduced the case of Mr. Mackenzie, who made several appointments between his defeat on September 17, 1878, and his resignation on October 16 following. The failure to grant supply was due to the unparalleled obstruction of the Opposition taking advantage of the fact that Parliament would expire on April 25.[1] He proceeded to add :—

I should fail in my duty to your Excellency as well as to the principles which govern the administration of public affairs in Canada, where Parliamentary Government is carried on precisely as it is in England, if I did not draw your attention to the very serious consequences of the views which you have indicated as guiding your action on the present occasion. The recognized authorities on Parliamentary Law, and the practice both in England and in Canada have, I contend, settled these questions beyond dispute. Todd, in his *Parliamentary Government in England*, vol. ii, p. 512, says :—

'The verdict of the country having been pronounced against Ministers at a general election, it is nevertheless competent for them to remain in office until the new Parliament has

[1] It was debated whether, as the writ for Algoma was only returned thirty-nine days after the writs were due, the House need be dissolved until thirty-nine days after April 25, 1896, but the Government decided to adhere to the strict letter of the law; see Bourinot, *Constitutional History of Canada*, p. 61, note 4. An Ontario Act of 1901 met a similar difficulty by allowing ten days' grace after prorogation if the House was sitting when it was due to expire by efflux of time. But this provision was only temporary and does not appear in Act 1908, c. 5. See *Canadian Annual Register*, 1901, p. 429.

met and given a definitive and final decision upon their merits; for the House of Commons is the legitimate organ of the people, whose opinions cannot be constitutionally ascertained except through their representatives in Parliament. It is necessary, however, and according to precedent, that, under such circumstances, the new Parliament should be called together without delay.'

And on page 513 :—

'For, notwithstanding their resignations, the outgoing Ministers are bound to conduct the ordinary business of Parliament and of the country so long as they retain the seals of office. They continue, moreover, in full possession of their official authority and functions, and must meet and incur the full responsibility of all public transactions until their successors have kissed hands upon their acceptance of office.'

And on page 514 :—

'It was always the practice to fill up vacancies. Peerages promised by a Minister's predecessors in office had been granted, though no instrument had been signed or sealed on the subject.'

. . . . . .

'In 1858, Lord Palmerston, after his tender of resignation, and before his successor was appointed, allotted three of the highest honours of the Crown—three Garters—which were then unappropriated, to three eminent noblemen, his friends and supporters. And in 1866, upon the dissolution of the second Russell Ministry, an office was filled up by that Government which did not become vacant until two days after their resignation had been tendered to Her Majesty. The interference of Parliament with the exercise of the prerogative under such circumstances has never taken place, and would only be justifiable under circumstances of a flagrant character.'

And on page 515 :—

'The Disraeli Ministry (after its defeat in 1868) appointed the Earl of Mayo to be Governor-General of India; but this appointment, though severely criticized by the Liberal press, was unquestioned in Parliament.'

In 1852 Lord Derby took office with a minority. The new Ministers were defeated in the House by 234 to 146, and dissolved on July 1st, 1852. They were beaten at the elections; but summoned Parliament, and did not resign until defeated—305 to 286—on the Budget.

In 1859 Lord Derby dissolved on April 19th, and Ministers were defeated at the polls by 350 to 302, but they met

Parliament on May 31st and did not resign until defeated by a majority of 13.

In 1892, Lord Salisbury dissolved, but the Opposition previously voted the Estimates for the year and expedited public business. He was defeated by a majority of 40; but he did not resign until he was defeated by a direct vote of want of confidence, 350 to 310.

He then quoted the case of Lord Onslow's appointment of six members of the Legislative Council of New Zealand, and the approval of his action by the Secretary of State in 1891. He pointed out that after his defeat in 1878 by a majority of between eighty and ninety, Mr. Mackenzie was allowed to appoint a deputy minister, a judge of the Supreme Court of Canada, four puisne judges, and a County Court Judge. He also asserted that the judges of Canada had in many cases, including the then Chief Justice, been appointed by the Liberal party, and that the Senate only twice in Mr. Mackenzie's Government refused to accept his measures, and then they were in sympathy with Mr. Mackenzie's own supporters, and he added :—

I may venture to remind Your Excellency that the exigencies of the public service and the difficulties to which you have alluded have been caused by the obstruction of public business by the Opposition, notwithstanding that the Government, of which I was the leader in the House of Commons, had the support of a large majority of that House. At that time the unfortunate circumstance to which I have referred, enabled comparatively few persons to prevent any legislation or public business being done by the House. Had the Opposition in Canada adopted the course followed in the Imperial Parliament in 1892, when the Opposition voted the estimates for the year and expedited public business, no such difficulty could have presented itself, and I fail to see why such obstruction on the part of an Opposition should entitle them to the special consideration of the Crown.

With reference to the inquiries which Your Excellency has from time to time thought fit to address to the Clerk of the Privy Council, I can only re-state my impression that such information in times past has been sought and obtained by the Governor-General through communications with the Prime Minister or the Minister directly concerned, rather

than by means of official memoranda which become part of the Records of Council.

In conclusion, I may be permitted to say to Your Excellency that, under the British constitutional system which Canada has the happiness to enjoy, the Queen's representative, like Her Majesty, is the executive head of the country, removed from the arena of public controversy, however fierce the conflict of parties may be; and in my judgment no more fatal mistake could be made than any interposition in the management of public affairs which would cause the Governor-General to be identified with either one party or the other.

Adhering respectfully but firmly to the opinions I have ventured to express in this memorandum, which I regret to find do not agree with those of Your Excellency, it remains only for me to tender the resignation of my colleagues and myself, and to ask that we may be relieved from our responsibilities as Ministers of the Crown at the earliest convenience of Your Excellency.

To this memorandum Lord Aberdeen simply replied on July 9 as follows :—

My action at the present time has been guided solely by a regard for the following facts, namely, that—

1. Parliament expired on April 25th.

2. The result of the General Elections on June 23rd was the defeat of the Government.

3. The supplies for the public service came to an end on June 30th, and by the view that, pending the assembly of Parliament, the full powers and authority, unquestionably possessed by the Government, should be exercised in such directions only as are demanded by the exigencies of the public interest, and so as to avoid all acts which may tend to embarrass the succeeding Administration.

Sir Charles Tupper also very vehemently attacked the Governor-General's action in the House of Commons, and he was defended by ministers as having vindicated in a signal manner the rule of democracy by resenting the abuse of power by a minister after he had ceased to enjoy the support of the people.[1] The beneficial results of the whole affair were

[1] Canada *House of Commons Debates*, 1896, Sess. 2, pp. 1631–60 (Sir C. Tupper), 1660–71 (Sir W. Laurier). The Speaker had to call Sir C. Tupper's attention to the rule that he must not attack the Governor-General personally, but the Ministry, ibid., 1638, 1656.

seen in 1909, when the occurrence of a dead heat in Newfoundland rendered the position very difficult: the Government did not attempt to make any appointments or contracts with one exception,[1] which could be disapproved by their successors, and thus avoided the unfortunate event which took place in Canada when the new Government cancelled many of the appointments made by the outgoing Government. There is, however, no doubt that that Government had strained its functions. None the less, in 1908, after their defeat at the general election of that year, the Government of New Brunswick, which had held office since 1891, not merely remained for nearly a month in office after their failure to secure their return to power, but asked the Lieutenant-Governor to make certain appointments, which he declined to do on the ground that they no longer represented the will of the people.[2] The question was much canvassed in connexion with the resignation of the Ross Ministry in 1905 in Ontario, as they made various appointments, and these appointments were naturally resented by their political opponents.[3]

The position of the Governor with regard to his ministers when they cannot certainly command the support of the Legislature is curiously illustrated by a remarkable series of events which took place in Newfoundland in 1893 and 1894.[4] In the former year the Government of Sir W. Whiteway returned to office with a very substantial majority in the Lower House of 36 members, having 24 members to 12. But as usual the victory of the party had been secured by judicious expenditure at the election time of the funds raised under an Act of the Colony for a loan for the purpose of

[1] See the pamphlet, *Protest of Anglo-American Telegraph Company, Ltd., against the Ratifying of a Draft Contract between the Government of Newfoundland and the Commercial Cable Co., signed February 18, 1909*, published in Newfoundland.

[2] *Canadian Annual Review*, 1908, p. 402. [3] Ibid., 1905, p. 489.

[4] See *Journals* of House of Assembly, 1894, and the newspapers *passim*. Mr. Whiteway became Premier first in 1877, and after a period of eclipse from 1885–9 succeeded in retaining office until 1894, and again returned to power in 1895.

constructing connecting roads between the railways of the Colony. This procedure had long been usual, but unhappily an Act had just been passed with regard to corrupt practices, and the practice turned out to be illegal. Consequently the Opposition produced petitions, just before the time for presenting such petitions was expiring, against the return of 17 members of the majority, including the whole of the Cabinet with the exception of Mr. Harvey. This action took the Government by surprise, or they would have been prepared to lodge similar petitions against their opponents.

The Legislature opened on February 16, 1894, in the curious position of the Government possessing a large majority, but a large majority which was, however, holding its tenure in a very uncertain manner. The situation was complicated by the fact that it was necessary to pass the usual annual Bill for giving powers to the officers of the Imperial Government for the enforcement of the French Treaties, and Sir W. Whiteway was not ready to pass the Bill exactly in the form in which it was desired by the Imperial Government; in particular, he desired merely to procure a temporary Act. The proceedings against the members of the House resulted in March in the unseating of the Surveyor-General and Mr. Woods, and the Premier conceived the idea of a Bill cancelling the Elections Act under which these members had lost their seats. On the judgement in the Surveyor-General's case being communicated as usual to the Assembly, the Prime Minister and a deputation of twenty members approached the Government dissenting from the judgement on the ground that the judgement was wrong, as it was an attempt to interfere with the discretion of the Executive Government in spending money on public works between the dissolution of Parliament and the new elections. They asked for a dissolution, but the Governor was unwilling to consent that they should have one, on the ground that, despite their majority, they were not really entitled to have a dissolution.

The entire Opposition protested against a dissolution on the ground that their opponents were really in a minority as the

majority of the Government side would shortly be unseated. Accordingly, the Governor in the exercise of his discretion refused to grant a dissolution, and thereupon the Government resigned office on April 11, 1894, on the ground of his refusal.

The Governor asked the leader of the Opposition to form a Ministry, and he was allowed a short prorogation of Parliament to enable him to form the Government. The Legislative Assembly on the 13th of April passed a resolution protesting against the action of the Governor, and asking him to dissolve the Legislature forthwith so as to prevent the chaos which would ensue in the absence of Revenue and Supply Acts, and the entrusting of the Government to a party consisting of only one-third of the members of the House.

The House proceeded to rescind the resolution it had passed for the grant of supply, and declared that for any persons in the Government of the Colony to pay any sums for or towards the support of services voted, after the Legislature should have been prorogued or dissolved before an Appropriation Act had been passed, would be a gross breach of the public trust, and derogatory to the fundamental principles of the Legislature, and subversive of the principles of responsible government. They also protested that the minority in the House should not be entrusted with the collection of taxes for the purpose of revenue.

The position was very difficult, as the Revenue Act expired on the 11th of June, and on the other hand it was practically impossible to hold a general election in the spring, as the people of the Colony were engaged in preparing for the fisheries, and the difficulties of an election would interfere with those preparations. Moreover, dissolution at once would terminate the trials of the election petitions.

The Governor, on the advice of ministers, prorogued the House of Assembly to the 23rd of May. But it was found impossible to obtain supply by the 11th of June, and accordingly the taxes were levied on the authority of the Executive Government alone and under the protection of a man-of-war stationed at St. John's. In the meantime a dissolution was withheld and kept over until the termination of the election

petitions. When these election petitions had unseated, on the 31st of July, Sir W. Whiteway, Mr. Robert Bond, Mr. Watson, and others, a Proclamation was issued calling together the Legislature, and by the 4th of August several Bills were passed and supply was granted, though it was only carried with great difficulty in the Upper House, in which the ex-Ministry held a considerable majority of seats. The Government, however, only held office on a doubtful tenure, having no real majority, and the Ministry resigned not long afterwards on the financial crisis of 1894.

§ 3. The Dismissal of Ministers

While the power of refusing a dissolution is frequently exercised, it is different with the power of dismissing ministers. That power is claimed by Todd[1] for the Crown on the strength of the action of William IV in 1834, and while the precedent is not perfectly in point, it is certainly a precedent which is not fortunate,[2] and the dicta[3] which at the present day regard it as a possible course of action seem clearly wrong as tending to the subversion of the constitution and the ultimate overthrow of monarchical institutions. Nor in effect is it much different in the Colonies; the power has been exercised and may again be exercised, for it is not one which would be fatal in any sense to a Governor or to the Imperial Government, but is an extreme measure; it is wiser to let the constitution work out slowly but surely its own changes and not to attempt to rush matters on.

Such was the view taken by Lord Elgin in the classic case of the Rebellion Losses Bill in Canada in 1849.[4] That measure evoked almost incredible outbursts of anger on the part of the loyalists in Canada, and every pressure was brought to bear on the Governor-General to insist on the resignation of ministers; he firmly declined to do so, and his firmness was proved to be correct by the fact that the

[1] *Parliamentary Government in the British Colonies*, p. 432.

[2] See Anson, *Law of the Constitution*,[3] II, i, 38, 39, and cf. xxx, xxxi.

[3] e.g. Sir C. Dilke, *Journal of Royal Society of Arts*, lvi. 344.

[4] *Parl. Pap.*, May and June 7, 1849.

Ministry had a strong hold on the Government for some time after. In 1856, however, there occurred a striking case of dismissal in New Brunswick, where the Legislature had passed a quite unworkable liquor prohibition law, and the Lieutenant-Governor was anxious that the Government should dissolve and get a clear expression of public opinion on the topic of liquor legislation. The Lieutenant-Governor declared that he would not dream of dissolving without the consent of the Executive Council, and therefore demanded that they should consent or resign. They were unwilling to do either, but eventually resigned after the Provincial Secretary had actually issued the proclamation dissolving the Assembly: the action of the Lieutenant-Governor was upheld by the result, for the obnoxious Act was repealed by a majority of thirty-eight votes to two in the Assembly, and both Houses expressed satisfaction with the Lieutenant-Governor's action and its results.[1] In 1859, according to Sir W. Denison, he induced his ministers in New South Wales to abstain from pressing an illegal measure, but he had resolved to dismiss them if they persisted in their course of action.[2] In 1861 the Governor of Newfoundland dismissed a Ministry, being dissatisfied with the advice tendered to him, and granted Mr. Hoyles, the leader of the Opposition, a dissolution, though the Assembly passed on March 5, 1861, a resolution against the dissolution.[3]

The dismissal of his ministers was also a course urged upon Lord Dufferin on many sides in 1873. Canada has been singularly free as regards the Federal Government from cases of refusal of dissolutions, and it has been governed without interval by ministers holding by a secure tenure. In 1873 the Ministry in office was that of Sir John Macdonald. In April 1873, shortly after the general election, there were brought against the Ministry charges of having obtained

[1] New Brunswick *Assembly Journals*, 1856, pp. 8, 23; 1857, p. 88; Hannay, *New Brunswick*, ii. 180, 181.

[2] *Viceregal Life*, i. 468. Cf. i. 435.

[3] Newfoundland *House of Assembly Journals*, March 5 and 6, 1861; Toronto *Globe*, October 3, 1879; Prowse, *History of Newfoundland*, pp. 488, 489.

funds to bribe the constituencies by means of promising various privileges to capitalists in connexion with the building of the Pacific Railway. Naturally feeling ran high in Canada, and the Governor-General was asked by the Liberal press to put in force the reserve powers of the Crown and to dismiss the ministers. He declined to do so, and left matters to develop. A Royal Commission of three judges was at last appointed to investigate, and the evidence taken by them was laid before the Parliament when it reassembled in October, together with his own dispatches to the Secretary of State. The result was a strong outburst of feeling in Parliament, which led to the resignation of the Ministry to avoid a vote of censure, and to the formation of a new Government by Mr. Mackenzie, which held office until 1878. The Governor-General was shown by the result to have acted wisely: he recognized, as he wrote to the Secretary of State, that he could have dismissed his Ministry, and have taken the chance of Parliament approving his action, but he did not feel justified in doing so on the evidence before him. It was therefore with justice that he congratulated himself, in reporting on the termination of the incident to the Secretary of State, that the result had been brought about not by an ill-considered and hasty exercise of Imperial authority, nor by the application of premature pressure from without, but by the free and spontaneous action of the representatives of the Canadian people. He recognized that he could have used the power of dismissal, and that he would have done so if essential, but he naturally was glad to have avoided the use of an instrument which would probably have told against the party which sought to find out the real facts of the case by enabling the Government to divert attention to what would have been called an invasion of the powers of Canada.[1]

[1] Canada *House of Commons Journals*, October Session, 1873; *Parl. Pap.*, C. 911. The matter is told at length in Pope's *Sir John Macdonald*, especially ii. 174–89. The proposal to investigate Mr. Huntingdon's charges came first in the form of a Parliamentary Committee, and a Bill was passed to give it power to administer oaths, but was disallowed as *ultra vires* (under s. 18 of 30 Vict. c. 3). Then Parliament tried to discuss

On the other hand, Goldwin Smith severely condemned his inaction, and a large Parliamentary deputation asked him to disregard the advice of his ministers and secure earlier a decision of Parliament.[1]

But the Province of Quebec was a little later to be the scene of a striking instance of the exercise of the power of dismissal. The Lieutenant-Governor of that Province, Mr. Luc Letellier de St. Just, an ex-member of the Mackenzie Administration, found it necessary to dismiss his Government for the reasons given in the memorandum of March 1, 1878, communicating his decision :—[2]

> The Lieutenant-Governor deems it right to observe that, in his memorandum of the 25th February inst., he in no way expressed the opinion that he believed that the Premier ever had the intention of taking upon himself the right 'of having measures passed without his approbation, or of disregarding the prerogatives of the representative of the Crown.'
>
> But the Prime Minister cannot lose sight of the fact that, although there was no intention on his part, in fact the thing exists, as the Lieutenant-Governor told him.
>
> The fact of having proposed to the Houses several new and important measures without having previously in any way advised the Lieutenant-Governor thereof, although the intention of disregarding his prerogatives did not exist, does not the less constitute one of those false positions which place the representative of the Crown in a critical and difficult position with regard to the two Houses of the Legislature.
>
> The Lieutenant-Governor cannot admit that the responsibility of this state of affairs should rest with him.
>
> With regard to the Bill intituled 'An Act respecting the Quebec, Montreal, Ottawa and Occidental Railway', the Premier cannot claim for that measure the asserted general authorisation which he mentions in his letter, for their inter-

the question on meeting in August,* but the Governor-General simply, despite protests, prorogued the House of Commons—as it had been understood that the meeting was to be purely formal, and the Government's supporters were in many cases absent. But the Royal Commission's report was conclusive.

[1] Cf. Sir A. Gordon's views on the duty of a Governor in *Parl. Pap.*, C. 3382, p. 268; Rusden, *New Zealand*, iii. 435, 436.

[2] *Parl. Pap.*, C. 2445, pp. 102, 103.

view was on the 19th February, and that Bill was before the Legislature several days before that date, without the Lieutenant-Governor having been in any way informed of it by his advisers.

The Lieutenant-Governor expressed at that time to the Premier how much he regretted that legislation; he represented to him that he considered it contrary to the principles of law and justice; notwithstanding that, the measure was carried through both Houses until adopted.

It is true that the Premier gives in his letter, as one of the reasons for acting as he did, 'that this permission of using the name of the representative of the Crown had, besides, always been granted him by the predecessor of the present Lieutenant-Governor, the late lamented Mr. Caron.'

This reason cannot be one for the Lieutenant-Governor, for in so acting he would have abdicated his position as representative of the Crown, which act neither the Lieutenant-Governor nor the Premier could reconcile with the obligations of the Lieutenant-Governor towards the Crown.

The Lieutenant-Governor regrets having to state, as he told the Premier, that he has not been informed, in general, in an explicit manner of the measures adopted by the cabinet, although the Lieutenant-Governor had often given the Premier an opportunity to do so, especially during last year.

From time to time, since the last session of the Legislature, the Lieutenant-Governor has drawn the attention of the Premier to several subjects regarding the interests of the Province of Quebec, amongst others:

1st. The enormous expenditure occasioned by very large subsidies to several railways, while the Province was burdened with the construction of the great railway from Quebec to Ottawa, which should take precedence of the others; and this, when the state of our finances obliged us to undertake loans disproportioned to our revenue.

2nd. The necessity of reducing the expenses of the Civil Government and of the Legislature, instead of having recourse to new taxes, in view of avoiding financial embarrassment.

The Lieutenant-Governor expressed also, but with regret, to the Premier, that the Orders passed in Council to increase the salaries of Civil Service servants seemed to him inopportune, at a time when the Government were negotiating with the Bank of Montreal a loan of half a million, with power to increase that loan to $1,000,000, at a rate of

interest of 7 (seven) per cent.; and indeed, even to-day (1st of March), the Lieutenant-Governor is obliged to allow an Order in Council to be passed to obtain the last half million for the Government, without which the Government would be unable to meet its obligations, as I was informed by the Hon. the Provincial Treasurer to-day by order of the Prime Minister.

The Premier did not let the Lieutenant-Governor know, then or since, that the Government were in such a state of penury as to necessitate special legislation to increase public taxation.

Therefore the Lieutenant-Governor said and repeated these things to the Premier, and he deems it advisable to record them here, that they may serve as memoranda for himself and for the Premier.

It therefore results:

1st. That although the Lieutenant-Governor has made many recommendations in his position as representative of the Crown to the Premier on these different subjects of public interest, his advisers have undertaken a course of administrative and legislative acts contrary to these recommendations, and without having previously advised him.

2nd. That the Lieutenant-Governor has been placed, without evil intention, but in fact, in a false position, by being exposed to a conflict with the will of the Legislature, which he recognizes as being, in all cases, supreme, so long as that will is expressed in all constitutional ways.

The Lieutenant-Governor has read and examined carefully the memorandum and documents which the Premier was kind enough to bring him yesterday.

There are, in the record, petitions from several municipal corporations and from citizens of different places, addressed to the Lieutenant-Governor, against the resolutions and the Government Bill, with regard to the 'Quebec, Montreal, Ottawa, and Occidental Railway'.

The Lieutenant-Governor was only yesterday able to take cognizance of some of these petitions, as they had not been communicated to him before he received them in the record.

The Lieutenant-Governor, after having maturely deliberated, cannot accept advice of the Premier with regard to the sanctioning of the Railway Bill, intituled 'An Act respecting the Quebec, Montreal, Ottawa, and Occidental Railway'.

For all these causes the Lieutenant-Governor cannot

conclude this memorandum without expressing to the Premier the regret he feels at being no longer able to continue to retain him in his position, contrary to the rights and privileges of the Crown.

(Signed) L. LETELLIER.

To this the Premier replied on March 2, 1878 :—

YOUR EXCELLENCY,

I have the honour to acknowledge the receipt of your memorandum, in which you come to the conclusion that you can no longer continue to retain me in my position as Prime Minister. There is no other duty for me to fulfil but to submit to the dismissal from office, which your Excellency has notified me of, declaring at the same time my profound respect for the rights and privileges of the Crown, and my devotion to the interests of the Province.

I have, &c.

(Signed) C. B. DE BOUCHERVILLE.

After the dismissal he sent for Mr. Joly and allowed him to have a dissolution of Parliament. Mr. Joly was returned with a bare majority, which was only secured by the device of having elected as Speaker in the Lower House a member who had been elected as an opponent, and his action was bitterly resented by the Conservative party in Canada, at that time still in a minority in the Lower House of the Dominion, but in a majority as always in the Senate. The Senate therefore censured his conduct, while the Lower House was only able to approve it by declaring that it was a local matter for local decision, and not a case for interference by the Dominion Government. But a change of Ministry took place, and a private member insisted on dividing the House in support of a motion against the Lieutenant-Governor, whereupon the Governor-General was asked to dismiss him. He demurred, and the Governor-General agreed to a reference home, which was accordingly made. The case against the Lieutenant-Governor was stated by the Premier in an able paper dated April 14, 1879, which deserves quotation from its clear enunciation of one view of the powers of a Governor and his duties. After explaining that the action of Mr. Letellier had been inspired by a desire to inter-

vene in Dominion politics by helping his party in Quebec in view of the elections of 1878, he said :—[1]

Notwithstanding the purchase of the Speaker a vote of want of confidence was passed in the Legislative Assembly, and a similar resolution was adopted in the Upper House. Mr. Joly, however, did not resign as he ought to have done, and as the Lieutenant-Governor ought to have called upon him to do. He held to office and proceeded with the business of the country. He succeeded in carrying the supplies, and the fact of his having done so is quoted as a proof of the substantial confidence of the House in him. But the refusal of supplies is an antiquated procedure, and has long since been succeeded in England by votes of want of confidence, and for the same reasons which induced the Opposition at Quebec to vote the supplies. The refusal to do so would have clogged the whole machinery of Government, would have stopped the construction of the Government railways and ruined the contractors, and at a time of great depression would have deprived very many working men of the means of subsistence. The Opposition therefore patriotically deemed it wise, while persisting in their expression of want of confidence, not to obstruct the whole business of the country. During the whole of the legislative existence of Mr. Joly he has thus been carrying on the Government by the improper partisanship of the Lieutenant-Governor, and the casting vote of a Speaker purchased with his connivance. In the session of the Dominion Parliament of 1878 the conduct of Mr. Letellier was brought before the House of Commons by Sir John Macdonald, the leader of the Opposition, who moved the following resolution :—

'That the recent dismissal by the Lieutenant-Governor of the Province of Quebec of his Ministry was, under the circumstances, unwise and subversive of the position accorded to the advisers of the Crown since the concession of the principle of responsible Government to the British North American Colonies.'

On reference to the debates, it will be seen that Mr. Mackenzie's Government did not defend Mr. Letellier's action, although they supported their old colleague by a vote of 112 to 70. During the same session the Senate passed by a vote of 37 to 20 the following resolution :—

'That the messages of his Excellency the Governor-General of the 26th March and 8th April be now read, and

[1] *Parl. Pap.*, C. 2445, pp. 107–9.

that it be resolved that the course adopted by the Lieutenant-Governor of the Province of Quebec towards his late Ministry was at variance with the constitutional principles upon which Responsible Government should be conducted.'

Then came on last autumn the general election for the Parliament of the Dominion, and among the many questions submitted to the people, one of the most prominent was the conduct of Mr. Letellier, and the votes of the two Houses of Parliament with respect to it. In the Province of Quebec it was the question of the day, and the opinion of the electors may be known by the return of 48 gentlemen pledged to Mr. Letellier's condemnation against 17 supporters. When the present session of Parliament met, Mr. Mousseau, a representative from Quebec, brought forward a motion identical in its terms with that moved in the previous session by Sir John Macdonald, and it was carried by a vote of 136 to 51 members. The analysis of this vote sufficiently shows that the general condemnation of Mr. Letellier's conduct was not confined to his own Province.

Under these circumstances the Governor-General's advisers thought it their duty to convey to his Excellency their opinion that after the Senate's resolution of last session, and the vote of the House of Commons during the present session, Mr. Letellier's usefulness was gone, and they advised his removal; and now the whole question stands for the consideration of Her Majesty's Government on the Governor-General's reference.

It is necessary now to consider the tenure of office by Lieutenant-Governors appointed under British North America Act, 1867. When the resolutions on which that Act was based were being prepared it was thought expedient to continue in the Dominion the English practice with respect to Colonial Governors. This might have been done without legislative enactment, but to prevent the possibility of its being supposed that Lieutenant-Governors under the new régime were of necessity to be in sympathy with the Dominion Ministry of the day, and to be removable with every change of party, the provision in the 59th clause was introduced which says that no Lieutenant-Governor shall be removable within five years of his appointment except for cause assigned, which shall be communicated within one month after the order for removal is made, and shall be communicated by message to the Senate and House of Commons.

This left the tenure to be one of pleasure as before, but

was intended by statutory enactment to establish the practice which obtains in England. It gives no vested right to a Lieutenant-Governor in his office for five years; it does not place him in the position of a judge who holds office during good behaviour, although removable by vote of both houses. The statute merely operates and was meant to operate as a check upon the capricious and arbitrary exercise of the power of dismissal by compelling the Ministry to submit the reasons for the exercise of the royal pleasure for Parliament. A Lieutenant-Governor is still removable and ought to be removable whenever it is felt by the Dominion Government that it is for the public interest that he should be displaced. Due regard should of course be had to his feelings and position, and the power should not be lightly exercised; but it is not necessary that he should be tried, convicted, or even charged with gross moral or personal wrong.

If, as in the case of Imperial officers of like position, it becomes necessary or expedient for the advantage, good government, or contentment of the people governed that he should be removed, it is the duty of the Dominion Government to discard him. His usefulness may have been destroyed by accident or misfortune as well as by fault, but still the usefulness once gone the office should also go. This is, we know, the practice in England, but there Her Majesty's Government have the means from the multiplicity of offices at their gift to remove the unsuccessful or erring Governor to another sphere of action. Here the same means can scarcely be said to exist. It may perhaps be said that stronger reasons should therefore be assigned for the dismissal of a Governor; but, on the other hand, a Canadian officer so removed is not deprived of any professional status or prospects. He belongs to no service, and his office is considered more as a dignified retirement from active political life than one of profit or emolument. At the end of his five years he has no claim for another appointment or for further consideration, and he stands in a position similar to that of a minister who has lost power. In Mr. Letellier's case it is not in the opinion of his Excellency's advisers at all necessary in order to justify their advice to go behind the vote of Parliament; it is sufficient for them that Parliament has passed a censure on his official conduct.

After such a vote it must be obvious that he cannot either with profit or advantage be maintained in his position. At the same time they must express their full concurrence in

the justice of the censure. They proved that by their votes in the Legislature; but had they not voted at all, or even if their opinion had been averse to that arrived at by Parliament, it seems clear that they are bound to respect that decision and to act upon it as they have done by advising the removal. It has been argued that while by the 58th clause of the Act, Lieutenant-Governors are to be appointed by the Governor-General in Council by instrument under the Great Seal, the 59th clause provides that he shall hold office during the pleasure of the Governor-General, and that therefore while the appointment must be under the advice of a Responsible Ministry, the removal may be made by his Excellency without reference to his Council, and the 12th clause of the Act is quoted in support of that view. That clause provides as to what powers, authorities, and functions are to be vested in the Governor-General with the advice of his Privy Council, and what in the Governor-General himself. The argument is not, however, tenable. Long before Confederation the principle of what is known as Responsible Government had been conceded to the Colonies now united in the Dominion. This principle established that in all matters of internal concern the representative of the Crown should act according to the advice of Ministers enjoying the confidence of Parliament. The concession was not withdrawn by the Confederation Act. On the contrary, it begins by a preamble stating the desire of the Provinces to be united into one Dominion with a constitution similar in principle to that of the United Kingdom; and this has been carried out in theory and practice in the Dominion of Canada from the commencement of its existence. The principle forms part of our constitution now as it did in those of the several Provinces before the Union. It is a part of the *lex non scripta* of the constitution, and any express enactment of the principle was wisely avoided.

A comparison between the elasticity of the British constitution and its gradual development under an unwritten law with the rigidity of a written constitution as existing in the United States has shown the superiority of the former system. Whether, therefore, in any case power is given to the Governor-General to act individually or with the aid of his Council the act as one within the scope of the Canadian Constitution must be on the advice of a Responsible Minister. The distinction drawn in the Statute between an act of the Governor and an act of the Governor in Council is a technical one, and arose from the fact that in Canada for a long period

before confederation certain acts of administration were required by law to be done under the sanction of an Order in Council while others did not require that formality. In both cases, however, since Responsible Government has been conceded, such acts have always been performed under the advice of a Responsible Ministry or Minister. Again, the 59th clause provides that the Lieutenant-Governor is not to be removed except for cause assigned. Someone must be responsible to Parliament for the reasonableness of such cause, and must defend it there, and be liable to censure should the cause be deemed insufficient.

Now the Governor-General cannot be held constitutionally responsible or open to censure in any way by Parliament. As Her Majesty's representative he holds the same constitutional position in that respect as the Queen does in England. It seems to follow, therefore, that upon the Ministry of the day must rest the responsibility of advising the removal, of assigning the cause, and of justifying its sufficiency.

Two special grounds have been urged why Mr. Letellier should not be removed; first, that the motion of censure made in the late Parliament having been lost, the case should not be re-opened without new cause; second, that Mr. Joly assumed the whole responsibility of the Lieutenant-Governor's act, and after an appeal to the people his Ministry still exists. As to the first ground it may be answered that, as already stated, the arguments used in opposition to the motion did not attempt to justify his conduct, but were founded on the inexpediency of raising the question at that time when Mr. Joly had gone or was about to go to the country, that the question had not been before the people at the time the then House of Commons was elected, and that it had been one of the subjects submitted to the people at the last election for the Dominion. The present House of Commons coming fresh from the people and supposed to express their opinion has by an overwhelming vote reversed the decision of the expiring Parliament, and pronounced a deliberate censure on Mr. Letellier's conduct. As to the second ground, the answer is that the Lieutenant-Governor of a Province holds the same relation to the Dominion Government and Legislature as the Governor-General does to Her Majesty and the Imperial Parliament. Here we have nothing to do with the appointment or removal of the Queen's representative. We loyally accept the Governor-General selected by the Queen, and have no right to express an opinion as to his continuation in office or recall. All that

the people of Canada can require is that the Governor-General for the time being should always act upon the advice of Ministers responsible to him. The right of discussion and the power of censure rest practically with the Imperial House of Commons, and have been not infrequently exercised there. So in the Province of Quebec its legislature and people are bound to receive the nominee of the Governor-General, and so long as their constitutional rights are protected have nothing to say against his recall for any cause whatever. If Mr. Letellier were removed his successor must accept the Ministry which he finds enjoying the confidence of the Legislature, and so long as this constitutional right is preserved it matters not to them who may be their Lieutenant-Governor. It rests with the Dominion Parliament to approve or disapprove of a change in the personnel in the Lieutenant-Governorship. The distinction seems to have been fully observed in the Province of Quebec during the late Local and Dominion elections. It must be borne in mind that the constituencies and the franchise are the same for both elections, and the same body of electors which when the question constitutionally before them was the comparative merits of the De Boucherville and Joly administrations divided in nearly equal numbers returned to the Dominion Parliament 48 as against 17, or a majority of 31 pledged to vote for the censure of Mr. Letellier's conduct in the place where it alone could be constitutionally impugned.

After full and anxious consideration his Excellency's advisers desire to express their strong conviction that it is highly expedient that the vote of Parliament should be given effect to by the dismissal of Mr. Letellier. If it is not, a Provincial Lieutenant-Governor will be the only practically irresponsible official in Canada. On the other hand, his removal will be a warning to all future Lieutenant-Governors to exercise their powers as such with the strictest impartiality. As Mr. Letellier has been the first, in the case of his removal he will probably be the last partisan Lieutenant-Governor, and all further trouble from that source may be considered as at an end. His fate will be a warning to others for all time to come. Again, they are convinced that peace and contentment will not be restored in the Province of Quebec so long as he retains his present position; and lastly, they think that a Ministry enjoying the confidence of Her Majesty's representative and a large majority of both Houses of Parliament and administering all the affairs of Canada, whether of a legislative or executive character, and including

the appointment of Lieutenant-Governors, may be safely entrusted with the responsibility of advising their removal.

All which is respectfully submitted.

The reply of the Secretary of State was dated July 3, 1879:[1]

Her Majesty's Government have given their attentive consideration to your request for their instructions with reference to the recommendation made by your ministers that Mr. Letellier, the Lieutenant-Governor of Quebec, should be removed from his office.

It will not have escaped your observation, in making this request, that the constitutional question to which it relates is one affecting the internal affairs of the Dominion, and belongs to a class of subjects with which the Government and Parliament of Canada are fully competent to deal. I notice with satisfaction that, owing to the ability and patience with which the new Constitution has been made by the Canadian people to fulfil the objects with which it was framed, it has very rarely been found necessary to resort to the Imperial authority for assistance in any of those complications which might have been expected to arise during the first years of the Dominion; and I need not point out to you that such references should only be made in circumstances of a very exceptional nature.

I readily admit, however, that the principles involved in the particular case now before me are of more than ordinary importance. The true effect and intent of those sections of the British North America Act, 1867, which apply to it, have been much discussed; and as this is the first case which has occurred under those sections, there is no precedent for your guidance. For this reason, though regretting that any cause should have arisen for the reference now made to them, Her Majesty's Government approve of the course which you have taken on the responsibility and with the consent of your ministers, and I will now proceed to convey to you the views which they have formed on the question submitted for their consideration.

The several circumstances affecting the particular case of Mr. Letellier have been fully stated in Sir J. A. Macdonald's memorandum of 14th April, in Lieutenant-Governor Letellier's letter of 18th April, and in communications which I have since received from Mr. Langevin, who, accompanied by Mr. Abbott, has come to this country for the purpose of

[1] *Parl. Pap.*, C. 2445, pp. 127, 128; cf. Egerton, *Federations and Unions*, p. 138, n. 1.

supporting the advice given by the Government of which he is a member, and from Mr. Joly, who was similarly empowered to offer any explanations that might be required on the part of Mr. Letellier. If it had been the duty of Her Majesty's Government to decide whether Mr. Letellier ought or ought not to be removed, the reasons in favour of and against his removal would, I am confident, have been very ably and thoroughly put before them by Messrs. Langevin and Abbott, and by Mr. Joly. I have not, however, had occasion to call for any arguments from either side on the merits of Mr. Letellier's case. The law does not empower Her Majesty's Government to decide it, and they do not therefore propose to express any opinion with regard to it. You are aware that the powers given by the British North America Act, 1867, with respect to the removal of a Lieutenant-Governor from office, are vested, not in Her Majesty's Government, but in the Governor-General; and I understand that it is merely in view of the important precedent which you consider may be established by your action in this instance, and the doubts which you entertain as to the meaning of the statute, that you have asked for an authoritative expression of the opinion of Her Majesty's Government on the abstract question of the responsibilities and functions of the Governor-General in relation to the Lieutenant-Governor of a province under the British North America Act, 1867.

The main principles determining the position of the Lieutenant-Governor of a province in the matter now under consideration are plain. There can be no doubt that he has an unquestionable constitutional right to dismiss his provincial ministers if, from any cause, he feels it incumbent upon him to do so. In the exercise of this right, as of any other of his functions, he should, of course, maintain the impartiality towards rival political parties which is essential to the proper performance of the duties of his office; and for any action he may take he is, under the 59th section of the Act, directly responsible to the Governor-General.

This brings me at once to the point with which alone I have now to deal, namely, whether in deciding whether the conduct of a Lieutenant-Governor merits removal from office, it would be right and sufficient for the Governor-General, as in any ordinary matter of administration, simply to follow the advice of his ministers, or whether he is placed by the special provisions of the Statute under an obligation to act upon his own individual judgment. With reference to this question

it has been noticed that while under section 58 of the Act the appointment of a Lieutenant-Governor is to be made 'by the Governor-General in Council by instrument under the Great Seal of Canada', section 59 provides that 'a Lieutenant-Governor shall hold office during the pleasure of the Governor-General'; and much stress has been laid upon the supposed intention of the Legislature in thus varying the language of these sections. But it must be remembered that other powers vested in a similar way by the Statute in the Governor-General, were clearly intended to be, and in practice are, exercised by him by and with the advice of his ministers; and though the position of a Governor-General would entitle his views on such a subject as that now under consideration to peculiar weight, yet Her Majesty's Government do not find anything in the circumstances which would justify him in departing in this instance from the general rule, and declining to follow the decided and sustained opinion of his ministers, who are responsible for the peace and good government of the whole Dominion to the Parliament to which, according to the 59th section of the Statute, the cause assigned for the removal of a Lieutenant-Governor must be communicated.

Her Majesty's Government therefore can only desire you to request your ministers again to consider the action to be taken in the case of Mr. Letellier. It will be proper that you should, in the first instance, invite them to inform you whether their views, as expressed in Sir J. A. Macdonald's memorandum, are in any way modified after perusal of this dispatch, and after examination of the circumstances now existing, which since the date of that memorandum may have so materially changed as to make it in their opinion no longer necessary for the advantage, good government, or contentment of the province, that so serious a step should be taken as the removal of a Lieutenant-Governor from office. It will, I am confident, be clearly borne in mind that it was the spirit and intention of the British North America Act, 1867, that the tenure of the high office of Lieutenant-Governor should, as a rule, endure for the term of years specifically mentioned, and that not only should the power of removal never be exercised except for grave cause, but that the fact that the political opinions of a Lieutenant-Governor had not been, during his former career, in accordance with those held by any Dominion Ministry who might happen to succeed to power during his term of office, would afford no reason for its exercise.

The political antecedents and present position of nearly

all the Lieutenant-Governors now holding office prove that the correctness of this view has been hitherto recognized in practice; and I cannot doubt that your advisers, from the opinions they have expressed, would be equally ready with the late Government to appreciate the objections to any action which might tend to weaken its influence in the future.

I have directed your attention particularly to this point, because it appears to me to be important that, in considering a case which may be referred to hereafter as a precedent, the true constitutional position of a Lieutenant-Governor should be defined. The whole subject may, I am satisfied, now be once more reviewed with advantage, and I cannot but think that the interval which has elapsed (and which has from various causes been unavoidable) may have been useful in affording means for a thorough comprehension of a very complicated question, and in allowing time for the strong feelings, on both sides, which I regret to observe have been often too bitterly expressed, to subside.

Another striking instance of the straining of the power of dissolution and dismissal entrusted to the Governor was shown by the action of the Lieutenant-Governor of British Columbia—Mr. T. R. McInnes—in the years 1898–1900.[1]

In 1898 Mr. McInnes decided to dismiss the Ministry of Mr. Turner, which he considered to have no longer the confidence of the people of the province. The Ministry which took the place of Mr. Turner's Government was also very weak; it failed to meet Parliament in 1900 until January 4; it was defeated immediately after the meeting of Parliament, and only retained office throughout January and February by a majority of either one vote or of the casting vote of the Speaker. Moreover, the Ministry requested the Lieutenant-Governor to approve warrants for certain expenditures which were not authorized by the Legislature, and when the Lieutenant-Governor asked that he should receive a legal opinion from the Attorney-General as to the constitutionality of such warrants, no answer was supplied. Further, the Government advised him to take action with a view to making an important change in the Minerals Act empowering the Governor to cancel certain certificates of improvement

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

after they had been issued. Although the Legislature was in session they did not obtain its approval for the alteration, despite the fact that in the opinion of the Lieutenant-Governor the modification should have been authorized by an Act and should not have been carried out by an Order in Council. Moreover, the Government declined to carry out an instruction from the Lieutenant-Governor to issue a Crown grant under s. 39 of the Minerals Act to a petitioner named Dunlop. The Lieutenant-Governor accordingly on February 27, 1900, addressed his Prime Minister, dismissing him from office on the grounds enumerated. He then called to office Mr. Joseph Martin. The Secretary of State for the Dominion had telegraphed, just before he took action to dismiss his Ministers, suggesting that as it was understood that the Government party was being strengthened by the defection of members from the ranks of the Opposition, it was desirable to wait a time before calling upon his Ministers either to dissolve or to retire after the defeat which they had encountered in the Legislature on February 23. Later the Secretary of State informed the Lieutenant-Governor that in the opinion of the Privy Council of Canada the Legislature should be dissolved at once or should be called to meet so that an appeal might be made without delay to the people. Though the Legislature was dissolved in accordance with these instructions on April 10, it was found impossible to hold an election before June 9, the writs being returnable on June 30. The Privy Council called upon the Lieutenant-Governor to explain his conduct with regard to the selection of Mr. Martin, the delay before dissolving the Legislature, and in completing the Executive Council. The Lieutenant-Governor defended himself in a long report from the various charges which had been brought against his conduct. With regard to the criticism that the House was left in session without any Ministry to carry on the Government, he quoted the British precedent of 1783, when an interregnum of thirty-seven days took place after the resignation of the Shelburne Ministry, and the interregnum of twenty-eight days after the assassination of Mr. Perceval

on May 11, 1812, and the interregnum of ten days after the resignation of the Russell Ministry on June 26, 1866. In this case the Ministry was sworn in on the day following the dismissal of the Semlin Ministry. He justified the delay in the completion of the personnel of the new Cabinet by instances from Canadian history—in the Ministry of the Honourable Alexander Mackenzie in 1873, the Ministry of Sir John Macdonald in 1878, and the Ministry of Sir Wilfrid Laurier in 1896.

In the case of British Columbia three ministers were sworn in at once on February 27, and another two ministers were sworn in within thirty-five days after the assumption of office by the Premier. In reply to the accusation that the persons selected to form the Ministry were new and untried men, he urged that it was unquestionably solely a matter for the discretion of the Prime Minister to select his colleagues without any interference, and that he could not have checked him in his choice without an unwarrantable exercise of authority.

The criticism that the ministers had continued in office without by-elections being held for the ratification of their appointments by the electorate he met by pointing out that he was advised that in view of the impending dissolution of the Legislature and consequent general election, such by-elections were not necessary. He also pointed out that in Ontario ministers of the Crown—the Commissioner of Crown Lands and the Minister of Agriculture, both defeated during the Ontario general election of 1898—had both retained office for a period of eight months thereafter.

With regard to the accusation of having dissolved so soon a Legislature so recently elected without having made an effort to form a Ministry from the members thereof, he quoted the case of Manitoba, where the Legislature was dissolved on November 11, 1878, and again on November 26, 1879, while at a later period it was dissolved on November 11, 1886, and again dissolved on June 16, 1888; in the Province of Quebec the Legislature was dissolved on May 10, 1890, and again on December 22, 1891. In the case of British

Columbia the Legislature was dissolved on June 7, 1898, and not again dissolved until April 10, 1900.

He denied the statement that legislatures do not divide on party lines and that coalition should have been permitted. It was true that in British Columbia the Dominion party lines were not followed in provincial elections, but there had been a distinct division on party lines in provincial matters in 1898. Mr. Semlin could not have formed a coalition, for though Mr. Semlin moved and carried a motion after his dismissal, 'That this House, being fully alive to the great loss, inconvenience, and expense to the country of any interruption of the business of this House at the present time, begs leave to express its regret that His Honour has seen fit to dismiss his advisers, as in the present crisis they have efficient control of the House,' by a vote of twenty-two to fifteen, yet the leader of the Opposition and his former colleagues with one exception voted against the motion, showing that no coalition had been effected.

The delay in holding the general election he justified by the case of the dismissal by Lieutenant-Governor Angers of the Mercier Ministry on December 16, 1891, when the ensuing general election was not held until March 8 following—the time elapsing being much the same as in the case of British Columbia—while no censure had been imposed on Lieutenant-Governor Angers for his action in the matter. He also quoted the circumstances attendant upon the formation of Mr. Pitt's first administration in 1783.

Despite, however, the elaborate explanations furnished by the Lieutenant-Governor, it was decided by the Dominion Government that the Lieutenant-Governor should be dismissed on the grounds that his action in dismissing his ministers had not been approved by the people of British Columbia, and that in view of recent events in British Columbia it was evident that the Government of the Province could not be carried on in the manner contemplated by the constitution under the administration of Mr. McInnes, whose official conduct had been 'subversive of the principles of responsible government'.

The decision of the Privy Council was obviously correct. As the Secretary of State pointed out in a private letter to Mr. McInnes, there was no parallel in the history of constitutional government that a body of men, five-sixths of whom had never been members of the Legislature, should be permitted to carry on a Government for three months without any public sanction or approval. Although it was clear that the conditions existing in British Columbia had made the position of the Lieutenant-Governor a very difficult one—the bitter personal feeling shown between the rivals for place and power intensifying the embarrassment as the rivals were so nearly equal in numbers—it was nevertheless impossible to approve action so completely contrary to any ordinary theory of responsible government.

The Governor of Newfoundland in 1861 dismissed the Kent Ministry from office, expressly on the ground that he had been attacked by Mr. Kent in the House of Assembly, and his action was upheld by the results, the new Ministry securing firm hold of office.[1]

In December 1891 the Lieutenant-Governor of Quebec—Mr. Angers—decided to dismiss from office the Mercier Ministry. For some months before, it appears, he had declined to treat them with full confidence, and had only maintained them in office pending the result of further investigations into their conduct. It was alleged against them that they had received moneys in connexion with the Chaleurs Bay Railway, and a commission of three justices was appointed to investigate. The report of the commission asserted positively that certain ministers, including the Premier, had received payment in connexion with the railway, and the Lieutenant-Governor then took the decisive step of declining any longer to continue the Ministry in office. In his letter of dismissal he alleged among other things that the ministers had illegally spent money without his sanction, and had completely misinformed him and misled him as to public affairs.

The drastic step thus taken by Mr. Angers was deeply

[1] Prowse, *History of Newfoundland*, pp. 488, 489; above, p. 224. n. 3.

resented by Mr. Mercier and his supporters, and his conduct was violently denounced as unconstitutional and illegal. But Mr. de Boucherville, who was asked by the Lieutenant-Governor to take office, was successful in forming a Ministry, and at the election in March 1892 he was triumphantly returned with an overwhelming majority of thirty-one, in a House then of seventy-three members.[1]

Among the numerous points discussed during the course of the dispute, which was conducted with much heat on both sides, as the Ministry was a Liberal one and the Lieutenant-Governor the nominee of a Conservative Government at Ottawa, there was the point whether the Lieutenant-Governor had not broken the law in dissolving the new Legislature before it could conduct any business, with the result that the year 1891 saw no session whatever of the Legislature of Quebec.[2] It was argued that this was a breach of the provisions of the British North America Act, which requires one session of the Legislature every year, but on the other hand it was contended, apparently correctly, that it was sufficient that the Legislature should be formally summoned, and that the necessity of having one business session a year was subject also to the power of the Lieutenant-Governor at any time to dissolve the Legislature. In any case, it was certainly in harmony with common sense that the Legislature should not have met until a general election had decided the question as to the confidence of the country in the new Ministry.

In 1903 the Lieutenant-Governor of British Columbia decided to dismiss Colonel Prior, who was then the head of the provincial Ministry.[3] Ever since 1900 there had been constant strife of parties divided on no intelligible lines, and mainly concerned with the ambition for power of the several members of the party. But the Ministry had suffered early in the year a serious blow by allegations made against two

[1] See *Canadian Gazette*, xviii. 4, 9, 81, 97, 289, 296, 300, 322, 324, 398, 471, 513, 565, 584, 588; Canada *Sess. Pap.*, 1891, No. 86; 1892, No. 88.

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

[3] See *Canadian Annual Review*, 1903, pp. 213 seq.

of the ministers in connexion with land transactions in favour ultimately of the Canadian Pacific Railway Company. These transactions were deemed to have been prejudicial to the interests of the Province, and the position of the Premier personally was weakened by accusations that he had allowed the Government to give a contract to a firm of which he was a member at a time when he had seen tenders submitted by other firms. The Premier justified the position that his firm could accept contracts from the provincial Government, and asserted that it was perfectly proper to do so just as it was perfectly proper for the Attorney-General of the province to take steps to secure the passing of private Bills. After being sustained on one issue by the casting vote of the Speaker, the Government were eventually defeated, and intended to secure a dissolution from the Lieutenant-Governor. This, however, was not conceded, and on June 1 it transpired that the Lieutenant-Governor had dismissed the Ministry, giving as ground for doing so his dissatisfaction with the attitude adopted by the Premier on the question of Government contracts. Mr. McBride then consented to accept office, and determined that politics should be carried on on purely Dominion party lines, with the result that at the ensuing general election he secured a small but adequate majority on Conservative party lines, and has since that date maintained his position with ever-increasing strength.

CHAPTER V

THE GOVERNOR AND THE LAW

§ 1. The Expenditure of Public Funds

There is another limitation to the right and duty of the Governor to act on ministerial advice, unless he sees fit for adequate cause to dismiss his Ministry or cause them to resign by refusing to accept their advice on some matter which they deem of essential importance to them in the conduct of the Government. He is, as we have seen above, bound to obey the law because he is not immune from action, criminal or civil, if he disobeys the law. His letters patent and his commission record the duty in clear language, and he should remember the paramount importance of being above suspicion of illegality. It is also a matter in which his double responsibility, that to his ministers and that to the Secretary of State, comes into full play. The Colony is entitled to expect that the head of the Government will not in any way infringe the law of the land ; in a constitutional Dominion there is only one way of altering law, that is the change of the law by the legally constituted legislative body, and the violation of law is not a matter which can possibly be condoned without the gravest cause.

We have seen in the case of dissolutions the duty which the Governor has thrown upon him to try to secure supply before he grants a dissolution : whenever that is not done there will certainly be a time when the law will, strictly speaking, be violated if the public obligations are to be met. But this fact is subject to various considerations : in the first place, in the Australian Colonies, which are, and have always been, by far the greatest offenders in this respect in virtue of the constant change of Ministries, the practice exists and has always existed for moneys to be paid out on a Governor's warrant anticipating the sanction of Parliament. This custom is not a desirable one, but it has been so rooted in the practice of those Colonies, now States, that it cannot

be expected to disappear for a long time. Recent instances of such happenings are afforded by the large sum expended by Mr. Philp's Government in 1907–8, when the House had refused all supply, and had urged the Governor of Queensland not to dissolve the House as requested by the Ministry: in that case the opposition was extremely indignant, and there were many threats of what would happen in the country when they came back to office;[1] indeed, that feeling was strong is shown by the fact that the money in question was ultimately voted in so indirect a manner that the Labour party, which would have resisted energetically its appropriation, was caught unaware and let the Bill through at the end of the session, when every one was thinking of getting away and vigilance was relaxed. In the case of the dissolution in 1908 in Victoria the Governor was assured that supply was available, but that was not true, and in that instance a most gross violation of law took place, because the Premier, who was also Treasurer, spent large sums (over £180,000) not merely with only the consent of the Governor, which would have been at any rate, if undesirable, a not rare occurrence in the case of Australia, but without the sanction of a Governor's warrant, in the face of the constitution and in face of the Audit Acts.[2] None the less, though a committee was appointed by the new Government to investigate the case, it did not appear that Sir Thomas Bent had been much of a sinner compared with the long tradition of financial irregularity in the case of Victoria. In Tasmania, again, a very vigilant and careful Governor found it necessary without legal appropriation to approve the issue of certain sums of money to the judges, who were

[1] The Government of Mr. Kidston, which took office on Mr. Philp's resignation, in face of the result of the general elections refused even to pay wages until a Supply Bill had been passed. Similar tactics were employed in 1908 by the Dominion Government to meet obstruction of supply in Canada; see *Canadian Annual Review*, 1908, p. 53.

[2] Victoria *Parliamentary Debates*, 1909, pp. 9 seq., 330–3; *Parl. Pap.*, 1909, Sess. 2, No. 1. It should be noted that in most of the Dominions there are now provisions in the Audit or other Acts allowing in certain circumstances special expenditure (e. g. Canada *Rev. Stat.*, 1906, c. 24. s. 42), but these provisions are constantly being exceeded.

doing extra work during a vacancy in the bench: this action was attacked in the Assembly, but the Opposition failed to carry the motion of censure: it is clear, however, that the act was illegal.[1] In the case of Western Australia the same Governor, in 1909, was forced to allow the meeting of Parliament to be delayed until July 28, after the return from England of his Premier, who had been there on a visit, and so the country was for a considerable period without legal authority for appropriation at all. In South Australia the habit of signing excess warrants has existed for no less than twenty years, and has been approved, if not recognized as legal, by no less than three ministers, one after another, it being defended by one minister as a convenient and, indeed, necessary means of procedure. It is clear that it merely assists the Lower House to secure its sway over the Upper House, which can hardly reject expenditure which has already been incurred, and this is certainly in South Australia sometimes a source of annoyance to the Upper House. But it is quite helpless in the matter: the only possible action would be to refuse supply, and despite the large powers in law of the Upper House of that state the House dare not interfere with popular expenditure, if the members wish to retain their seats in Parliament. It is significant of the whole position that the Government of Western Australia[2] announced, evidently with honest pride, in 1910, that though they had the money for a certain public work they would not spend it without a legal appropriation: it is not quite certain whether their audience was as appreciative of the virtue thus displayed as it should have been.

New South Wales used to be the worst offender of all, if

[1] See Hobart *Mercury*, October 15, 1908, for a report of the attack on the Government. For a case in 1877 see *Legislative Council Journals*, 1877, Sess. 4, No. 11, p. 13.

[2] *West Australian*, July 4, 1910 (Mr. Gregory's speech). See also the Reports of the Auditor of Western Australia for 1909 and 1910; *West Australian*, December 15, 1909, December 15, 1910; South Australia Auditor's Report, 1910, pp. xi, xii. Cf. also Adelaide *Advertiser*, November 21, 22, 1900, as to personal duty thrown on Governor under Loan Act No. 648 of 1896. The practice in Newfoundland is also very irregular.

indeed it is possible to make distinctions of degree between sinners all so wicked. From 1858 onwards the custom there was to pay out sums in anticipation of Parliamentary sanction on the strength of the warrant of the Governor, and in a dispatch of September 30, 1868, the Secretary of State for the Colonies, on the application of the Governor, Lord Belmore, gave a reasoned opinion on the propriety of the practice and the limits within which it could be carried out. The dispatch runs :—[1]

I have to acknowledge the receipt of your Lordship's Despatch of the 17th of June, in which you desire instructions as to whether it is competent for you to exercise the discretionary power legally and constitutionally which the Governors of New South Wales have done during the last 10 years with regard to approving of Executive sanction being given in anticipation of Parliament appropriation to such payments as are referred to in the third paragraph of your Despatch.

The payments mentioned in the third paragraph are called for when the amount appropriated for any particular service has proved to be insufficient, or an item may have been casually omitted, or some unforeseen emergency has arisen.

I apprehend that you cannot legally exercise a power of expending moneys without an Appropriation Act, and that you would primâ facie be bound to refuse to sign a warrant sanctioning any expenditure of public money which has not been authorised by law.

But as in England, so in New South Wales, cases of supreme emergency may arise, when it may be impossible to adhere to the strict and proper rule without detriment to the public interest, and when the Government at home takes upon itself the responsibility of sanctioning such expenditure. Such are cases where a service voted requires more money than has been voted, or where some wholly unforeseen contingency arises of too urgent a nature to allow of the required expenditure being previously submitted to Parliament for their sanction.

Cases of this kind must be dealt with by the Governor on the responsibility of his ministers, and he must exercise his own judgment upon a careful consideration of all the circumstances brought under his notice by those ministers.

I shall not attempt to give you more definite instructions

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

upon this subject, as each case must stand or fall upon its own merits; but I should be disposed to say generally that such expenditure would be justifiable, first, on the ground of necessity, or, secondly, on the ground that it is sure to be subsequently sanctioned, joined to strong grounds of expediency, even though short of actual necessity.

You are probably aware that in England the Treasury have no power of transferring surpluses on civil or revenue service votes to meet deficiencies occurring on other votes of the same service; but a fund has been established by Parliament called the Civil Contingency Fund, amounting to 120,000*l.*, out of which the Treasury can provide temporarily for any services such as you allude to in the third paragraph of your Despatch. In the following estimates a vote is taken for all such advances, and the sum so voted is repaid to the Civil Contingency Fund.

It appears to me worthy of your careful consideration whether a similar contingency fund might not usefully be established in the Colony, though without further information I am not myself in a position to judge whether such a measure would in the result prove beneficial, or whether if proposed it would be likely to obtain the sanction of the Colonial Legislature.'

On March 25, 1869,[1] Lord Belmore reported to the Secretary of State on a difficulty which had arisen in the matter of such warrants. He had paid some salaries on a warrant issued without the approval of Parliament, and the Legislative Council had protested. As he read the Constitution Act, an appropriation was not required to authorize the Government to sign any warrant, but to authorize the Treasurer to act upon the Governor's warrant, no matter when or how long before signed. He quoted as his authority for his action the dispatch of 1868.

To this dispatch Lord Granville replied, disapproving the views of the Governor, and this gave rise to an interesting discussion of the views of the Secretary of State by the Executive Government of the Colony. The following extracts will show the position adopted by either side, and are of importance as illustrating the views held of responsible government by Lord Granville.

[1] *Parl. Pap.*, C. 2173, p. 117.

The Treasurer of the Colony in a minute of September 18, 1869,[1] thus explained the views of the Cabinet :—

Lord Belmore's justification of himself on the ground of these instructions for having assented to the payments in the case under consideration is thus conveyed in his Despatch to Lord Granville, of 25th March, covering the resolutions of the Council.

'Applying these instructions to the present case, which differs from the former in so far as this concerns estimates in chief and one House of Parliament only—those supplementary estimates and both Houses—I consider the present to be an "unforeseen contingency" of an urgent nature, and the course which has been pursued to be "justifiable" on the ground that it was presumably "sure to be subsequently sanctioned, joined to strong grounds of expediency, even though short of actual necessity".'

Lord Granville in reply (Despatch 16th June 1869) expresses himself as follows :—

'Having reference to the terms of the Duke of Buckingham's Despatch of 30th September, I am not prepared to disapprove the course which you adopted in authorising the payment of certain salaries in anticipation of an Appropriation Act; but at the same time I think that you have somewhat misunderstood the spirit of those instructions, and that the mere fact that a certain number of public officers would be put to a temporary inconvenience cannot be viewed as an unforeseen emergency, as it is a consequence which must in the nature of things result from any delay in passing an Appropriation Act; nor is it such a case of expediency as justifies a violation of law.

'But independently of these considerations, the question is settled prospectively by the action of the Legislative Council, as I consider it clear that except in case of absolute and immediate necessity (such, *e.g.*, as the preservation of life) no expenditure of public money should be incurred without sanction of law, unless it may be presumed not only that both branches of the Legislature will hold the expenditure itself unobjectionable, but also that they will approve of that expenditure being made in anticipation of their consent.

'Your Lordship will not therefore be at liberty on any future occasion to repeat the step which you have adopted in this case.'

[1] *Parl. Pap.*, C. 2173, p. 122.

Lord Granville appears to consider expenditure without parliamentary sanction justifiable on two grounds only—1st, on the ground of necessity, 2nd, on the ground of expediency accompanied by a reasonable presumption that both branches of the Legislature will subsequently approve of the expenditure.

Nevertheless, in the very case under consideration, Lord Granville, even if he does not directly censure, at least expressly prohibits for the future the course taken by Lord Belmore in having, upon the advice of his ministers under circumstances of great emergency, assented to an expenditure which, although not strictly legal, had been sanctioned by the Legislative Assembly, both by resolution and by Bill, and to which, although the Bill for the purpose had by a mere inadvertence failed to pass the Legislative Council, there could be no doubt whatever that the sanction of that body would have been afterwards obtained.

Without further dwelling, however, upon this apparent discrepancy between principles laid down and the application of those principles by the Secretary of State for the Colonies, I invite the serious attention of my colleagues to the probable effect of these instructions, and to the embarrassments in which the present or any future Government of this Colony might be thereby involved.

We see that in a case where every constitutional step was taken, excepting the final step of obtaining the technical consent of the Upper Chamber, in a case of such 'emergency' that delay on the part of the Executive might have been dangerous to the public interest, the Secretary of State's disapproval of the course adopted is scarcely withheld, while his injunction against its repetition is peremptorily imposed.

It then becomes a grave question whether by prohibitory instructions to the Governor of this kind the free action of responsible government in this Colony is not liable to be seriously impeded; whether our position and functions as Responsible Advisers of his Excellency, and ministers responsible to Parliament, are not interfered with by the Secretary of State so as to affect the principle of Colonial independence. Lord Granville seems to have overlooked the fact that the action of the Executive Council in cases like that referred to is not that of the Governor alone, but the joint action of the Governor and his Responsible Advisers. The Governor, no doubt, is responsible to the Imperial Government, but his advisers are responsible to the Parliament of this Colony, and to bind the Governor by thus

laying down an arbitrary course of procedure may bring him into collision with his ministers on matters affecting local interests alone, and involve such an encroachment upon the privileges of the people and Parliament of this Colony as appears quite inconsistent with those broad and enlightened principles of self-government which have been long acknowledged in this Colony, and of late so strongly impressed upon the Colonies by the Imperial Government.

The magnitude and frequency of unexpected demands upon our public funds may be estimated from the amount of supplementary appropriations made by Parliament annually during a series of years, say ten :—

		£
1859	supplementary estimate,	81,623
1860	do. do.	78,190
1861	do. do.	78,634
1862	do. do.	148,050
1863	do. do.	406,718
1864	do. do.	121,593
1865	do. do.	107,060
1866	do. do.	181,574
1867	do. do.	124,666
1868	do. do.	201,070

The greater part of this large supplemental expenditure has been from time to time dealt with as having originated under circumstances of emergency which were held to justify the exercise of Executive responsibility, and which was afterwards on that ground legalized by the harmonious action of both Chambers.

I may here point out that the practice in England is to pay moneys upon the resolution of the House of Commons alone, a practice expressly authorised and recognised by the 29th and 30th Vict. cap. 39, sec. 14, viz. :

'When any sum or sums of money shall have been granted to Her Majesty by a resolution of the House of Commons or by an Act of Parliament to defray expenses for any specified public services, *it shall be lawful* for Her Majesty by Her Royal Order under the Sign Manual, countersigned by the Treasury, to *authorise and require* the Treasury to issue out of the credits to be granted to them on the Exchequer Accounts the sums which may be required from time to time to defray such expenses.'

In opposition to the idea of Executive responsibility entertained by Lord Granville, I have recited by way of

contrast the opinions on the subject expressed by the Dukes of Newcastle and Buckingham and Chandos and Sir W. Denison and Sir G. Grey. I also add an extract from Todd's work on *Parliamentary Government in England*, viz. :—

'It is therefore erroneous to suppose that the Government can be absolutely *prevented* from any misapplication of the parliamentary grants. Even were it possible to do so it would not be politic to restrain the Government from expending money under any circumstances without the previous authority of Parliament. In the words of Mr. Macaulay (Secretary to the Board of Audit) cases must constantly arise in so complicated a system of government as ours where it becomes the duty of the Executive authorities, in the exercise of their discretionary powers, boldly to set aside the requirements of the Legislature, trusting to the good sense of Parliament when all the facts of the case shall have been explained to acquit them of all blame; and it would be not a public advantage, but a public calamity, if the Government were to be deprived of the means of so exercising their discretionary authority.'

To the same effect we have a declaration by a Committee of the House of Commons, that in special emergencies expenditure unauthorised by Parliament becomes absolutely essential. In all such cases the Executive must take the responsibility of sanctioning whatever immediate urgency requires; and it has never been found that Parliament exhibited any reluctance to supply the means of meeting such expenditure.

Under these circumstances I advise my colleagues to join with me in an expression of opinion against the instructions lately issued by the Right Honourable the Secretary of State for the Colonies to his Excellency the Governor as amounting to an interference in matters of local government with our responsibility as ministers of the Crown, and representatives of the Parliament and the people of this Colony, upon a question entirely unconnected with Imperial interests.

Lord Granville replied to this minute in a dispatch of January 17, 1870,[1] as follows :—

In my Despatch of the 16th of June I conveyed to you my opinion that, except in case of absolute and immediate necessity (such, *e. g.*, as the preservation of life), no expenditure of public money should be incurred without sanction of law, unless it could be presumed not only that both branches of the Legislature would hold the expenditure itself unobjectionable, but also that they would approve of that expenditure being made in anticipation of their consent;

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

and I added in effect an instruction that you would not be at liberty hereafter to issue your warrant for any expenditure not sanctioned by law, except under the conditions above described.

He then quoted the protest of the Treasurer and continued :—

So formal a protest from your ministers against the unconstitutional character of the instructions sent out to you renders it my duty to explain fully to them and to the people of New South Wales the position adopted in this matter by Her Majesty's Government and the considerations by which they are led to it.

I begin by admitting unreservedly that the matter now in hand is one of purely local interest, in respect to which Her Majesty's Government only desire that you should conform your conduct to the wishes of the Colony when constitutionally ascertained. Those wishes are constitutionally ascertained through two channels, the Legislature and the Executive Government.

The general rules by which the conduct of yourself and your ministers are to be regulated are prescribed by the Legislature in all free countries, the most solemn and authoritative organ of the national will.

In the application of those rules you are authorised to accept as the interpreter of public will a Council presumed to possess the confidence of the Legislature and constituting the Executive Government.

In any ordinary case, if the law required you to do one thing and your advisers recommended you to do another, there can be no doubt that the deliberate enactments of the Legislature would be more binding on you than the opinion of a Council deriving its authority from that Legislature, and commissioned not to dispense with the law but to administer it. It would be your plain duty to obey the law, and it would be idle to speak of such obedience as unconstitutional. This your ministry would probably admit, but they would argue that emergencies may confessedly arise in which it may become the duty of a public officer, or indeed of a private citizen, to overstep the law, and that in a case like the present it is for the Executive Council and not for the Governor to determine whether such a case has in fact arisen.

This present case, so far as it is material to this constitutional question, is as follows :

The 53rd section of the Constitution Act provides that,

subject to certain charges, the revenue of the Colony 'shall be subject to be appropriated to such specific purposes as by any Act of the Legislature of the Colony shall be prescribed in that behalf.' The 'Legislature of the Colony' consists of the Governor, Council, and Assembly, and it follows that to spend money without the authority of the Governor, Council, and Assembly is a breach of the law.

The 55th section of the Constitution Act provides that no part of that revenue 'shall be issued or shall be made issuable except in pursuance of warrants under the hand of the Governor of the Colony directed to the Public Treasurer thereof.'

On the Governor, therefore, is imposed the duty of seeing that no breach of the law is committed.

Your ministers are of opinion that if they desire the Governor to sign a warrant authorising the issue of any amount of public money for a purpose confessedly unwarranted by law, he is bound, whatever his opinion may be, to comply with their demand, if only they place before him a statement, even if it appears to him to be unfounded, that an emergency has arisen justifying that expenditure. Any position less unqualified than this would leave some personal discretion to the Governor, and therefore some opening for the collision which Mr. Samuel holds to be unconstitutional.

Her Majesty's Government cannot adopt this conclusion. They admit that the Legislature of New South Wales might, if they had chosen, have deprived the Governor of all right to interfere with the public finance. It might have left the Treasurer without control in his issue of public money, or subjected him in this respect to the check of the Auditor or some other permanent or political officer. Instead of doing this they have made the Governor responsible for the execution, and therefore for every violation of the law. That responsibility is, in the opinion of Her Majesty's Government, a personal one.

The distinction drawn by Mr. Samuel in the passage I have first quoted from his memorandum between the action of the Governor alone and that of the Governor in Council is correct and material, but it is misapplied. He rightly assumes that duties imposed by law on the Governor alone are to be exercised by him, with an amount of personal discretion far greater than belongs to him when acting in Council. But it will be seen by reference to the above cited clause from the Constitution Act that, to reverse Mr. Samuel's

language, 'the action in cases like that referred to is that of the Governor alone, and not the joint action of the Governor and his Responsible Advisers.' It is true that the personal responsibility of the Governor in no way absolves him from attaching great weight to the opinions of his ministers in respect to fact, law, or expediency. He must almost necessarily accept their statements on matters on which he is himself imperfectly informed. But with these qualifications he remains in the last resort the judge of his own duty, and is not at liberty on the advice of his ministers to sign the warrant required by the 55th clause of the Constitution Act, if he is clearly convinced that to do so would be to commit an act contrary not only to the letter but to the spirit of the law.

I am unable therefore to recall the instructions already communicated to you. You are to consider the Legislature as the most authoritative exponent of the will of the Colony. When the Legislature has enacted a law you are not to transgress that law unless on a reasonable conviction that the Legislature would itself approve your doing so. But you are justified in assuming such an approval under the pressure of one of those overwhelming emergencies, dangerous to anticipate or define, which dispense with all rule, or in cases of less moment when there are specific reasons for presuming that the Legislature will sanction a certain specific expenditure, and will desire its sanction to be anticipated.

I trust there is little chance, as apprehended by Mr. Samuel, that adherence to these instructions will bring you into collision with your ministers. I should deeply regret it. But in so painful a contingency it would be better to be in collision with your advisers than with the law.

A difference, however, with your ministers would render it necessary to ascertain the wishes of the Colony. I am myself disposed to think that the obstacle which is imposed on unauthorised expenditure by requiring for it the personal sanction of the Governor, in addition of course to the judgment of the ministry, is a useful obstacle, and it is not improbable that the Colony would pronounce in favour of retaining it. But Her Majesty's Government have no desire to dictate one or the other conclusion. Whatever is the decision of the Colony you will be bound to defer to it.

If the question arises how that decision should be expressed, the first and most satisfactory answer is that it should be embodied in an enactment 'repealing or modifying the 55th section of the Constitution Act.'

If, however, the passing of such an Act is likely to raise any collateral issues, or otherwise to be attended with difficulty or delay, I think that in the present case, which is rather constitutional than legal, the desire of the community would be sufficiently expressed by an Address from both branches of the Legislature.

If therefore the Council and Assembly should request you to be hereafter guided by the advice of your ministers in the execution of the duties imposed on you by the 55th section of the Constitution Act, Her Majesty authorises you to accede to that request, and will then hold you relieved of the personal responsibility which now attaches to you.

Not much resulted from this correspondence, for the truth is that the necessity of providing money by such warrants will always exist unless a Parliament has strong traditions of financial responsibility, and whatever the cause—whether from the practice in Crown Colony days where the authority of the Secretary of State is acted upon whenever given, and the grant ratified afterwards, a procedure harmless in a case where the Secretary of State has control of the Legislature or from the needs of young communities—the Colonies have not as a rule strong views as to constitutional action in financial matters. Thus in 1910 the New South Wales Act No. 44 covers over £207,000 suspense expenditure in anticipation of sanction. There are exceptions to that rule: on a recent occasion in Canada in the face of obstruction in the House of Commons, the Government refused to pay salaries,[1] but this step was regarded as decidedly a case of financial purism, and the Conservative Government in 1896 went on spending moneys freely though supply had expired,[2] until the Governor-General questioned

[1] *Canadian Annual Review*, 1908, p. 53. One of Lieutenant-Governor Angers's charges against Mr. Mercier was of illegal expenditure; see *Canadian Gazette*, xviii. 296, 513. The lack of parliamentary authority for the expenditure of funds was insisted on by Sir W. Laurier as a ground for inaction in regard to sending troops to South Africa in 1899; see Willison, *Sir Wilfrid Laurier*, ii. 339. For a case of Commonwealth irregularity, see *Gazette*, 1911, pp. 1222 seq.; Act No. 2 of 1910.

[2] See Canada *House of Commons Debates*, 1896, Sess. 2, pp. 58 seq., 620–852. Cf. also Sir R. Cartwright's remarks, ibid., 1891, pp. 4537 seq.; *Sess. Pap.*, 1896, Sess. 2, No. 8; but cf. *Canadian Annual Review*, 1905, pp. 147–9, for the resignation of the Auditor-General, as a protest.

their action and refused their advice, with the result of a retirement of the Ministry, when their action in spending money was criticized severely by Sir Wilfrid Laurier, and they retorted by censuring the new Government for spending money before Parliament voted it.[1] And in 1909, in New Zealand, when the Prime Minister required to go to England on the invitation of the Imperial Government, to attend the naval and military conference of that year, he would not go until he had induced Parliament to meet for a brief period and pass supply (Act No. 1), so as to provide means for carrying on the Government in his absence. In 1910 matters were simplified by passing a general Act, No. 43, allowing for expenditure at current rates for the first quarter of each new financial year.

Another aspect of the question was shown in the famous Darling case in Victoria :[2] Sir C. Darling in that case, where the Lower and the Upper Houses were at variance, sanctioned the levying of duties on a mere resolution of the Lower House, the raising of a loan without legislative sanction, the sum being made a legal debt by an admission of liability under the *Crown Remedies Act*, 28 Vict. No. 241, and the payment of official salaries without appropriation. The opinion of the Secretary of State on these proceedings was conveyed in two dispatches of November 27, 1865, and February 26, 1866, from which the following are extracts. After reciting the law of 22 Vict. No. 86, under which appropriations required the sanction of the Audit Commissioners, who had to be satisfied that the sums were legally available, and the signature of the Governor, and the *Crown Remedies Act*, which empowered the Governor to satisfy from the consolidated fund the demand of a claimant against the Colonial Government who had obtained a certificate from the Supreme Court of the validity of his claim, he proceeded :

In this state of the law the Government, with your sanction, prevailed upon one of the banks in which a 'Public

[1] *House of Commons Debates*, 1896, Sess. 2, pp. 1634 seq. (Sir C. Tupper's view of the duty of a Governor). Cf. also Pope, *Sir John Macdonald*, i. 217, for Sir J. Macdonald's view in 1859.

[2] See below, pp. 605 seq.

Account' was kept, to lend you or them certain sums of money, and to carry that money to a separate account, which was to be acted upon by you or them without the concurrence of the Audit Commissioners; and it was agreed that the Bank should at once petition the Supreme Court under the Act 28 Vict. for repayment of this loan, that your Government should at once confess judgment, and that you should thereupon enable them to repay themselves out of the 'Public Account' the amount they had placed to this new account.

I do not quite clearly understand whether the concurrence of the Audit Commissioners was necessary, or was obtained to this repayment. But this is of minor importance. The effect, practically, was to transfer the public money out of the 'Public Account' from which the Bank could not ordinarily issue it, without the Audit Commissioners' certificate, to another account entirely under the control of the Government.

The money so obtained has, I understand, been applied by the Executive Government to the payment of salaries, and I suppose to other immediate purposes specified in the Appropriation Bill, which the Council refused to pass. I infer that it is by the extension and continuation of this process that the Government has been since carried on.

This, I think, is a correct statement of the material facts, on which I proceed to express my opinion.

First. I have no hesitation in saying that independently of the Judgment of the Supreme Court, no consideration, at least none that is discernible in your despatches, should have induced you to give your concurrence to the levying of these duties.

The plea that taxes are levied in this country on a vote of the House of Commons before they are imposed by law is manifestly irrelevant. Such taxes are so levied because it is not doubted that the Bill imposing them as from the date of the Resolution of the House of Commons on which the Bill is founded (and after which only they are levied), will become law, by the concurrence of the two other Branches of the Legislature. If such concurrence were withheld, the sums so levied by anticipation would be repaid, and they would of course be no longer levied.

But in the present case you and your Government were perfectly aware that the Bill would not receive the sanction of the whole Legislature, and the exaction of these duties was not in anticipation but in defiance of the judgment of the Legislative Council. It was, therefore, not only in its origin unlawful, but there even was every reason to presume that

it would remain so. I look with extreme apprehension on a state of things in which the Government of a British Colony is engaged in collecting money by mere force from persons from whom the Supreme Court has declared that it is not due. It is an example of violence which may do incalculable mischief beyond the limits of the Colony in which it has been allowed to occur.

Next, I do not understand on what ground it can have been imagined that you were legally authorised to borrow from a private bank large sums of money on behalf of the public. No authority is alleged, and I am unable to conjecture any. The only excuse for such a proceeding would have been an overwhelming public emergency of such a nature as to justify what was not justified by the letter of the law. But, as I have observed, you had already declared that no such emergency existed. And you were right; no such emergency did exist. If payments were legally due from the Crown to public officers for salaries, or to any other persons on any account, it was open to such persons to recover what was so due to them in the ordinary course of law. It was for one or other branch of the Legislature to yield, or for both to compromise their difference. It was not for you to give a victory to one or the other party by a proceeding unwarranted either by your Commission or by the laws of the Colony. I must point out that by such a proceeding the Governor and his Government, with the co-operation of a local bank, might at any moment withdraw any amount of public funds from the 'Public Account' to which it is consigned by law, and place it at their own command, relieved from all the checks with which the Legislature has carefully surrounded it.

Thirdly, as to the expenditure of the moneys thus obtained, I find it difficult to suppose that by the Crown Remedies and Liabilities Act the Legislature intended to enable the Government to discharge, without its concurrence, those ordinary expenses of Government which it reserves to itself the right to re-consider annually. It may, perhaps, be doubted whether office-holders who are under a standing notice that their salaries are dependent on laws, annually passed, by the Colonial Parliament, would be treated by the Supreme Court as having a claim upon the Government independently of any such law. But it is not alleged that the Supreme Court was ever called upon to give judgment on the question, and you do not inform me of any law which would warrant you in paying away any public money except

under the authority either of such a judgment or of the Auditors' certificate.

As at present advised, therefore, I am of opinion that in these three respects—in collecting duties without sanction of law; in contracting a loan without sanction of law; and in paying salaries without sanction of law—you have departed from the principle of conduct announced by yourself and approved by me—the principle of rigid adherence to the law. I deeply regret this. The Queen's Representative is justified in deferring very largely to his Constitutional advisers in matters of policy and even of equity. But he is imperatively bound to withhold the Queen's authority from all or any of those manifestly unlawful proceedings by which one political party, or one member of the body politic, is occasionally tempted to endeavour to establish its preponderance over another. I am quite sure that all honest and intelligent Colonists will concur with me in thinking that the powers of the Crown ought never to be used to authorize or facilitate any act which is required for an immediate political purpose, but is forbidden by law.

It will be for the gentlemen who guide the opinions of the Colony, or form the majorities in the two Houses of the Legislature, to ascertain, and you will of course afford them every facility for ascertaining, how the Government of the Colony is to be carried on. It is for you to take care that all proceedings taken in the Queen's name, and under your authority, are consistent with the law of the Colony.

As I said in the beginning of this despatch, I could have wished to postpone any expression of my opinion until I should be in possession of the papers which you lead me to expect by the next mail. But the continued violation of the law, with the concurrence of the Queen's representative, would be so serious an evil that I have felt compelled thus to address you now. I believe that I have stated correctly the facts of the case. I have given you my view of the law arising from those facts. I have to instruct you in this, as in every other case, to conform yourself strictly to the line of conduct which the law prescribes.

In a dispatch of February 26, 1866, Mr. Cardwell wrote :—

I have already, in my despatch No. 107 of the 27th November, instructed you that some of the acts of your Government to which you gave your sanction were illegal, and have directed you to retrace your steps. But your present despatch imposes upon me new obligations. I shall

therefore briefly review the circumstances under which this Address has been adopted by the Petitioners.

The course pursued in the Assembly with respect to the Tariff and Appropriation Bills was not warranted by the practice of the English House of Commons, to which, by the Constitution Act, it was intended that the Assembly of Victoria should generally conform. Here, not only is a Bill introduced on the very day on which Resolutions for the alteration of Customs duties are agreed to, for the purpose of giving effect to those Resolutions, but every exertion is made to pass the Bill with as little delay as possible. Again, no practice is more carefully observed than that which avoids what is called tacking, or the combination of any other enactments with the Bill of Appropriation. But still, in the case which has occurred under your government, the delay of the Tariff Bill, and its union with the Appropriation Bill, were exposed to the same checks to which the like proceedings, if resorted to, would be exposed in this country. The Supreme Court was able to vindicate the right of any subject who might complain that duties were levied from him illegally, and the Legislative Council was able to maintain its own privileges by laying aside the compound Bill. I do not think it would have been desirable for you to interfere in any such manner as to withdraw these matters from their ordinary sphere, and so give to the dispute a character, which did not naturally belong to it, of a conflict between the Assembly of Victoria and the Representative of the Crown. I am not able to say that, in the actual circumstances of the case, you had it in your power to influence or control the course of affairs without incurring the risk of such a consequence.

But you ought to have interposed, with all the weight of your authority, when your Ministers continued to levy the duties notwithstanding the adverse decision of the Court. Still more evidently was it your duty to withhold your personal co-operation from the scheme of borrowing money in a manner unauthorized by law. I say unauthorized by law, because the loan itself had not been sanctioned by the Legislature of Victoria, and because the judgment which enabled you to repay that loan, having been obtained as it was, can be regarded only as a form under colour of which the substance of the law was evaded. By these proceedings the Supreme Court and the Legislative Council were practically deprived of the power with which the Constitution intended to invest them. This conduct on your part

involved a grave responsibility ; and it has led, by natural consequence, to the Address which I have now to consider.

The Secretary of State proceeded to announce the decision of the Imperial Government to terminate Sir C. Darling's tenure of office, and directed him to leave the Colony in the charge of the officer commanding.

Governor Darling was therefore removed from office. But it was found necessary to remind later, in 1867, his successor also of the essential duty of observing the law : in a dispatch of February 1, 1868,[1] the Secretary of State wrote :—

But in any case in which the law invests you with the power of preventing the issue of public funds by refusing your warrant, or of preventing the conclusion of any contract, for the satisfaction of which no money has been provided by Parliament, Her Majesty's Government are unable to relieve you of the necessity of deciding for yourself, according to the circumstances, whether you would be warranted in using that power in order to prevent an issue of public funds which may appear to you unconstitutional.

In the constitutional struggle, as renewed in 1878, the Governor had the misfortune to receive a rather severe rebuke from the Secretary of State for his action in allowing the Government to dismiss a large number of public servants. His action was not, it was clear, illegal, for it was upheld by the Courts except as to some minor matters, and the principle on which the censure of the Secretary of State was based was the necessity of maintaining the rule of the constitution that public servants who were not ministers were not liable to dismissal on political grounds. In a dispatch of July 5, 1878,[2] the Secretary of State laid down the rule that the Governor was bound to secure respect for law, though he might normally act on the advice of his law officers if they advised as law officers not as ministers, but even if they advised he was not bound to accept their legal advice if he felt that it was wrong. He might break the law in case of necessity, but the necessity must be very strong and very clear : the responsibility was a grave one, and should only

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

be incurred under the most serious circumstances. It cannot be said that the Secretary of State was wrong in the matter, at least in principle : the question is not that the Governor must be very chary of breaking the law, but whether in the case in question it was really not one of those instances where the circumstances are so extremely unusual as to justify even so strong a step as a breach of the law, and on the whole a calm judgement must say that the Governor made out for himself in the correspondence a very strong though not necessarily convincing case.

In the case of the Transvaal an interesting example of financial irregularity occurred just before the Colony was merged into the Union of South Africa.[1] There was held in 1910 a very short session, mainly for the purpose of providing for the election of senators to the Parliament of the Union. It was, however, desired by the Government to pay to the members of Parliament the full salary to which they would nominally have been entitled had the session been completed, and as a matter of fact, on April 28 cheques for the whole amount were issued to the members of the Lower House. The action of the Ministry was by no means generally popular, as it was felt that to make full payment for so short a period was not a legitimate employment of public funds, and accordingly an interdict was applied for and granted on May 2 by the Supreme Court in respect of the payment in question. The matter then came before the Supreme Court, and on May 10 judgement was delivered by the Chief Justice, which while holding that the plaintiffs had no *locus standi*, laid it down clearly that the payment proposed was a contravention of Act No. 12 of 1907, regulating payment to members of Parliament, and also probably a contravention of the *Audit Act* No. 14 of 1907, inasmuch as money could only be withdrawn from the Exchequer Account under cover of a special warrant from the Governor in virtue of s. 20 of that Act,[2]

[1] See a full account and discussion in *The State of South Africa*, iii. 990 seq.; iv. 296 seq., 667 seq.

[2] This section deals with cases of essential expenditure when Parliament is not in session. See *Dalrymple and others* v. *Colonial Treasurer*, [1910] T. S. 372.

and even if the Governor were able to concur that the special payment was necessary in the public interest, yet the fact remained that the necessity arose while the House was in session, and could have been dealt with in Parliament by means of a Bill. As a matter of fact the Government had intended to deal with it in Parliament, but the knowledge that the Opposition in the Upper House would not approve the proposal induced the Government to make the payment without obtaining the assent of that House. Notwithstanding these dicta of the Supreme Court the Transvaal Government proceeded to ask the Governor to issue a special warrant for the sanctioning of the payment of the amount in question. When the warrant was issued the Legislature had risen, and therefore the objection by the Chief Justice that the Legislature was in session when the payment was made did not apply, strictly speaking, to the signing of the warrant. The action of the Administrator was much questioned, and the matter was brought before the Imperial Parliament, when the Under-Secretary of State accepted for his chief full responsibility for the action of the Administrator, who it appeared had telegraphed home for instructions and had received authority to sign the warrant. In the House of Commons on June 29, the defence of the Administrator's action was based by the Under-Secretary of State on the grounds that he had signed on the advice of ministers, and that as the *Audit Act* defined Governor in that Act to mean Governor in Council[1] the Administrator was bound to act on the advice of his ministers, and could not act otherwise. It was not made quite clear whether the Under-Secretary of State considered that he must always act on the advice of his ministers, or whether he merely held that the case was not one in which it would have been justifiable to decline to accept advice. The matter seemed so unsatisfactory to Lord Northcote that he raised the question in the House of Lords on July 25, and Lord Crewe gave a more complete

[1] The Union Interpretation Act, No. 5 of 1910, similarly defines Governor-General to mean in all cases Governor-General in Council. This is an inconvenient definition, but follows Cape Act No. 5 of 1883.

statement as to the position of a Governor.[1] He pointed out that no illegality had been committed by the Administrator in signing the warrant. He thus disregarded the view of the Chief Justice that the payment to members in excess of the amount authorized in the Act No. 12 of 1907 was a contravention of the statute, and he evidently held that the other point made by the Chief Justice, that the expenditure could not legally be authorized by a warrant under s. 20 of the *Audit Act* because the necessity for such expenditure had arisen, if at all, while Parliament was still in session, was only an *obiter dictum* of the Chief Justice, and was not a decision binding on the Administrator. He admitted, however, that a Governor must not normally, whether advised by ministers or not, participate in an illegal action. Such participation could only be approved in case of most supreme public necessity, and normally in such cases the action would not be such as would be pronounced illegal until after it had been taken. Moreover, the Governor had his Attorney-General and his legal advisers, and he presumably, not as a rule being a legal expert himself, was entitled to take the view of the state of the law from them. That being so, he did not think that it was reasonable or necessary to lay down instructions for a Governor as to what he was to do if action were proposed to him which he considered illegal, but he recognized the principle that a Governor of a Colony, even when acting as Governor in Council, was not to regard the advice of his ministers as having an authority superior to that of the law, and that except in the case of the most urgent public necessity it was his duty to refuse to approve an illegal action.

A much more serious feature of this case is the fact that the money was paid without any Governor's warrant at all. Under the letters patent granting responsible government, and under the Audit Acts, the procedure with regard to expenditure in the Transvaal was as follows :—

All moneys received were paid into an Exchequer Account, and expenditure was met from the Paymaster-General's Account, which was kept in funds by transfers from time to time from the Exchequer Account. The transfers were only

[1] *House of Lords Debates*, vi. 407 seq. Cf. *Parl. Pap.*, C. 6487, p. 72.

made on the authority of the Governor's warrant, which was issued upon a requisition by the Treasurer, and a certificate by the Auditor, that the funds requisitioned by the Treasury were legally available for issue. But the value of this procedure was completely vitiated by two facts. It appears that the system was that all the officers should draw upon one account, the Paymaster-General's Account, and it was possible for the Treasury, after money had been transferred from the Exchequer Account to the Paymaster-General's Account to meet the expenditure under the one head in the estimates, to divert that expenditure to an entirely different purpose, even one for which no provision at all had been made in the estimates. This method of managing the public accounts was condemned by the Transvaal Public Services Commission, and by the Auditor-General in paragraph 30 of his report for the year ended June 30, 1907, but no alteration was made in the practice. Then the Treasury, even if there were no balance in the Paymaster-General's Account, used to allow overdrafts on that Account despite the protests of the Auditor-General and the Public Accounts Committee in 1909. The result was that there was nothing whatever to prevent the totally illegal action of paying salaries before Parliament had consented at all.[1]

[1] Ministers are of course personally responsible for their own illegal acts, though (e.g. in cases of expenditure such as that sanctioned by Sir T. Bent) it may often be that impeachment—which is quite obsolete as regards the Dominions—would be the only possible punishment. Cases are not rare of other illegal deeds, such as Sir H. Parke's efforts illegally to exclude Chinese (see *Parl. Pap.*, C. 5448, pp. 23, 46, 47) from New South Wales, which failed. It was also a Prime Minister of New South Wales who in 1907 removed illegally wire netting while detained by the Commonwealth Customs Department; Turner, *Australian Commonwealth*, pp. 180–2. Malversation in office, such as that of Mr. Crick in New South Wales, is of course punishable in the ordinary way, and minor offences (such as those of Mr. McKenzie in Victoria in 1903) may be met by loss of office. For a gross example of disregard of law by a Ministry and Governor-General, cf. the extradition of Lamirande in Canada (Clarke, *Extradition*, pp. 116–8; Canada *Sess. Pap.*, 1867–8, No. 50). For Sir H. Robinson's insistence on law, cf. his action in Rossi's case, *Parl. Pap.*, C. 1202, p. 54. For the violation of law in the Cape in the war, see Cd. 1162. For New Zealand cases, see Rusden, iii. 159, 160, 454, 455.

§ 2. Martial Law

But these are lesser matters,[1] and the real importance of the question arises in the application of the rule to the proclamation of martial law by the Governor. In no self-governing Colony is there any provision for martial law as part of the law of the land, and there is therefore no statutory basis on which the proclamation of such law can rest. Nor again can it be held that there is any common-law right to proclaim martial law: it is no part of the prerogative to upset the established law of the land. On the other hand, there need not necessarily be any illegality in the issue of a proclamation of martial law: it would be difficult to see what crime would be committed by the mere issue, and at any rate, even if conceivably there might be regarded as being some crime in issuing a proclamation which might lead to serious disturbances from aggrieved citizens, the risk of any Court so holding does not seem to be great. For after all, the proclamation stripped of its phraseology merely means that, in the opinion of the Executive, there exists a state of matters in which the suspension of the ordinary legal forms is necessary, and it operates as a warning to citizens that this is the case, and that they should therefore be on their guard to maintain order: it may even be that such a proclamation may have effect in terrifying evil-doers and mitigating the evil results of their machinations against the State. Now the acts done under martial law may be viewed in two aspects: there are acts which can be justified

[1] A curious case arose in December 1910: the Labour Government of South Australia found itself faced with a most serious strike, which paralysed the food-supply of the town of Adelaide. The Commissioner of Police gave colour to a doctrine which would have allowed rioting to pass unchecked, and anarchy threatened. Fortunately the Government intervened with a correct statement of the law by its Attorney-General, and the strike subsided just in time to prevent serious difficulties. The Governor was believed to have brought influence to bear in favour of the vindication of the law, and an attack—clearly unjustified—on him by the Premier at a celebration banquet seemed to lend colour to this belief. The Opposition severely censured the Government; see Adelaide *Register*, December 17–31, 1910, January 9, 1911.

by the common law, as acts which are necessary for the maintenance of order and peace. The common law is not loath to recognize such acts: it knows that the safety of the law at times requires that its ordinary prescriptions must yield; for example, there can be no doubt that even in England in the case of actual hostilities there is a right which may be called a common-law right to disregard the rights of individuals in the cause of the State, e. g. to enter private houses, to seize private property for martial uses, and so on. Whether such seizure ought not to be paid for is matter of equity not of legal obligation, and in any case the essential thing is that in taking goods in this way the taker would not be acting as a robber, who might be killed if necessary for successful resistance, but would only be acting in accordance with the law. The common law of England is the common law of most of the self-governing Colonies, and in any case the Roman Dutch law and the French law of Quebec admit as clearly as the English law the doctrine *salus reipublicae suprema lex.*

But it must be at once admitted that this common-law right has not sufficient definition to be a trustworthy guide in cases of action in emergencies. At the best it may extend, as Sir F. Pollock [1] has argued, to cover acts done in good faith for the purpose of quelling revolt, but it is not certain that it does extend so far, and it may be well that the view taken by Professor Dicey,[2] which restricts it to necessary acts, is more sound. And in any case, whether the criterion be reason or necessity, the criterion will be applied in cold blood long after the events by a judge sitting in a court far removed from all the circumstances which make reason or necessity obvious in one's actions. It is therefore clear that, in the interest of those who act under martial law, they will be well advised not to fail to secure for themselves acts of indemnity. As a matter of fact, it will be found that acts of indemnity are invariably adopted after the exercise of martial law in the Colonies, and that such acts will bar civil proceedings in this country is proved by the case of *Phillips*

[1] *Law Quarterly Review*, xviii, 152–8; xix. 230.

[2] *Law of the Constitution*,[7] p. 533.

v. *Eyre*,[1] which arose out of the Jamaica rising and its suppression by the Governor, and by the case of *Rex* v. *Tilonko*,[2] in which in 1907 the Privy Council said :—

> Their lordships are unable to advise his Majesty to grant special leave to appeal in this case. The question raised is settled by an Act of Natal, and it is not within the power or within the province of the Board to discuss or consider the policy or expediency or wisdom of an Act, or to do anything beyond deciding whether the Act applies. Their Lordships are of opinion that the Act applies and they are bound by it and must give effect to it.

It is therefore important that indemnity acts should be worded so as to cover all that it is right to cover without affording a cover to acts of private malice done under the pretence of suppressing a rebellion. The Irish case of *Wright* v. *Fitzgerald*[3] shows that such an act is not covered by the ordinary act of indemnity, and the Colonial Office in 1867[4] followed this precedent by declining to approve a New Zealand Act which was not limited to an indemnity for acts done in good faith in the suppression of the native rising in that Colony, but covered all acts done in the suppression of the rebellion without qualification. In the case of the indemnity acts passed after the Boer war by the Cape and Natal the protection given was most carefully worded so as to cover only acts done in good faith by the officers concerned in repressing the disturbances in those Colonies, nor does it seem that there were thus protected any serious cases of abuse.[5] On the other hand, the Indemnity Act passed by Natal in 1906, No. 51, to legalize the acts done by the officers and others in the Colony during the rebellion of that year, was severely criticized not only in England but in South Africa, as a bad departure from precedent in that it was provided that all acts done by military or civil officials should have been deemed to have been done in good faith, while the acts of non-officials were legalized only if either

[1] 4 Q. B. 225; 6 Q. B. 1. [2] [1907] A. C. 461.
[3] 27 St. Tr. 759. [4] New Zealand *Parliamentary Debates*, i. 1003.
[5] Cape Acts Nos. 4 and 10 of 1902; cf. No. 35 of 1904; Natal, No. 22 of 1902.

they acted under the instructions of such officials or in good faith. But the Imperial Government allowed the act partly because it was not desirable to allow the régime of martial law to continue in the Colony, and partly because the Ministry were not willing to withdraw martial law unless the act came into force and protected them from suit.[1]

The proclamation by the Natal Government in 1906 of martial law, and its maintenance in 1907 and 1908 despite the absence for much of the time of any obvious necessity for the system, was much criticized in England and even in South Africa. Fortunately the matter was not complicated to any serious extent by the fact of any misuse of the powers which the Government thus possessed, and the question can be considered as practically one of constitutional law. In the first place, it was asked whether a Governor could proclaim martial law when as a matter of fact there was no actual war being waged in the Colony. The answer would appear to be that it would be difficult to declare that any such action was illegal; any action might be illegal, but hardly the proclamation. Again, it was suggested that there was no possibility of martial law existing if there were no war. The argument seems fairly sound, but obviously it must be left to the Courts to decide as a matter of fact whether or not there is war. It appears very clearly from the cases of *Marais* [2] and *van Reenen* [3] that the Colonial Courts have no right to interfere if there is war being waged; but it rests for the Court to decide if war is being waged; the only way of preventing it so deciding is by force. The whole position is admirably laid down by the judgement of the Privy Council in the case of Tilonko's appeal for special leave to appeal from a judgement of the court-martial sitting at Pietermaritzburg, which was declined on November 2, 1906, for the grounds set out in the following judgement :—[4]

This is an application for special leave to appeal to His Majesty in Council. It is desirable to call attention to that

[1] *Parl. Pap.*, Cd. 3247, pp. 36, 92–4. [2] [1902] A. C. 109.
[3] [1904] A. C. 114. Cf. the Natal case, *Msolo and Gwana* v. *Rex*, Cd. 3247, pp. 8, 9; 26 N. L. R. 421. [4] [1907] A. C. 93.

fact, because the learned Counsel for the Petitioner has, from time to time, used the phrase that his right to appeal cannot be refused. There is no right to appeal. This is an application for special leave to appeal, which their Lordships have no difficulty in advising His Majesty to refuse.

The foundation upon which Counsel for the Petitioner has proceeded is a totally inaccurate analogy between the proceedings of a Military Court sitting under what is called the Mutiny Act, and proceedings which are not constituted according to any system of law at all. It is by this time a very familiar observation that what is called 'martial law' is no law at all. The notion that 'martial law' exists by reason of the Proclamation—an expression which the learned Counsel has more than once used—is an entire delusion. The right to administer force against force in actual war does not depend upon the Proclamation of martial law at all. It depends upon the question whether there is war or not. If there is war, there is the right to repel force by force, but it is found convenient and decorous, from time to time, to authorize what are called 'Courts' to administer punishments, and to restrain by acts of repression the violence that is committed in time of war, instead of leaving such punishment and repression to the casual action of persons acting without sufficient consultation, or without sufficient order or regularity in the procedure in which things alleged to have been done are proved. But to attempt to make these proceedings of so-called 'Courts-Martial', administering summary justice under the supervision of a military commander, analogous to the regular proceedings of Courts of Justice is quite illusory.[1] Such acts of justice are justified by necessity, by the fact of actual war; and that they are so justified under the circumstances is a fact that it is no longer necessary to insist upon, because it has been over and over again so decided by Courts as to whose authority there can be no doubt.

But the question whether war existed or not may, of course, from time to time be a question of doubt, and if that had been the question in this case, it is possible that some of the observations of the learned Counsel with regard to the period of trial, and the course that has been pursued, might have required consideration. But no such question arises here. An Act of Parliament has been passed in Natal which in

[1] So in the case of the twelve Natal natives sentenced by order of a court martial in 1906 the Judicial Committee declined to interfere, partly on the ground of lack of jurisdiction—no application having been made to a court below—and partly for lack of knowledge; see *Parl. Pap.*, Cd. 2927, p. 9.

terms enacts the legality of the sentences in question, and provides that they shall be deemed to be sentences passed in the regular and ordinary course of criminal jurisdiction. This Board has no power to review these sentences, or to enquire into the propriety or impropriety of passing such an Act of Parliament. The only thing for persons who are subject to such an Act of Parliament to do is to obey. The question in this case arises under the Natal Act of Parliament in respect of offences committed in Natal, which Act has been assented to by the Governor and, having the force of law, is binding on their Lordships. The language of the Act appears to their Lordships to be subject to no question of doubt or ambiguity at all.

Section 6 enacts that :—

'All sentences passed by any Courts-Martial or by any Court or person administering Martial Law under the authority of the Governor or of the Commandant of Militia in Natal, or by any military officer purporting to exercise authority in that behalf, since the date of the aforesaid proclamation of 9th February, 1906, including fines and other punishments inflicted by military officers in the field, are hereby confirmed and made and declared to be lawful, and in so far as the same shall not have been already carried into effect, shall be deemed to be final sentences passed by duly and legally constituted Courts of this Colony, and no appeal shall lie in respect of same, but they shall be and remain in force and shall be carried out in the same manner as the sentences of the Courts of Law in this Colony.'

Under these circumstances their Lordships feel that it is impossible to entertain any question of appeal, and they will therefore humbly advise His Majesty to dismiss the Petition. Their Lordships are of opinion that in the circumstances of this case the Petitioner ought to pay the costs of the Petition.

Thirdly, it has been discussed with some confusion of thought whether or not the Governor is required to act on ministerial advice in proclaiming martial law. The answer is of course legally that he is not bound ; he is never bound to act on ministerial advice, and still less so when he may incur even with an indemnity act personal responsibility, and, even if he is safe from chance of criminal conviction, runs the risk of being in a troublesome position. No Governor wishes to be haled before magistrates, as happened in the case of *Eyre*,[1] or to have a Chief Justice delivering a long address to a grand jury in which he possibly figures as the villain. But it is clear that this is precisely one of the

[1] 3 Q. B. 487; cf. *Parl. Pap.*, Cd. 4403, p. 129.

cases where the action of the Governor can almost never but be in accord with that of ministers. If a Ministry, which is presumably at least honest, assures the Governor that he should proclaim martial law, he would rest under a grave responsibility if he refused to do so and in the face of a crisis left the Government in hopeless confusion, while the Governor was running about trying to find a minister to accept responsibility for carrying on the Government. It is certainly within the bounds of possibility that a crisis might arise in which it was clearly the unhappy Governor's duty to dismiss ministers or to refuse their advice and accept their resignations, but it is not probable, and it may fairly be said that this is one of the cases where the Governor can hardly be expected to differ from ministers. Similarly the Imperial Government cannot well disallow an indemnity act,[1] for the logical conclusion of such disallowance would be that the Colonial Government should be deprived of self-government; the matter would be a critical proof that the Imperial Government did not consider the Government and the Parliament capable of conducting with propriety the affairs of the country. But even so, the Imperial Government raised, in connexion with Act No. 5 of 1908,[2] the question which they had before raised, that the Act was too widely worded and would cover certain grave alleged wrongs committed in the course of the matter of the repression, but the Act was not disallowed. It may be noted that the Act expressly reserved power to punish civil and military persons for any wrongdoing in a manner to be decided by the Governor. The Act is a remarkable document, for it ratifies and makes all the actions of the Governor and the various officers legal, and confirms the sentences and makes them legal sentences, and allows pardon by express enactment to the Governor in Executive Council. This is a strange

[1] The Bill of 1866 in New Zealand was never allowed, but a suitable Act, No. 39, was passed in 1867 and then allowed; Rusden, ii. 364, 365.

[2] *Parl. Pap.*, Cd. 4328, pp. 88 seq., 103 seq. See also the debates, *Hansard*, 1908, cxc. 102–29; cxciii. 2101 seq., and the replies to questions, clxxxv. 336, 672; clxxxvi. 1076.

limitation of the right to pardon, and it expresses the intention to discriminate between these crimes and ordinary crimes. But it is a significant comment upon the whole situation that Sir Matthew Nathan, an experienced officer and an able Governor, wrote on July 18, 1908[1]:—'I can still find none [no justification] for the maintenance of martial law for a period of eight months in a country where there has been neither war nor rebellion.'

Fortunately martial law has not often been declared in responsible-government Colonies. In the Cape in 1878 it was found for a time necessary in view of native rebellions, but its operation was very limited.[2] In Natal there were several instances before responsible government, but the first widespread use after 1893 was in the course of the Boer war, when large districts of both the Cape and Natal fell under its operation, and it naturally was widespread in the Transvaal and the Orange River Colony after annexation.[3] Natal again in 1906, in the disturbances in Zululand, had to resort to this measure. New Zealand occasionally resorted to it during the long native wars after 1862, as it had done in 1845–7, but Australia has not needed it, and Canada has had no disturbance since the North-West Rebellion of 1885[4] to justify a proclamation.

In the Cape of Good Hope there were a good many cases of interest in the Courts. The Court steadily asserted its right to inquire into cases under martial law. In *Reg.* v. *Bekker*[5] it granted an order to a jailer to show by what cause Bekker was confined in jail. In the case of *Reg.* v. *Geldenhuys*[6] the Court declined to order the military authorities to admit the applicant to bail, because as long as martial law existed in any district and it was not shown that it was not necessary, the Court should not interfere, recognizing that if it were thought fit the Court could interfere. So

[1] *Parl. Pap.*, Cd. 4328, p. 29.

[2] See Molteno, *Sir John Molteno*, ii. 290 seq.; Act No. 21 of 1879.

[3] See *Parl. Pap.*, Cd. 981 and 1423, especially Cd. 981, pp. 13, 14, 72, 73; Cd. 1423, p. 14.

[4] See Denison, *Soldiering in Canada*, pp. 261 seq.

[5] (1901) 10 Sheil, 407.

[6] 10 Sheil, 369.

also during the continuance of martial law the Court refused in *Rex* v. *Naude and others* [1] to set aside the arrest by the military of persons admitted to bail under Act No. 6 of 1900. In that case the Court recognized that as a rule it should not interfere with operations under martial law, but it asserted that later on it could freely criticize the actions of the military. The same doctrine was reasserted in *ex parte Marais*,[2] when a clear intimation was given that the Court would, unless an act of indemnity was passed, examine the actions of the military authorities after the war, but would not interfere with them in the meantime. So in *Reinecke* v. *Attorney-General* [3] the Court ordered the discharge of Reinecke from the custody of a civil jailer who detained him on military orders, on the ground that he had no right to do so, but declined to grant an order interdicting the military authorities from trying the man under military law. In *ex parte Minnaar* [4] they declined to order the military authorities to grant a permit to Minnaar to return to his farm.

Acting on this principle, the Court declined to uphold a conviction for prison-breaking in *Rex* v. *Link and Wenner*,[5] when the prisoner was merely confined by order of the military authorities, and a similar proposition was laid down in *Rex* v. *Malan and Bruyns*.[6] Moreover, in a series of cases, *Rex* v. *van Reenen*,[7] *Rex* v. *van Vuuren*,[8] and *Rex* v. *van der Merwe*,[9] the Court quashed convictions which purported to be convictions by magistrates as such for breaches of martial-law regulations. After the proclamation of peace a rule *nisi* was granted in *ex parte Botha and others*,[10] calling on the officer commanding the troops in the district to show cause why he should not be interdicted from selling confiscated property of certain British subjects whose goods had been

[1] (1902) 11 Sheil, 93.
[2] 11 Sheil, 467.
[3] 11 Sheil, 565.
[4] 11 Sheil, 217.
[5] (1903) 12 C. T. R. 144.
[6] 12 C. T. R. 259.
[7] 12 C. T. R. 557. Nor is the defect removed by changing the record so as to show the conviction as purely a military one; ibid., 710.
[8] 12 C. T. R. 902.
[9] 12 C. T. R. 805. Cf. *Rex* v. *Walters*, ibid., 805; *Rex* v. *Kalp*, ibid., 1008; *ex parte Gagiano*, ibid., 969.
[10] 12 C. T. R. 612.

seized after the proclamation of peace, and again after peace in *du Toit* v. *Marais*[1] it was held that the plaintiff could recover his stock in the hands of the defendant, who had been given them by the military authorities, as their action could not change the ownership of the stock.

In Natal several important cases on martial law arose during the war of 1899–1902. In the case of *Morcom* v. *Postmaster-General*[2] the question was raised whether it was within the power of the Postmaster-General, acting under martial-law regulations, to detain and open letters addressed to private individuals. The Court there held that martial law was in some cases justifiable, that acts of this kind in furtherance of military operations could be investigated by the Courts of Natal, and that they were justifiable in so far as real necessity existed. This necessity they held to be proved by statements which were made by General Buller, that the opening of letters prevented information being received by the enemy, that in fact that when letters were opened he was able to carry out surprise movements which had been impossible when letters were not opened, and they therefore declined to give the plaintiff Morcom the relief for which he asked.

In the case of *Umbilini and others* v. *the General Officer Commanding*[3] the question was raised whether the Court had any right to interfere with the decision of an administrator of martial law, and the Court decided that it could so interfere, but when the case actually came on for consideration it also decided that it would not interfere. It held that the treatment of the two natives in that case who were punished for being spies was reasonable and proper in view of the necessities of war.

Subsequent to these cases was the Cape case decided on appeal to the Privy Council *in re Marais*.[4] That case, the judgement in which is unhappily too brief to be satisfactory and not without ambiguity, established as a binding rule that when war was actually proceeding civil Courts must not interfere; but it cannot be said to have done more than this,

[1] (1904) 13 C. T. R. 139.
[2] (1900) 21 N. L. R. 32.
[3] (1900) 21 N. L. R. 86 and 169.
[4] [1902] A. C. 109.

and any inference drawn from the wording of the decision that the civil Courts must be satisfied with an allegation that war is proceeding is negatived by the language used by Lord Halsbury himself in the subsequent case of *Tilonko*.[1]

Another case of importance was decided by the Privy Council on appeal from a decision above mentioned of the Supreme Court of the Cape—*The Attorney-General for the Cape of Good Hope* v. *van Reenen*.[2] In that case a magistrate who was acting as an administrator of martial law had sentenced van Reenen for a breach of martial-law regulations, but the papers did not clearly show that he had acted in his capacity as an administrator of martial law. With a view to removing any ambiguity on this question the Supreme Court reversed the decision as far as it was given by the magistrate as such.[3] On the other hand, the Privy Council reversed the decision of the Supreme Court. They insisted that the decision was purely one given by the magistrate as administrator of martial law. There was no record as in civil cases to be reversed, and the decision should not have been reversed, for it was agreed by the Chief Justice of the Supreme Court of the Cape that the Supreme Court had no jurisdiction to deal with or to affect the judgement of martial-law Courts. It should be noted that this decision does not in any way invalidate the view expressed in the Court below —that the Supreme Court could inquire into matters done during martial law when the war was no longer raging—and but for the Indemnity Act passed in the Cape no doubt the Supreme Court would have exercised freely such powers.

In Natal, on the occurrence of the Native Rebellion of 1906, the effect of these decisions was clearly seen in the attitude adopted by the Court. In the case of *Msolo and Gwana* v. *Rex*[4] the Court held that they had no jurisdiction to review the judgement of the magistrate given when acting in his capacity as special administrator under martial law, even though the records showed that the proceedings took place in the Martial Law Court and Magistrate's Court, it

[1] [1907] A. C. 93, at p. 95.
[2] [1904] A. C. 114.
[3] (1903) 12 C. T. R. 557.
[4] (1906) 26 N. L. R. 421.

appearing that they in fact took place in the administration of martial law.

In the case of *Kimber* v. *Colonial Government*,[1] which was a claim for the value of a horse which had been commandeered by a trooper under orders for use against the natives, the Court examined elaborately the question whether the act took place under martial law or not, and coming to the conclusion that it did, they held that they had no jurisdiction to interfere, but it may be noted that the Court was clearly of opinion that it had a full right to inquire into the circumstances and to decide whether or not the case was one which fell within the category.

In the case of *Tilonko* [2] the Court was invited to examine into the circumstances in which that native chief was being detained in the Central Jail at Pietermaritzburg. In that case it was alleged that about July 30, 1906, when Natal was not in a state of war, though martial law still existed, Tilonko was tried before a court-martial at Pietermaritzburg, found guilty of sedition and public violence, and since then had been detained in jail. The Commandant of Militia put in an affidavit which stated that his trial and detention were done under martial law and were not justiciable by the Court. This view was accepted by Beaumont J., who thought that during the existence of martial law the Court was not at liberty to inquire into the question whether at the time when the act complained of was committed there was existing such a state of war or rebellion as to justify the exercise of the arbitrary powers of martial law in a place admittedly within the areas covered by the Proclamation and after the outbreak of hostilities, though he appeared to think that the Court was entitled to satisfy itself, as had been done in the case of *Kimber*, that the act complained of was done by virtue of martial law and under the authority of those in whom the power of martial law was vested. On the other hand, Dove Wilson J., after quoting the affidavit, said that he was not satisfied that a mere statement that martial law was in existence, and that an act done under the

[1] (1906) 26 N. L. R. 524. [2] (1906) 26 N. L. R. 567.

authority of that martial law was necessary, was sufficient to oust the jurisdiction of the Court to inquire into the propriety of the act. At the same time, looking to the fact that the situation in the Colony was in the eyes of the Executive so serious that martial law was still in force, he was not prepared to dispose of the application without giving the respondents an opportunity of filing a further affidavit stating the grounds on which the necessity arose. With this view Broome J. concurred.

As a matter of fact, no further steps were taken in the matter, as the Indemnity Act received the royal assent, and it was not thought necessary to deal with the matter further in the Courts of the Colony.

On the other hand, attempts were made in England to obtain an adjudication of the Privy Council on the question. In the first place it was sought to bring an appeal from the decision of the Court Martial in Natal on the question, but, as has been seen above, the Privy Council rejected the attempt[1] on the express ground that the Indemnity Act was binding upon the Court, and that therefore it was quite impossible for any action to be taken by the Colonial Government in the matter. It is clear from the judgement that the Privy Council were not prepared to deny that it was open to the Court to examine the question whether or not a state of war was actually existing, and the remark of Lord Halsbury shows clearly that the decision in the case of *Marais*[2] must not be deemed to assert that the mere statement that war is raging is sufficient to oust the jurisdiction of the Court. It might be noted too that a line of argument which might have been adopted does not seem to have been urged; the Indemnity Act provided that the sentences should be confirmed and prisoners still detained treated as though they were detained under ordinary sentences of the civil Courts. It might have been contended that by making the sentences equivalent to those of the civil Courts a right of appeal from such sentences was brought into existence, but it is very improbable that such a contention would have

[1] [1907] A. C. 93; above, pp. 272–4. [2] [1902] A. C. 109.

received favourable consideration by the Court. A further attempt was made to bring an appeal from the decision of the Supreme Court of Natal cited above, and the Privy Council naturally held that the Act of Indemnity was conclusive, and to mark their disapproval of bringing the case again in this form condemned the appellant to pay the costs of the Attorney-General of Natal.[1] From these cases it appears, therefore, fairly certain that the civil Courts still retain power to inquire whether war is raging, but that if they find war is raging they must not exercise their jurisdiction in any matter where the existence of war is urged as a reason for barring their action. This of course leaves them free to take whatever action is necessary when the war is over, and the consciousness of this state of affairs evidently weighed with the Government of Natal in declining to withdraw martial law until after the Indemnity Act had received the royal assent. It cannot be said that the situation is very satisfactory, and it may be added that no case has yet disposed of the clear difficulty that a Governor or other officer who takes steps under martial law may be tried in England either under the statutes of 1699 and 1802, or under the *Offences Against the Person Act*, 1861, s. 9 of which renders justiciable in the United Kingdom offences of murder or manslaughter wherever committed by a British subject. Fortunately, it seems clear that this enactment does not give power to demand action under the *Fugitive Offenders Act*, 1881, but it is clear also that an act of indemnity could not be pleaded in bar of an Imperial statute, and there is some force in the protest that was made by the New Zealand Ministry and Governor in 1869, that the position of a Governor acting on the advice of his responsible ministers in such a case would be unsatisfactory and abnormal.[2]

[1] [1907] A. C. 461.

[2] See *Parl. Pap.*, H. C. 307, 1869, p. 400; C. 83, pp. 33, 191. The Imperial Government disposed of the matter somewhat lightly by thinking that the case of Eyre showed that an indemnity act barred action in England. But that applied only to civil liability, not to criminal liability, and Eyre's law costs were very heavy, and had to be defrayed by a committee of supporters.

CHAPTER VI

THE GOVERNOR AS AN IMPERIAL OFFICER

§ 1. The Governor's Duty under Imperial Instructions

The Governor, besides acting according to law, has to act according to the instructions of the Secretary of State. He is called upon to do so by the instruments which create his office and appoint him Governor,[1] and he obeys the Secretary of State as the mouthpiece of the Crown. It is no longer the practice to issue all instructions in the name of the Crown, as was once the custom, and the royal name is reserved for the most important formal instruments, but the instruction of the Secretary of State is issued for the Crown, and is as binding as though conveyed in a formal instrument. It has indeed been argued in Canada that the prerogative cannot be exercised by anything less than a formal instrument;[2] this was done with reference to the question of the validity of legislation as to the appointment in the Canadian provinces of Queen's Counsel, but it is impossible to accept that view as so expressed. The formal intimation is sometimes more suitable than the informal, but in the absence of law to the contrary the intimation of the royal pleasure under the hand of the Secretary of State is sufficient.

Now these instructions may in many cases place the Governor in opposition to the Ministry of the day, and, as a matter of fact, historically there have been many cases in which this divergence has appeared. The instructions have always been based on some broad Imperial interest which was supposed to require their maintenance, and therefore wherever the Governor has obeyed them and differed from his ministers they have really rested upon Imperial

[1] See e.g. Commonwealth Letters Patent, clause i; Governor-General's Commission, clause ii.

[2] *Lenoir* v. *Ritchie*, 3 S. C. R. 575.

grounds, in the sense that they rested on grounds which the Imperial Government believed it was their duty in the interest of the whole Empire to maintain. Thus, as will be seen later, for years they thought that it was right that all pardons in the case of criminals should be given on the deliberate judgement of the Governor, advisedly insisting upon this rule in the case of local matters as well as Imperial. Or, as will also be seen later, they insisted on Governors reserving currency Bills, divorce Bills, and Bills for differential duties along with Bills more clearly of Imperial interest in the narrower sense of the term in which are included only matters which affect the Empire independently of the particular part concerned, such as matters affecting the control of the Imperial troops in the Colonies and acts prejudicing persons in other parts of the Empire, or British shipping. The whole process of self-government has consisted in a development of the conception of the narrower sense of Imperial interest, and in the recognition of the fact that the government of a Colony in its internal affairs is normally not a matter with which the Imperial Government can or should interfere ; it may be said in a wider sense that the good or the bad government of a Colony is a matter of intense importance to the Empire, but it is of more importance to the Colony, and the Colony must be left to decide whether or not it approves its system. The principle is a sound and very wise one ; the various parts of the Empire must develop internally on their own lines ; there must be no effort at a uniformity even if that uniformity is much better in theory than the diversity which independence always produces. The real life of the Empire might well fail entirely to survive artificial uniformity, for the Empire is an organism in which the development of the whole is dependent on the free growth of the several parts.

Of this new sense of Imperial interest there is no trace at all in the old-fashioned letters patent and instructions of the Cape and of Newfoundland. But save in such cases the prerogative of mercy is to be exercised subject to ministerial advice according to the letters patent issued for the

Australian States, New Zealand, the Commonwealth, and Canada. In the case of the Transvaal, the Orange River Colony, and Natal, there is silence as to Imperial interests, and this is followed by the case of the Union of South Africa, for in all these cases a more antique model—that of the Cape —is followed, which throws upon the Governor in every capital case the duty of deciding on his own deliberate judgement what course to take. In the case of Natal the Governor was given with regard to his acts as Supreme Chief a free hand after communicating his views to the Ministry and endeavouring to secure their co-operation, and in the case of the Transvaal and the Orange River Colony it was arranged in the letters patent constituting the representative Legislature and responsible government that the Governor as opposed to the Governor in Council should exercise the functions of supreme or paramount chief. In both cases the control of the natives was deemed an Imperial interest, not on the ground of any special duty of the Imperial Government to secure the good government of the natives in these Colonies, but because the Imperial Government is responsible for the rest of British South Africa, and unrest among any set of the natives communicates itself at once to the others, a fact fully appreciated by the Transvaal and Orange River Colonies when during the Natal native rebellion they sent men to the assistance of the Colony, and a consideration which weighed very heavily with those who agreed to unite the Colonies of South Africa. The matters in which the Governor is required to reserve Bills are now all matters which can fairly be said to have Imperial interest in the narrower sense: they concern divorce, which has Imperial bearings as a question of private international law; any present to the Governor himself which is due to the Imperial Government's control over the Governor; currency and differential duties; any law containing provisions inconsistent with treaties; any law interfering with the discipline and control of the Imperial troops where there are detachments still situated in the Colonies, and any extraordinary law affecting the prerogative, the shipping of the Empire, or the rights

and properties of persons not residing in the Colony. But what is more important still is the fact that all these provisions may be read as only applying in the cases where they substantially affect the classes of subjects mentioned in their Imperial aspect as affecting people and places outside the Colony in question. You can legislate as you think fit for yourselves, the Imperial Government in effect says, but you must not without some check such as reservation legislate for us.

It will be seen that in some cases in executive acts of the ordinary kind, in more in regard to the prerogative of mercy, and in quite a number as regards the reservation of Bills, the Governor has no option but to obey his instructions unless he desires to be faithless in his duty to the Imperial Government. The peculiar nature of his position in these cases is reflected in the fact that the Governor is entitled under the Colonial regulations to receive, and, what is more important, does receive in each case ere he assents to an Act an assurance from his law officer, given as such, that the Bill is one which he can properly assent to on legal grounds, and, where there are any instructions specifying the classes of Bills to be reserved, he adds that there are no provisions in the instructions which require reservation. The advice is not given by the Premier as Premier, even if he happens, as has been the case,[1] to hold the position of Attorney-General as well; it is given as that of the legal adviser of the Governor, as the Crown law officer, as the Commonwealth phrase is, and in no other capacity, and in those cases where the Minister of Justice is also Attorney-General he expressly gives the opinion as Attorney-General.[2]

It will be convenient to consider later on the cases in which Imperial interference has been employed in the past and will be used in the future, but the question here arises of

[1] e. g. in New South Wales during Mr. Wade's Ministry, 1907–10.

[2] e. g. in Newfoundland. So in New Zealand the Attorney-General, not the Minister of Justice, certifies. In Canada, for some unknown reason, no certificate is given, perhaps because there are no classes of Canadian Bills which must legally be reserved, but that applies to New Zealand also.

the position of the Ministry and the Governor when a Governor, in obedience to his instructions or what he conceives to be his instructions, refuses to accept ministerial advice. In one point the matter is being simplified: it is no longer necessary, as it was even until comparatively late in the last century, for a Governor to act on what he deems to be Imperial grounds without knowing whether or not the matter which his ministers intend to do is really one considered by the Imperial Government a case for serious action. In the early days of responsible government, when dispatches took two months to reach Australia, and there was no telegraph, the Governor held an awkward position:[1] he might either neglect Imperial interests, in which case he would probably be recalled, or he might fight with ministers and make the place very uncomfortable for himself by the process of setting up an Imperial interest in which the Imperial Government did not happen to be interested. On the other hand, if the difficulties are lightened by bringing the protagonists, the Dominion and the Imperial Governments, together, there is also the disadvantage that a convenient buffer for either party has disappeared: the Imperial Government could in the old days dispose of the matter by intimating that the Governor had been too zealous, while the Dominion Government could assert that they had not objected to the substance but to the tone of the Governor's communications to the Ministry.

This question of the relations of the Ministry and the Governor is full of constitutional difficulty, but it may be hoped that care will solve it adequately: there is one thing in favour of a satisfactory solution, that it is being realized as a serious question, and that the disappearance of the Colonial Governments in South Africa leaves the question of the relations of the Mother Country and the Dominions to be dealt with by more responsible and prudent heads than can be produced by minor Colonies governed by men with

[1] The history of Sir George Grey in South Africa before responsible government, and in New Zealand before and after responsible government, is instructive.

little experience of affairs or political prudence. Moreover, on the other hand, there is much less danger of even the appearance of interference from home when the Dominion addressed is not a minor Colony but a great self-governing entity of the extent of a continent in itself.

There is, however, one thing clear, that if the principle of full ministerial responsibility is enforced the present constitution of the Empire must be abandoned. It is at present still the case that there is one unity, the Imperial Government, which speaks for the Empire as a whole and which, in the last resort, must be obeyed if it seems to it necessary to demand obedience. If it is open to a Dominion Government to reply to a request for redress to a foreign state with the answer that the Ministry will not accord it, but will resign, and that no other Ministry will take office, there is at once an end of the unity of the Empire, for the only alternatives before the Empire in the long run are either to acknowledge some common head or to dissolve into fragments which, however united, must cease to be one nation. Of course, strictly speaking, the Imperial Parliament might revoke the grant of self-government, but this is quite out of the question: in the height of the Boer war, when the petition was strongly supported, even in the Colony, that the constitution of the Cape should be suspended, the Imperial Government would not act, but allowed matters to remain in *statu quo*,[1] nor has Newfoundland, even in the financial crisis of 1894, been deprived of its constitutional independence.[2]

On the other hand, if it is the duty of a Dominion not to adopt the policy of a California and defy Imperial obligations, it is no less the duty of the Imperial Government to see that no action of its shall, if it can be helped, run counter to the interests of a Dominion; nor in truth can the Imperial Government be fairly charged with lack of appreciation of this view. There is therefore every reason to hope that the matter will

[1] See *Parl. Pap.*, Cd. 1162. In New Zealand during the native war of 1862–70 sporadic requests were made by individuals and bodies in the Colony for the revocation of Colonial self-government, but naturally in vain.

[2] See *Parl. Pap.*, H. C. 104, 1895; C. 7686.

resolve itself gradually as the growth of power of the Dominions renders them less liable to the defects of weakness: the fact that Canada respects the obligations of treaties as religiously as the Imperial Government itself is indeed of good augury for the future of the Empire.[1]

In 1859 the Government of Canada in a reasoned memorandum raised and discussed the question whether the Imperial Government could continue in any way to dictate the financial policy of Canada without at the same time taking upon itself the Government of Canada, and the rebuke which was effective was not unjustified.[2] Clearly, if a country is to be governed the Government must have in their hands the control of fiscal matters, and the Colonial Office itself claims for itself, in all Crown Colonies in which it can, the power over the final financial arrangements of the Colony, however ready and willing it may be to consent to the Colony exercising full legislative power in other regards.[3] In 1872 there was a dispute in Tasmania as to a pardon given by the Governor on the advice of his ministers to Louisa Hunt, and the Ministry were defeated on the question of their advice in both Houses of the Parliament, but they did not resign because they held that this was not a matter in which the final responsibility rested with them, so that they did not regard the votes as really being censures of them.[4] In 1878 the case of Sir Bartle Frere in the Cape of Good Hope raised serious difficulties. In that year the Cape was in great trouble with two Kaffir wars on hand, and the Governor wished in his capacity of High Commissioner to concert operations between the two forces, the Imperial troops on the one hand and the Colonial forces on the other. But his Ministry, who were anxious to avoid Imperial

[1] See a Japanese view in *Canadian Annual Review*, 1907, pp. 393 seq. The same tone pervades the Japanese complaints to the Canadian Government against British Columbian legislation in 1898–1904.

[2] *Parl. Pap.*, H. C. 400, 1864.

[3] See the case of Jamaica, *Parl. Pap.*, C. 9147, 9412, 9413; Cd. 125.

[4] Tasmania *Legislative Council Journals*, 1878, Nos. 35 and 36. But in 1888 Sir T. McIlwraith resigned over a question of the prerogative; see also New Zealand *Parl. Pap.*, 1891, Sess. 2, pp. 4, 5, 19, 20.

control, refused to concert measures, and instead appointed a member of the Government to take full and sole charge of the war, while they made appointments and carried out the control of the forces independently of the Governor: the Governor at last decided to dismiss them from office, which he did on February 2, 1878, and his action was upheld by the fact that the new Ministry under Mr. Sprigg sustained an attack on the Governor in the House of Assembly, and were successful by a substantial majority, after which matters proceeded smoothly.[1] It will be seen here that the Governor clearly acted, as the Secretary of State suggested in approving his action, as an Imperial officer, the High Commissioner for South Africa, entrusted with the duty of considering the matter from the point of view of the whole of the country, and the Ministry should, in the opinion of the Secretary of State, in view of this fact have been prepared to yield to his judgement in the matter. In this case the difficulty was disposed of, but not very satisfactorily, by the fact that the matter resulted like a dismissal on mere internal grounds, the Governor finding new ministers to support his action: but the fact seems to be clear that the Molteno Ministry acted unwisely: if they thought that the Imperial officer was going too far their right and duty was to appeal to the Imperial Government against him, not to take the grave responsibility of compelling the Governor to dismiss them from office at a time when the action might have been fraught with the gravest dangers to the State.

In 1880 Mr. Todd[2] thus laid down the constitutional doctrine in the 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 proceeded to quote the following definition of the situation from a dispatch[3]

[1] *Parl. Pap.*, C. 2079, 2100. Cf. Molteno, *Sir John Molteno*, ii. 300–401.

[2] *Parliamentary Government in the British Colonies*,[1] p. 590.

[3] See Canada *Sess. Pap.*, 1876, No. 116, p. 82. See also *Parl. Pap.*, C. 1248, p. 7.

from Lord Carnarvon, dealing with the then usual division of responsibility in the exercise of the prerogative of mercy between the Governor and the Ministry : ' 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.' This position was adopted in full by the Ballance Government in New Zealand in 1892, when they were involved in a dispute with the Governor as to the addition of members to the Legislative Council, and when he refused to add the number asked for, being under the impression that it was his duty as an Imperial officer to maintain the constitutional balance of the Houses contrary to ministerial advice, a view which it is fair to say it was quite natural, if erroneous, for the Governor to take on the papers before him. He therefore declined to appoint the twelve members they asked for to redress the balance of debating power in the Upper House, not to swamp it, and offered nine, a concession which they refused to accept. They would not, however, resign their offices despite the refusal, as the Governor wanted them to do, so that the matter might have been decided by a reference to the constituencies, but referred home to the Secretary of State, who in a dispatch of September 26, 1892, the anniversary of which is now made the Dominion Day of the Dominion, practically told the Governor to accept ministerial advice wherever the interests of the Imperial Government were not concerned.[1]

In the case of Natal in 1906 a serious difference of procedure occurred.[2] On March 28, 1906, the Governor telegraphed that a court martial had ordered the execution of twelve natives out of twenty-four for the murder of certain police officers. The proceedings of the Court had been carefully reviewed by the Governor in Council, and being in order and no injustice committed, he had accepted the unanimous advice of his ministers to carry the sentence into effect. In a reply by telegraph on March 28, the Secretary

[1] *Parl. Pap.*, H. C. 198, 1893–4, p. 48. [2] *Ibid.*, Cd. 2905.

of State said that continued executions under martial law were exciting strong opposition, and as the Imperial Government were retaining troops in the Colony and would have to sanction any act of indemnity, it was greatly to be preferred that the natives should be tried by a civil Court. He added: 'I must impress upon you necessity of utmost caution in the matter, and you should suspend executions until I have had opportunity of considering your further observations.' The answer to this telegram was a message from the Agent-General that the Ministry had resigned, and the Secretary of State telegraphed to the Governor to ask for full information as to the circumstances of the case. This was supplied by a telegram of March 29[1] and by a reply of March 30[2] the incident closed. The substantial part of the correspondence may be quoted below:—

'Trial of the prisoners took place in accordance with Colonial Office Circular 26th January, 1867,[3] for the principal act which led to proclamation of martial law. Accused were represented by counsel and were allowed to call witnesses. Attorney-General gave it as his opinion that the circumstances fully justified trial by Court Martial, that the proceedings were in order, and that the accused had had fair trial. Evidence was conclusive against condemned men. I went most carefully into it and prepared précis of the evidence against each individual prisoner for information of Executive Council.

On receipt of your telegram of yesterday's date, I requested Prime Minister to be good enough to order suspension of executions which had been fixed for to-morrow pending further instructions from your Lordship. He replied that he regretted that he could not authorize suspension of executions which had been confirmed after full and deliberate consideration. I discussed matter with him and explained that this decision would oblige me, as Governor of the Colony, to exercise prerogative of the Crown under the Letters Patent and to cancel death warrant which I had signed. He quite recognized this but said that as a most important Constitutional question was involved he would feel obliged

[1] *Parl. Pap.*, Cd. 2905, p. 28. [2] Ibid., p. 29.

[3] See Appendix No. I of Cd. 2905. This circular was an outcome of the Jamaican disturbances.

if I would give him written instructions. This I did, upon which he wrote me following Minute :—

Begins : 'As Your Excellency has thought it necessary to give instructions to suspend executions which were confirmed by the Executive Council and appointed to be carried out on Friday next, I feel that it is impossible for me to continue in office as Prime Minister, and I beg to tender my resignation. My colleagues are unanimous in supporting me in what under the present circumstances appears to them a most important Constitutional question.' *Ends.*

As your Lordship has only directed me to suspend executions in order to have my further observations I replied to Prime Minister as follows :—

Begins : 'It is with the greatest regret that I have received above Minute. I should feel much obliged if your colleagues and yourself will retain office whilst I am making further communication to the Secretary of State for the Colonies.' *Ends.*

To this he has replied as follows :—

Begins : 'I have no wish to cause Your Excellency inconvenience and, with my colleagues, will retain office whilst further communication is being made to the Secretary of State for the Colonies. I would point out as in my opinion matter as affecting native population is most urgent I trust there will be no delay in receiving reply to your communication.' *Ends.*

I trust that with the additional facts contained in this telegram your Lordship will see your way to withdraw objection. I am afraid that very intense feeling will be excited in the Colony by my having suspended execution.—McCallum.'

The reply was :—

Your telegram 29th March, No. 1, giving full information as to the procedure and circumstances of trial and the opinion of the Attorney-General thereupon, and your own careful examination of the whole case and of the evidence against each individual prisoner, and the conclusive manner in which the individual guilt of each prisoner was established, in which I doubt not any mitigating circumstances which might differentiate their guilt were considered, has received careful consideration of His Majesty's Government.

His Majesty's Government have at no time had the intention to interfere with action of the Responsible Government of Natal or to control Governor in exercise of prerogative. But your Ministers will, I feel sure, recognize that in all the circumstances now existing, and in view of the presence of British troops in the Colony, His Majesty's Government are entitled, and were in duty bound, to obtain full and precise information in reference to these martial law cases in regard to which an Act of Indemnity has

ultimately to be assented to by the Crown. In the light of the information now furnished His Majesty's Government recognize that the decision of this grave matter rests in the hands of your Ministers and yourself.

The manner in which you have placed the various aspects of this question before your Ministers from the 16th March onwards has my approval; but I regret that you did not keep me informed by telegraph of the steps you were taking, or that the telegram announcing the imminent execution of these twelve men did not contain the detailed information which has now been given in reply to my telegram of the 28th. It was this lack of information which necessitated my telegram.—ELGIN.

In a dispatch of April 19 [1] the Secretary of State corrected the error committed by the Governor in treating the matter as falling under the royal instructions as to pardon. He wrote:—

I observe that in your telegram, No. 2, of 10th April, you speak of the Executive Council having advised you to exercise 'the prerogative of mercy'. It seems doubtful whether this phrase can properly be applied in cases of sentences by courts martial under martial law, and I am disposed to think that it would be more correct to say that the Executive Council had advised you not to confirm the death sentences.

Similarly, in your minute to Ministers of 17th March you speak of death sentences (by courts martial under martial law) being considered in Executive Council 'in accordance with Royal Instructions'. It is clear, however, from the decision of the Judicial Committee of the Privy Council on the 2nd of April [2] that such sentences cannot be regarded as being on the same footing as sentences pronounced by lawfully established Courts to which the Royal Instructions refer.

In making these remarks, I beg that you will not understand me as in the least degree questioning the propriety of your acting in concurrence with your Ministers in matters arising out of the present application of martial law.

Meanwhile the Government of the Commonwealth of Australia telegraphed to express the view that interference even as to the prerogative of pardon with a self-governing Colony would establish a dangerous precedent with regard to all the states of the Empire, and appealed for a reconsidera-

[1] *Parl. Pap.*, Cd. 2905, p. 44. [2] Ibid., Cd. 2927.

tion of the resolution arrived at by the Imperial Government. New Zealand, with less assumption of superior virtue, contented itself with asking for information, and said that it felt sure that no interference was intended with the powers of a self-governing Colony, but that owing to meagre and conflicting accounts it wished to be relieved of anxiety. The facts were briefly telegraphed out with an assurance that there was no intention of interference, but that in view of the presence of British troops the Imperial Government were entitled and in duty bound to obtain full and precise information as to these sentences. A discussion in Parliament also took place on April 2, but it cannot be said to have added much light to the case, the disputants all apparently not realizing the exact points at issue. An effort was made to induce the Judicial Committee of the Privy Council to grant leave to appeal in respect of these sentences, but it was declined for the reasons given in the judgements of the Court on April 2, on which day the natives were executed.

The following is the judgement of the Judicial Committee :

Their Lordships thought it right to sit at the earliest moment to hear an application which they were informed concerned a matter of life or death. Having heard it, their Lordships are unable to advise His Majesty to grant this Petition. It is not an appeal from a Court, but in substance from an act of the Executive. Evidently the responsible Government of the Colony consider that a serious situation exists, for Martial Law has been proclaimed. The Courts of Justice in the Colony have not been asked to interpose; and, apart from questions as to jurisdiction, any interposition of a judicial character directed with most imperfect knowledge both of the danger that has threatened or may threaten Natal, and of the facts which came before the tribunal of war, would be inconsistent with their Lordships' duties. Their Lordships will therefore humbly advise His Majesty to dismiss the Petition.

The case was a very unsatisfactory one : the Governor had evidently not supplied adequate information for the Secretary of State to be able to decide whether the case was one for Imperial intervention or not. It could simply not be said on the evidence which was then before the Secretary of State

that the natives were or were not probably guilty, and in time of apparently profound peace in South Africa the execution of twelve natives by a sentence of a court martial seemed a strange step. The error of the Governor about the prerogative of mercy was a curious one, though none of his ministers evidently saw it. But it is hard to defend the action of the Natal Government, because they must have recognized that the Imperial Government had a strong right to intervene, if they thought fit, since there were Imperial forces in the Colony serving the important purpose of keeping the Colony quiet, and available for any emergency if the Colonial forces had suffered a serious defeat. To resign and plunge the Government of Natal into the weakness of an interregnum, or rather to leave the Governor without any effective Ministry, for there was no chance then of an alternative Ministry—was an action which cannot be felt to be other than ill-advised and precipitate, and it throws doubt on the arguments in favour of the granting of self-government to the Colony in 1893. At the very least, they should have communicated with the Imperial Government setting out their views, and have waited for a reply before they published to the world the dispute between the Governments.

In 1907 a different example occurred: in that year, in view of the hopeless differences with the Government of the United States regarding the rights of American fishermen in the waters of Newfoundland, it was agreed to submit the questions at issue to the arbitrament of the Hague Tribunal. In the meantime a *modus vivendi* was necessary, but the local Government would not consent to it, and it was found necessary to override the Government by an Order in Council issued under an Act of 1819, which was of course thirteen years before the Government of Newfoundland was formally constituted on a representative basis. The action was strong but necessary. It was received with great indignation in the Colony, and his opponents taunted the Premier and said he should resign: but Sir Robert Bond maintained that resignation was not the proper attitude for a Colonial Government, but submission so far as was absolutely inevitable,

under protest.[1] And it may be noted that when in 1908 the Imperial Government was at variance with the Natal Government, both on the question of the Indemnity Bill and the payment of Dinuzulu's salary, which the Natal Government had stopped but which the Imperial Government on legal advice admitted themselves liable to pay, the Natal Government did not resign.[2]

In connexion with the latter issue it may be interesting to quote remarks of Mr. Evans, M.L.A. of Natal, who wrote as follows :— [3]

> If the Natal Government on the advice of their law officers thought the salary should have been suspended or withdrawn, the first thing to do was to obtain the approval of the Secretary of State. If, as was the case, the Secretary of State on the advice of his law officers objected, the Natal Government should have entered a dignified protest and continued to pay it. Had they done so the dignity of the Colony would not have suffered, and all this unrest and recrimination, making Natal a by-word among the British people, would have been avoided. That we are regarded as hopelessly in the wrong by the British people is evident by the fact that both parties in the House of Commons, those usually regarded as our friends as well as those deemed our critics, are at one, Earl Crewe and Mr. Lyttelton, Sir Gilbert Parker and Colonel Seely. This is the first time I remember this to have happened, and surely it should give us pause.

Naturally disputes between the Colonial and Imperial Governments are grave and serious things, but the unity of the Empire is more serious still. If there disappears a power which has the theoretic and practical right, subject to the duty of the fullest consultation, to conclude treaties and to legislate and so forth for the Empire at large, it will be harder to recreate it if the growth of the power of the Dominions causes them to ask for a Federal Government.

[1] See *Parl. Pap.*, Cd. 3765 ; *Canadian Annual Review*, 1907, pp. 328, 329, 365.

[2] See *Parl. Pap.*, Cd. 4194, 4328.

[3] *Parl. Pap.*, Cd. 4328, p. 77. Cf. also Sir C. Dilke in *Hansard*, Ser. 4, cxc. 113–5.

§ 2. The Governor's Duties under Imperial Acts

There are, in addition to the duties which the Governor has to perform as the head of the Colonial Government, many which he has to do as a mandatory of the Imperial Parliament. Thus, for example, he is empowered to grant certificates of re-admission to British naturalization, under s. 8 of the Imperial *Naturalization Act*, 1870. Again, he is given a great variety of powers with regard to British shipping by ss. 84, 90, 205, 366 of the *Merchant Shipping Act*, 1894. He is also the authority for many acts under the *Fugitive Offenders Act*, 1881, and the *Extradition Acts*, 1870 (s. 17) and 1873 (s. 1). His authority is required if a prosecution of foreigners is taken under the terms of the *Territorial Waters Jurisdiction Act*, 1878, and he is empowered to grant various licences under the *Pacific Islanders Protection Acts*, 1872 and 1875; he has duties under ss. 54, 89, 94, 131, 132 of the *Army Act*, 1881, under the *Colonial Courts of Admiralty Act*, 1890 (s. 9), and there are a good many other cases. In all these instances there is no doubt that the Governor can legally act without the advice of ministers at all, and on the theory of Mr. Higinbotham he should so act, though that authority considered that some of the powers vested in the Governor as regards merchant shipping should really be transferred to the Governor acting under Colonial Acts. But as a matter of fact and of propriety, the Governor will consult his ministers in every case before acting. For example, it is on ministers that the real burden should fall of deciding whether or not a fugitive criminal whose extradition is being asked for should be handed over: no doubt the Governor must on imperial grounds retain a discretion, and the matter can never be one where the Ministry can constitutionally say that he must accept advice or resign, for he is not acting in any direct way as head of the Government; but still it would be a mistake to imagine that he should do such an act without ministerial advice, inasmuch as he needs ministerial assistance if there is anything to be done.

Fortunately there is admirable authority for this view of

the case—the reasoned pronouncement of the Privy Council of the Dominion of Canada in a report which it rendered as to the Government of Canada, where they expressly allude to these acts as being cases in which the Governor-General would ask the advice of ministers.[1] Moreover, in a case arising out of the *Pacific Islanders Protection Acts* the Governor of New Zealand and the Secretary of State were both agreed that the action of the Governor in the matter should be in harmony with the views of ministers and through their agency,[2] and the Governor of Victoria in 1908 refused on ministerial advice a request for a licence to recruit.[3]

In some cases the Governor is also invested with powers over other matters deliberately, in order to preserve harmony of action between his Ministry and some dependency. The classical case is that of the Governor of the Cape, who from 1878 to 1900 was High Commissioner for South Africa, until the Boer War transferred the centre of gravity to the Transvaal, and Lord Milner as Governor of the Transvaal and the Orange River Colony became High Commissioner for South Africa. After the grant of responsible government to the Orange River Colony the Governor of the Transvaal was High Commissioner. The High Commissionership is now, since 1910, associated with the Governor-Generalship of the Union of South Africa. As High Commissioner the Governor-General controls the Protectorates of Bechuanaland[4] and Swaziland[5] and the Colony of Basutoland,[6] and is charged with the conduct of Colonial relations with foreign possessions in South Africa. There was from 1879 to 1881 a

[1] *Parl. Pap.*, H. C. 194, 1890, p. 8. For an early case of action without advice, cf. *Hansard*, Ser. 3, cclxxvi. 1902, 1946.

[2] New Zealand *Parl. Pap.*, 1891, A. 1, p. 7.

[3] So in minor matters (e. g. leases of Western Pacific islands, &c.) Governors receive ministerial help and advice, though, strictly speaking, these matters are not within the sphere of ministerial activity.

[4] Created in 1885, organized in 1891 under Order in Council, May 9.

[5] Formerly a quasi-protectorate of the South African Republic; attached to High Commissioner by Order in Council, December 1, 1906.

[6] Annexed in 1868, and attached to Cape by Act No. 12 of 1871; disannexed by Act No. 34 of 1883.

High Commissioner for South-eastern Africa, and formerly the Governor of Natal was also a Special Commissioner for Zululand, which was annexed in 1897 to the Colony.[1] Moreover, in the early days of the Cape the Governor as High Commissioner was invested with control over the Crown Colonies which were gradually absorbed by the Cape: British Kaffraria (annexed in 1865 under Act No. 3), Griqualand West (annexed in 1880 under Act No. 39 of 1877), British Bechuanaland (annexed in 1895 under Act No. 41 of 1895),[2] and minor territories. In all these cases the High Commissioner was expected to manage affairs on his own responsibility, but to accommodate matters so far as possible to the views of his ministers. This was not always easy, and for a time Sir H. Robinson had great trouble in carrying on affairs, and the Rev. J. Mackenzie, who was for some time in charge of Bechuanaland, proposed that the posts of Governor and High Commissioner should be separated.[3] The reasons against this proposal were, however, then overwhelming. There was not sufficient work for a High Commissioner who had no other duties; the protectorates were held in the interests of the Cape and Natal, and the adoption of a policy of separation would have been idle and useless, the real aim being to secure the interests of the Colonies. On the other hand, annexation was not always wise; for example, Basutoland, after a premature annexation in 1871 and a rash attempt at disarmament, had to be retransferred to the direct Imperial control in 1884.[4]

[1] See *Parl. Pap.*, C. 8782.

[2] See *Parl. Pap.*, C. 7932. It was made a Crown Colony in 1885.

[3] See *Parl. Pap.*, C. 5488 (1888).

[4] For the powers of the High Commissioner before Union, see *Parl. Pap.*, H. C. 130, 1905. He still controls the protectorates and Basutoland, and represents the control of the Imperial Government over Rhodesia, which is administered by the Chartered Company. In his functions as regards Rhodesia he acts on his own responsibility, but in general harmony with the views of his Government in the Union. Cf. the discussion of the Umteli outrage question in February 1911.

CHAPTER VII

THE CABINET SYSTEM IN THE DOMINIONS

§ 1. The Cabinets of the Dominions

The Cabinet system in the Colonies is chiefly remarkable because of its close resemblance to the English model on which it is based. The conventions of the English constitution are followed in a manner which is almost embarrassing in its closeness of imitation, and the number of experiments which have been tried is very small, and they have been unimportant in actual result.

There is a certain difference in the nature of the Cabinet: in England the Cabinet is a body scarcely known in formal law, formed out of the Privy Council, and besides the Cabinet a Government includes ministers who have offices, and may or may not be Privy Councillors, but are not of the Cabinet. The Privy Council itself is a body including Cabinet members, ex-Cabinet members, ministers and ex-ministers, who have been called to the board, and many other persons who have been given the rank mainly as a compliment, such as ambassadors, prominent politicians, and distinguished men of various kinds, including occasionally a man like the late Professor Max Müller, who was appointed because of his great literary and social qualities.

To this body there is nothing in the Dominions precisely corresponding. In the first place, in many of the Dominions and States, and in the Canadian Provinces, the rule is simply that the Cabinet is the Executive Council pure and simple: there may be members of that body who are more closely in the confidence of the Premier than the others, but that is equally true of the Imperial Cabinet, and the only determining feature is whether or not they are invited to the formal meetings of the body, and in both cases the whole Cabinet meets for discussion. It is the rule in Newfoundland, in the Provinces of Canada, in New South Wales, in South

Australia, in Western Australia, and in Queensland. It also was the rule in the Transvaal, the Orange River Colony, and Natal. In all these cases there were no distinctions between the Executive Council and the Cabinet. On the other hand, in the Commonwealth of Australia, in Victoria, and in Tasmania the practice, as also formerly in the Cape and now in the Union, is different: the members of the Executive Council do not resign office as a normal rule, though they can be removed if thought fit by the Governor, and occasionally this power has been exercised in regard to the two states, and so the Council consists of members under summons and members not under summons.[1] Here, however, the analogy to the Privy Council is incomplete, for the members of the Council under summons alone attend the meetings of the Council, and there is no parallel to the system in England under which any three Councillors may be called upon to make up a quorum for the passing of an Order in Council, and where orders are now and then passed when no other members are in attendance than three officers of the Court, or other members of the Council who neither are nor have been ministers. Moreover, sometimes Orders in Council are passed when ministers of both parties happen to be in attendance.

The Privy Council in Canada which alone[2] has the old name—though it is not a tradition but a new name coined in 1867, for the old Council of the united Province was always called simply the Executive Council—is a little more like in composition to the Privy Council, for besides ex-ministers it contains, or has contained, one or two persons, Speakers of the House of Commons who have been placed there for honorary purposes, or like the present High Commissioner for Canada, Lord Strathcona, who was never a minister in the ordinary sense of the word. Moreover, the Solicitor-General is a member of the Privy Council without being a member of the Cabinet. But there again the likeness is not more than formal, for the members who are not of

[1] The distinction is formally recognized in the Instructions of October 29, 1900, as regards Victoria, but not in the other cases.

[2] It still survives in Jamaica of Crown Colonies.

the Cabinet are not summoned to meetings of the Privy Council under normal circumstances.

It is curious how old and vague ideas of the Council as a body which can act as one may revive: in the discussion on the case of the prisoner Hudson in Tasmania[1] it was suggested in the press that the whole of the Executive Council should be called together to deliberate on the fate of the prisoner, but naturally that was not done. But it is rather remarkable that in 1908 there should be so distinct an echo of what was a favourite idea of Sir G. Bowen when Governor of Victoria, that the enlarged Privy Council could perhaps in a case of need be called into being.

Like the Privy Council, the Executive Council is normally a creation of the prerogative: this is the case in all the Colonies except the Dominion of Canada, the Commonwealth, and the Union of South Africa. In all these cases, as there was being created a new parliamentary body which the Crown had no prerogative to create, it was felt right—though not probably[2] necessary—that the Executive authority should also be so created, and this remark applies also to the case of the Provinces of Ontario and Quebec, which were created out of the United Province of Canada by the *British North America Act*. The Executive Councils in the maritime provinces and in British Columbia exist in virtue of the prerogative, though the Executive Councils have in various details been regulated—not *created*—by Act since: in the case of the three provinces so far created by Canada, Manitoba, Alberta, and Saskatchewan, the Council is created by the Dominion Act establishing the constitution and regulated by provincial Acts. In the case of New Zealand, Newfoundland, and the Australian States, as in the case of the four Colonies of South Africa before the Union, the existence of the Council was provided for in the letters patent, and the

[1] Hobart *Mercury*, October 20 and 21, 1908.

[2] It is clearly recognized by Clark, *Australian Constitutional Law*, pp. 190 seq., that the prerogative of the executive control attached at once to the Commonwealth as to the Federation of Canada. So also to the Union.

committee of the Legislative Council of Natal, which drafted the bill for the Act by which responsible government was given, were informed that to create the Executive Council was not proper for a Colonial Act, as the matters should be left to the prerogative. It thus happened that the letters patent which confer on the Transvaal and the Orange River Colony self-government say nothing of the Executive Council, and the mention of that institution is found only in the letters patent creating the office of Governor. On the other hand, in the case of the Dominion, the Commonwealth, and the Union of South Africa, the letters patent are silent as to the Executive Council altogether.

It has been seen above that ministerial responsibility to Parliament is very imperfectly secured by law in the Dominions. In Canada the result is really not secured at all, for though in Nova Scotia,[1] New Brunswick, and British Columbia[2] the number of Executive Councillors is defined as nine, nine, and seven (increased to eight by an Act of 1911) respectively, there is no provision for these Councillors being members of the Legislature. In Newfoundland the position is the same. In New South Wales there is no provision requiring an Executive Councillor to be a member of Parliament; so in Tasmania and Queensland; in South Australia, s. 32 of the *Constitution Act*, 1855–6, provides that certain persons shall be members of the Executive Council *ex officio*, and must not hold office for more than three months without seat in one or other of the Houses of the Legislature. In Victoria eight members of the Executive Council may[3] have seats in the two Houses, of whom two may be in the

[1] *Revised Statutes*, 1900, c. 9, s. 1. The number in New Brunswick (*Rev. Stat.*, 1903, c. 10) is not limited, but the old limit by the letters patent of 1861 was nine, and until changed it is binding. It is unlimited in any other province, though in all some persons are *ex officio* members; see Ontario Act 1908, c. 6; Quebec *Rev. Stat.*, 1909, s. 573; Manitoba *Rev. Stat.*, 1902, c. 59; Saskatchewan Act 1906, c. 3; Alberta Act 1909, c. 6. There is no limit of numbers in Prince Edward Island; there was none before 1873 in the letters patent, and the constitution is not changed by Acts so far in this regard.

[2] Act 1908, c. 12.

[3] And four must.

Upper House,[1] and in Western Australia [2] one of the members of the Executive Council must be in the Legislative Council. In New Zealand there is no express provision requiring the members of the Council to be members of Parliament.[3] In the Cape there was no necessity by law for parliamentary tenure of office, but in Natal [4] the period of four months was allowed to the ministers to become members of Parliament, but not more than two were to be members of the Upper House. But there is even then no legal connexion between ministers and the Executive Council at all. The same rule was adopted in the case of the Transvaal and the Orange River Colony constitutions, and there again there was no legal connexion between the Executive Council and the Ministry other than that provided for in the letters patent constituting the office of Governor, which told the Governor that the Executive Council was to consist of ministers and such other persons as he thought fit. In the case of the Commonwealth,[5] and of the Union of South Africa,[6] the tenure of seats in the Executive Council and the Legislature is required of ministers, the time to obtain a seat being fixed at three months.

As a matter of fact, the practice is for members of the Executive Council to be members of Parliament: the rule is not absolutely rigid, and there have been a good many cases of its violation. Mr. Airey, in 1907, was a considerable time a minister in Queensland without having a seat; Mr. Kent, Minister of Justice in Newfoundland, held office for a time in 1908 without a seat; in Western Australia a minister who had been defeated at the general election in 1908, but whose opponent was being attacked for irregularity in the election, held office while the election petition was being tried, and his action was energetically defended by the Premier.[7] In Canada in 1900 the Lieutenant-Governor of British Columbia entrusted to a Ministry of whom one

[1] Act No. 1864, s. 9. [2] 53 & 54 Vict. c. 26, Sched. s. 6; 63 Vict. No. 19, s. 43.

[3] New Zealand Act No. 22 of 1908, s. 10, provides that the paid ministers are to be Executive Councillors. [4] Act No. 14 of 1893, s. 9.

[5] 63 & 64 Vict. c. 12, Const. s. 64. [6] 9 Edw. VII. c. 9, s. 14.

[7] Western Australia *Parliamentary Debates*, 1908, p. 59.

only had a seat in the last Legislature the conduct of the Government for a period of several months, but he was dismissed by the Dominion Government for his action, which cannot therefore be regarded as a happy precedent for others to follow. In his defence he quoted several other cases of such happenings, as, for example, two cases in Ontario in 1898.[1] In the Dominion elections of 1908, Mr. Templeman, though defeated in British Columbia, remained a minister until he secured re-election in 1909.

The Dominions still in some degree retain the inconvenient and stupid practice of requiring ministers after accepting office to vacate their seats. This is still the rule in Canada, where all ministers who accept departmental office must be re-elected.[2] This does not, however, apply to cases where there has been a new Cabinet formed owing to the death or resignation of the Premier,[3] but only if a new Government has been instated in its place : in that case the resignation has become complete, and however short the tenure of office by the new Government the old Ministry must face re-election. This was not once the case, if new offices were accepted within a month ; hence the famous ' double shuffle ' of 1858 in Canada. Thus on the death of Sir John Macdonald in 1891 Mr. Abbott formed a new Government, and all the old members retained their seats and places. The same procedure was followed in 1894, on the death of Sir John Thompson at Windsor on December 13, when again the ministers did not need to seek re-election : on the other hand, the ministers who changed their offices, Sir C. Tupper, Messrs. Bowell and Ives, took the oath of office of their new departments. In the case of all the Canadian Provinces it is specifically enacted that acceptance of office by a member of the Legislature vacates a seat, but re-election is allowed, and is not necessary if the minister in question is re-appointed after resignation within a month, unless a new Ministry has been formed in the interim. Appointment to the Legislature

[1] Canada *Sess. Pap.*, 1900, No. 174, p. 17.

[2] *Revised Statutes*, 1906, c. 11, s. 9.

[3] Bourinot, *Constitution of Canada*, pp. 184, 185.

of a minister of course does not vacate a seat, or the acceptance of another post, or of two portfolios.[1]

Elsewhere the practice varies; for example, in New South Wales in 1906[2] the rule of non-re-election was adopted, and it has always been in force in South Australia and New Zealand; it is now in force in Tasmania and in Queensland. In the Cape, the Transvaal, the Orange River Colony, and Natal it was never introduced, and the Union of South Africa, like the Commonwealth, follows the same model. In the other states it remains in force, but it may be hoped that it will not be perpetuated. It has indeed been argued by Mr. Todd[3] that it tends to stability of government by diminishing the otherwise constant changes of administrators of departments, and in the case of the Commonwealth there may be something in this, but there is really nothing else substantial in favour of so troublesome and so expensive a course of action.

§ 2. The Prime Minister and the Cabinet

The rules as to the Cabinet are much the same as in England; the Prime Minister chooses his colleagues, except in the case of Labour parties in Australia, where in Mr. Fisher's Ministry of 1908 and 1910 the caucus have asserted the right to select the Ministry, leaving the Prime Minister to assign the offices,[4] but the result seems substantially in accordance with the wishes of the Prime Minister; his predecessor, Mr. Watson, selected his own colleagues. The resignation of the Premier breaks up a Ministry, and even if there is a reconstruction and no formal handing over of the offices takes place, the Government is deemed to have resigned *en bloc* until the new

[1] Ontario Act, 1908, c. 5, s. 15; Quebec *Revised Statutes*, 1909, ss. 147, 148; Nova Scotia, *Revised Statutes*, 1900, c. 2, s. 19; New Brunswick, *Rev. Stat.*, 1903, c. 3, s. 12; Manitoba *Rev. Stat.*, 1902, c. 96, s. 20; Prince Edward Island Act, 1908, c. 1, s. 25; Saskatchewan Act, 1906, c. 4, s. 15; Alberta Act, 1909, c. 2, s. 16.

[2] *Parliamentary Elections Act*, 1906, s. 60. Cf. the proposals of the Government in Western Australia in 1910; *Parliamentary Debates*, 1910, p. 828. Re-election is still required in Victoria also.

[3] *Parliamentary Government in the British Colonies*,[1] p. 47.

[4] Harrison Moore, *The Commonwealth of Australia*,[2] pp. xxvi, 168, note 1.

Premier asks them to stay on; in accordance with this rule Sir N. Moore of Western Australia offered the resignation of himself and colleagues to the Governor, though the Governor decided only to accept his personal resignation, a course which, if convenient and corresponding to facts, was scarcely in accordance with the established practice, for it left the ministers in full possession of their places before the Premier who took the place of Sir N. Moore had an opportunity of deciding what ministers he should keep, and it would seem desirable to follow the strict course of accepting the resignations *en bloc*, and then allowing the members to hold on until the new Premier has decided on his policy. This avoids the necessity of asking a minister whose presence is not desired to resign his office instead of merely not asking him to remain in office.[1]

It may be doubted whether a Premier in the Dominions has the full control over the Ministry which a Premier in the United Kingdom possesses. Thus in 1908 the Premier of Victoria was noted with some surprise to have laid down the rule that his colleagues should discuss measures with him first of all, and obtain his approval before they brought them before the public as being his Government's views. In the same year one of his colleagues was the repeated object of attack by a newspaper which professed itself as a strong supporter of the Premier. In the case of the Commonwealth Parliament there was during the illness of the Prime Minister in 1907 an open fight between the Treasurer and the Minister for Trade, which ended in the retirement of the former, though

[1] For an older case of disregard of the rule in 1847, see Pope, *Sir John Macdonald*, i. 50, contra 157 (1856), 285 (1865). Sir B. Frere tried to disregard the rule in 1878; see Molteno, *Sir John Molteno*, ii. 342. In New Zealand, on Mr. Ballance's death in 1893, all the ministers resigned and a new Ministry was formed; in 1906, on Mr. Seddon's death, a new Ministry was formed on June 21 under Mr. (now Sir W.) Hall Jones, and on August 6 he resigned and Sir J. Ward formed a Government, really only a change of Premier. In September 1876, after a short interval, the Atkinson Ministry all resigned and then reconstituted themselves. In 1911 on Mr. Kidston's resignation in Queensland all the Ministers resigned. See also Anson, *Law of the Constitution*,[3] II. i. 120.

his retirement seems to have been thought generally to have been unnecessary, as far as constitutional practice went. Moreover his successor proceeded at once to repudiate the arrangements made by his predecessor for settling the eternal question of the finances of the Commonwealth, and adopted and proposed a new scheme of his own, a proceeding which could hardly happen in the United Kingdom, where the Prime Minister would have accepted the responsibility for the settlement with the states, and would not have allowed the promise of the Ministry to be violated by the change in its personnel.[1] In 1910 the Minister for Mines in Victoria openly stated that he had fought the Cabinet over the sale of coal from the state mines to the public, and had won his way.

There is undoubtedly in the Colonies a certain lack of definite coherence and loyalty among ministers, but there are exceptions; in the Dominion[2] of Canada, the personality of Sir John Macdonald and of Sir Wilfrid Laurier won for them a position of command similar to that attained by the Prime Minister in the United Kingdom. In New Zealand and Newfoundland Mr. Seddon and Sir J. Ward and Sir R. Bond and Sir E. Morris have been able to create Governments essentially dependent on themselves, but these cases are exceptional, and the rule of Sir R. Bond was finally overthrown by dissension from within, one of his chief lieutenants having come to the conclusion that it was impossible for Sir R. Bond and himself to co-operate in one Ministry. The matter of dispute was curious: it took its origin in regard to an order to increase the pay of men working on the roads, for which the Premier claimed that he must obtain the credit, while Sir E. Morris claimed that it was his act—clearly a declaration of revolt, since all the acts of the Cabinet must be regarded as approved and allowed by the Prime Minister.

[1] Cf. reports of the Premiers' Conference in Brisbane of May 1907, and of Melbourne in May 1908, and see New South Wales *Parliamentary Debates*, 1908, pp. 970 seq., especially at p. 991.

[2] In Ontario Sir O. Mowat held office as Premier for twenty-four years. Mr. McBride in British Columbia, Mr. Roblin in Manitoba, and Mr. Fielding in Nova Scotia are other examples.

§ 3. The Composition of the Dominion Cabinets

The size of Cabinets differs considerably from Dominion to Dominion, and in the Dominions there prevails a somewhat curious practice of having honorary ministers, who are full members of the Cabinet in the usual sense of the word, but who do not hold any office with emoluments attached thereto. They are available not merely to conduct governmental business in either House in which they may sit, but they can also be used to do work in the absence or illness of a minister,[1] or to act as whips. The institution is clearly a convenient one, and its use is increasing, not decreasing; it must be remembered that the great distances in the Dominions are partly the cause; a minister who visits an outlying part of the Dominion or state may have long distances to go and be away for some days as a matter of course in the middle of the session, and an ordinary minister, probably extremely busy himself, has no time to attend to the duties of another office. It must also be remembered that a minister in the Dominions has no assistance in Parliament corresponding to the Secretaries and Under-Secretaries of the governmental offices in England. The plan was tried in Canada in 1887, when Parliament provided for a department of trade and commerce presided over by a minister of trade having control and supervision of the departments of customs and inland revenue. The object of this was to appoint a controller of customs and one of inland revenue, who should be ministers but not members of the Cabinet, and who should work under the supervision of the Minister of Trade. The purpose was admitted by Sir John Macdonald[2] in his speech on the Act for the creation of the new arrangement to adopt the English practice as regards Under-Secretaries. In 1892 the new arrangement took

[1] So usually in New South Wales; cf. Act No. 32 of 1902, ss. 36–8; *Parliamentary Debates*, 1910, Sess. 2, p. 409. Interchange of duties in South Australia is rendered possible by Act No. 1000, 1910.

[2] Canada *House of Commons Debates*, 1887, ii. 862, 863. It is recommended for re-adoption by Sir R. Cartwright; see *Senate Debates*, 1911, p. 252.

effect, and the new controllers were re-elected to their seats after appointment in the usual way. In 1895 their position was entirely changed by their being called to the Cabinet instead of being left as subordinate ministers, a change which was not contemplated by the Act creating the offices nor intended by the framer of the Act.[1] The result was that on the formation of the Government of Sir Wilfrid Laurier in 1896 steps were taken by an Act of 1897 to restore the arrangements as they existed before 1887, the two departments being given ministers with seats in the Cabinet as usual, and their salaries were raised in 1899 to the usual figure of ministerial salaries.[2] On the other hand, another experiment tried in 1887 still holds good; the office of Solicitor-General, then created, is filled by an officer who may sit in Parliament, but who is not a member of the Cabinet. It is his duty to assist the Minister of Justice in the counsel work of his department. In New Zealand the Attorney-General may or may not be a member of the Executive Council, and may or may not be a member of Parliament.[3] In 1875 the Victorian Attorney-General was in the Government, but not in the Executive Council, and in 1892 the Attorney-General of the Cape had no seat in Parliament.

In the case of the Dominion of Canada the first Cabinet consisted of thirteen members, who, as was desirable in the case of a Federal Cabinet,[4] consisted of five members from Ontario, four from Quebec (one being a representative of the English part of the population), two from Nova Scotia, and two from New Brunswick. The ministers were Minister of Justice and Attorney-General, Minister of Militia, Minister of Customs, Minister of Finance, Minister of Public Works, Minister of Inland Revenue, Minister of Marine and Fisheries, Postmaster-General, Minister of Agriculture, Secretary of

[1] Canada *House of Commons Debates*, 1896, i. 1065 seq.

[2] Ibid., 1897, ii. 4122–30. See Acts 60 & 61 Vict. c. 18; 62 & 63 Vict. cc. 23 and 24.

[3] See the Act 50 & 51 Vict. c. 14, and No. 22 of 1908. So in New South Wales from 1875–78 the office was not political.

[4] For Sir W. Laurier's views on this topic see *House of Commons Debates*, May 15, 1909.

State of Canada, Receiver-General, Secretary of State for the Provinces, and President of the Council, the latter post being akin to the post of President of the Council in England, in that it was mainly an honorary ministry, but was not without portfolio. In 1873, on the coming into office of the Mackenzie Government, there were appointed fourteen ministers, two without portfolio, Mr. Blake and Mr. R. W. Scott. Subsequently the number was reduced to thirteen, but one representative was given to Prince Edward Island, which joined the Dominion in 1873. In 1878 the Speaker of the Senate received a call to the Privy Council, though without portfolio,[1] and in 1880, when he accepted the Lieutenant-Governorship of New Brunswick, his successor in the chair was so appointed.[2] In 1873 the office of Secretary of State for the Provinces was abolished, and a new Ministry of the Interior created to deal with Indian affairs, Dominion lands, and some other matters formerly entrusted to the Secretary of State for Canada. The Minister of the Interior is also responsible for the geological survey of Canada, which is presided over by an officer of high technical qualifications. In 1892 immigration was transferred from the Ministry of Agriculture to the Ministry of the Interior, but the Minister of the Interior still remains without the control of copyrights, patents, and trade marks, which the Minister of Agriculture retains in view of their close connexion with the subject-matter of his office. The Secretary of State for Canada retains the work connected with the provinces, and the preservation of records, miscellaneous correspondence, and the registration of instruments of summons, proclamations, commissions, letters patent, writs, and other documents issued under the Great Seal and requiring to be registered. He is also in charge of the department of public printing and stationery, organized in 1886. In 1909 a new office was created under the Secretary of State, that of Under-Secretary of State for External Affairs, to deal with the many important matters in which Canada was interested affecting her external relations with foreign powers, and especially of course her

[1] *Canada Gazette*, November 9, 1878. [2] Ibid., February 12, 1880.

relations with the United States of America.[1] This department resembles, moreover, the corresponding department in the Commonwealth, for like that department it deals with the correspondence passing with the Secretary of State for the Colonies as well as with matters of external interest properly so called. In 1879 the office of Receiver-General was abolished and the duties assigned to the finance minister. At the same time the department of public works was divided into two separate departments presided over by two ministers, one designated Minister of Railways and Canals, and the other Minister of Public Works. The changes in the department were rendered necessary by the constitution of the Canadian Pacific Railway, which threw much responsibility upon the departments of the Government. In 1884 the Ministry of Marine and Fisheries was divided into two subsections of marine and fisheries administered by one minister and two deputies, but the arrangement was revoked in 1892, to be again restored in a different form in 1910, when the development of the Canadian navy required the redivision of the ministry under two deputy heads, with powers extending, the one over marine and fisheries, the other over the new navy. Moreover, it was decided in 1909 to create a Minister of Labour as an independent branch of the Government.[2] The Ministry thus in 1911 consisted of the Prime Minister, who was President of the Privy Council, the Minister of Trade and Commerce, the Secretary of State, the Minister of Militia and Defence, the Minister of Agriculture, the Minister of Finance, the Minister of Customs, the Minister of Justice, the Minister of Inland Revenue and of Mines, the Minister of Railways and Canals, the Minister of Marine and Fisheries and of the Naval Service, the Minister of Public Works, the Minister of the Interior, the Postmaster-General, the Minister of Labour, and the Solicitor-General, a member of the Ministry but not of the Cabinet.

[1] See the First Annual Report of the Secretary of State for External Affairs, Canada *Sess. Pap.*, 1910, No. 29 b. *De facto* the Prime Minister is very much the Minister for External Affairs.

[2] See *Parl. Pap.*, Cd. 5135, p. 11.

It would be tedious to give in detail the changes of ministerial offices in the provinces. In Ontario there are now, in 1911, in addition to the Premier, who is President of the Council, the Attorney-General, Minister of Education, Minister of Public Works, Minister of Lands, Forests and Mines, Secretary, Treasurer, Minister of Agriculture, and three ministers without portfolio. In that province the ministerial salary is six thousand dollars, the Premier receiving nine thousand, which compares with seven thousand dollars in Canada for ministers, where since 1905 political pensions have been provided and a salary for the leader of the Opposition, Mr. Borden. In Quebec there is a Premier and Attorney-General,[1] Minister of Lands and Forests, Provincial Treasurer, Minister of Agriculture, Minister of Public Works and Labour, Provincial Secretary, Minister of Colonization, Mines, and Fisheries, and two ministers without portfolio. The ministerial salary is six thousand dollars. In Nova Scotia the number of the Executive Council is fixed at nine,[2] of whom only three have portfolios with salaries of five thousand dollars a year, and an additional thousand for the Premier: these are the Premier and Provincial Secretary, Attorney-General, and Commissioner of Mines and Public Works. In New Brunswick, where nine is the maximum, the Premier is Attorney-General, and there are the Provincial Secretary and Receiver-General, Surveyor-General, Chief Commissioner of Public Works, Commissioner for Agriculture, President of the Council, and Solicitor-General, of whom the President is unpaid, and the salaries of the rest vary from two thousand one hundred to seventeen hundred dollars, with twelve hundred for the Solicitor-General. In Manitoba the President of the Council, who is Premier, holds also the posts of Minister of Agriculture and Immigration, Commissioner of Railways, and Commissioner of Provincial Lands; there are also a Provincial Treasurer, a Minister of Public Works, an Attorney-General, a Provincial Secretary, and a Municipal

[1] The high position of the Attorney-General is common in nearly all the Dominions, and is one point of contrast with the practice in the United Kingdom.

[2] *Rev. Stat.*, 1900, c. 9.

Commissioner and Minister of Education. In British Columbia there are besides the Premier, who is Minister of Mines, a Minister of Finance and Agriculture, an Attorney-General, a Provincial Secretary who is Minister also of Education and Immigration, a Chief Commissioner of Lands, a Minister of Works, and a President of the Council, and since 1911 a Minister for Railways. The ministerial salary is five thousand dollars, and there must by law be not more than seven (since 1911 eight) members of the Executive Council, of whom six (seven since 1911) only can be paid salaries.[1] In Prince Edward Island there is a Premier who is Attorney-General, a Provincial Secretary who is Treasurer and Commissioner of Agriculture, and a Commissioner of Public Works, while there are five or six members also without portfolio. The paid members receive twelve hundred dollars a year. In Saskatchewan the Executive Council consists of a Premier who is President of the Council and Minister of Public Works, a Provincial Treasurer who is Minister of Education and Minister of Railways, Telegraphs and Telephones, an Attorney-General, a Minister of Agriculture and Provincial Secretary, and a Minister of Municipal Affairs, the salary being five thousand dollars with an extra thousand for the Premier. In Alberta again the Premier combines the portfolios of Premier, President of Council, Minister of Public Works and Provincial Treasurer, and there are also an Attorney-General and Minister of Education, a Minister of Agriculture and a Provincial Secretary, the salaries being as in Saskatchewan. It will be seen how curiously the division of duties varies, and how great in the cases of Prince Edward Island and in Nova Scotia is the contingent of unpaid members without portfolio, a survival in both cases from the large and amorphous councils period preceding responsible government.

In Newfoundland the same phenomenon is to be seen: the ministers include the Premier, who from 1900 to 1908 was Colonial Secretary, an Attorney-General and Minister of Justice, a Minister of Finance and Customs, and a Minister

[1] Act 1908, c. 12.

of Agriculture and Mines, together with four members without portfolio. It was altered by the accession to office of Sir E. Morris, who did not take the office of Colonial Secretary, but remained without portfolio.

In the case of the Commonwealth the proclamation of the Commonwealth took effect on January 1, 1901. The Governor-General, who had arrived, was ready with a Ministry, having first entrusted Sir William Lyne, and then, on his failure, Mr. Barton, with the duty of forming a Ministry, and so on the taking of the oaths he was prepared to form his Executive Council, whereupon he proceeded, with their advice, to declare under the Act that the following ministries should be established, those of External Affairs, Attorney-General, Home Affairs, Treasury, Trade and Customs, Defence, and the Postmaster-General. Besides there were two honorary ministers, of whom one bore the title of Vice-President of the Executive Council, and was the leader of the Government in the Upper House.[1] The departments of customs and excise in the states were on January 1 transferred under the Act to the Commonwealth, and under proclamations of February 14 and 25 the departments of posts and of defence were transferred with effect from March 1. The department of external affairs was occupied in the first place by the Prime Minister, Sir E. Barton, and it included more than might otherwise have been ascribed to the post, namely, immigration and emigration, influx of criminals, and the relations with England, the state Governors and the Governor-General, the Executive Council, and the officers of Parliament. It also deals with the relations of Australia and Papua, the High Commissioner in England, an office only constituted in 1909 after a long period of inadequate representation in this country, and such matters as the relations of Australia and the islands in the Pacific, especially in connexion with mail services, and since 1910 the control of the Northern Territory. The department has not been held in Labour Governments by the Prime

[1] See Harrison Moore, *Commonwealth of Australia*,[2] pp. 170 seq.; Commonwealth *Official Year Book*, 1901–8, p. 970.

Minister, who has in all three been Treasurer, and in the Ministry of 1909 Mr. Deakin held no portfolio.

The Attorney-General is entrusted with the conduct of the legal business of the Commonwealth, and his department contains the legal draftsmen. The Treasurer controls the financial business of the Government, and the audit department is subject to his general supervision, though the Auditor is given an independent position, and cannot be removed except on addresses from the two Houses of Parliament. The Minister for Home Affairs is entrusted with all electoral matters and with the control of the Commonwealth site (Act No. 23 of 1907 and No. 25 of 1910), but the administration of the *Invalid and Old Age Pension Acts* falls under the control of the Treasury. The Ministry for Customs includes all customs and excise matters and other important Acts dealing with trade. The Minister for Defence is charged with military and naval defences, and the Postmaster-General deals with postal, telegraphic, and telephone matters. There have been from the outset ministers without portfolio, two in 1901, two in 1908, and two in 1909, and three in 1910, but on no occasion except in the Ministry of June 1909–April 1910, when Mr. Deakin was Prime Minister without portfolio, has a minister of first importance been without office. Care has been taken to divide the ministries between states so as, as far as possible, to secure representation of all the states, or four or five at least, in the Government.[1] A sum of £12,000 is provided in the Constitution for the salaries of ministers, the distribution of the amount being left for the Government to decide.

In New South Wales the Executive Council, besides the Governor as President (the Governor being President in all the states and in the Commonwealth), includes the Vice-President, a minister in the Legislative Council without portfolio, the Premier, who in Mr. Wade's Ministry was Attorney-General and Minister of Justice, Colonial Secretary, who is also

[1] There were two from each state except Queensland and Tasmania in the Ministry of 1910, but the extra member in each case save New South Wales was honorary. There were in the Senate two honorary ministers.

Minister for Agriculture in Mr. McGowen's Ministry, the Colonial Treasurer (Premier in Mr. McGowen's Ministry), who is also Minister for Railways, the Secretary for Mines, the Secretary for Public Works, the Secretary for Lands, the Minister of Public Instruction, who is also Minister for Labour and Industry, and other ministers without portfolio. Salaries of the ministers range from £1,870 downwards, and the ministries are very variously grouped from time to time. In 1911 there is but one member in the Upper House.

In Victoria the Executive Council includes, besides ex-ministers who are still formally members, the Premier, now Chief Secretary and Minister for Labour, the Attorney-General and Solicitor-General, the Treasurer, the Minister of Mines and Forests, the Minister of Education and Railways, the Minister of Public Works and Health, the Minister of Water Supply and Agriculture, the Minister of Lands, and normally two to four honorary ministers. Salaries are £1,000 a year, with an extra £400 for the Premier. There are two ministers in the Upper House.

In Queensland the Executive Council includes the Vice-President, who in 1911 is Premier and Chief Secretary, the Secretary for Public Instruction and for Public Works, the Attorney-General, the Secretary for Public Lands, the Treasurer, the Secretary for Agriculture and Railways, the Home Secretary and Secretary for Mines. Salaries are £1,000 a year, with £300 extra for the Premier, and the leader of the Opposition is paid a salary of £200 in addition to his parliamentary pay. There are two ministers in the Council.

In South Australia the Executive Council includes, besides the Governor, the Chief Justice, who is *ex officio* regarded as a member, the Premier, who is Commissioner of Public Works and Minister of Mines, the Chief Secretary, the Attorney-General, the Treasurer and Commissioner of Crown Lands and Immigration, the Minister of Education, and the Minister of Industry and Agriculture. There are now two, but usually only one minister in the Upper House. The surrender of the Northern Territory may render necessary another change of portfolios. The number of ministers is

fixed by law of 1908 at not more than six, and a sum of £5,000 is provided for their salaries. In 1901 the number was reduced to four, but that proved inconvenient.

In Western Australia the Executive Council includes as ministers, one of whose members must be in the Upper House, the Premier, who is also Colonial Treasurer, the Minister for Works, the Minister for Mines and Railways, the Minister for Lands, Agriculture, and Industries, the Colonial Secretary, the Attorney-General and Minister for Education, and a minister or ministers without portfolio. The Premier receives £1,200 a year, and the other ministers £1,000 a year. In 1911 there were two, one honorary, in the Upper House.

In Tasmania the Executive Council includes the Premier, who is also Treasurer, the Chief Secretary, the Attorney-General and Minister of Education, and the Minister for Lands and Works, Mines, and Minister for Agriculture; they all receive salaries of £750 a year, which were until 1910 voted annually. The Executive Council includes all the ex-ministers. There is usually one minister in the Upper House.

It is recognized to be desirable that in both Houses of Parliament there should be an adequate number of ministers, but in practice the Upper House is repeatedly allowed to be without its fair share of ministers. In 1910 there were three ministers in the Upper House in the Commonwealth, seven in the Lower; two (one in Mr. McGowen's Ministry) in the New South Wales Upper House, eight (nine) in the Lower; four in the Victoria Upper House,[1] eight in the Lower; two in the Queensland Upper House, six in the Lower; two in the South Australia Upper House,[2] four in

[1] There was formerly only one member, but in the discussions of 1877 the inconvenience of only one became very clear; see *Parl. Pap.*, C. 2217, pp. 4, 40, 56. See also Act No. 1864, s. 5, which provides for not more than two members in the Council and six in the Lower House out of eight who can be members (and four *must* be members) of Parliament.

[2] The Legislative Council on July 31, 1877, decided to take the conduct of business out of the hands of the Chief Secretary and to entrust the conduct to a private member, and there is still constant dissatisfaction with the treatment of the Council by the Lower House. See also South Australia *Legislative Council Debates*, 1908, pp. 166, 205.

the Lower ; one (later two) in the Western Australia Upper House, six in the Lower ; one in the Tasmania Upper House, three in the Lower. But the numbers hardly show the extent to which the Upper House is considered inferior, because of the members in the Upper House one at least is merely an honorary minister, so that the Upper House has not the same control of the Government as the Lower House has. As a result the Upper House have continually contended that the number of ministers therein should be increased, and as continually nothing, or at any rate nothing substantial, has been done to meet their wishes. Moreover, the Labour Ministry of South Australia declined in 1910 to introduce any business in the Upper House, with the result that that body had to content itself with dealing with Bills already passed by the Lower House ; so too the Labour Ministry in New South Wales in 1910–11.

In the case of New Zealand the Executive Council contains, besides the Governor as President, the Prime Minister, who is also Minister of Finance, Postmaster-General, Minister of Telegraphs, Minister of Defence, and Minister of Lands and Commissioner of State Forests, the Minister for Railways, who is also Minister of Marine and of Labour, the Native Minister, the Attorney-General and Minister of Justice, the Minister of Education, who is Minister of Immigration and Minister of Customs, the Minister of Public Works and Minister of Mines, the Minister of Industries and Commerce, who is also Minister in charge of Tourists and Health Resorts and Minister of Agriculture, and the Minister of Internal Affairs, who is the Minister of Public Health, besides a minister without portfolio representing the native race. This confusion of portfolios is due to a desire to diminish the expenditure of the Government. The allotment of ministers to the Upper House has caused much dissatisfaction ; in 1876 the number was reduced to one, and an attempt of the Council in 1878 to pass a Bill increasing the number to two was frustrated by the attitude of the Lower House, but the number—one—is still deemed inadequate by the Council.

The Cape Ministry before the Union consisted of the Premier

and Treasurer, the Minister of Public Works, Minister of Agriculture, Colonial Secretary, Attorney-General, and two ministers without portfolio, while all ex-ministers were included in the Executive Council. In Natal the Prime Minister was also Minister for Native Affairs, and there were the Colonial Secretary and Minister of Education, Minister of Agriculture and Minister of Defence, Attorney-General, Minister for Railways and Harbours, and Treasurer, no honorary minister being appointed, and every minister being a member of the Legislative Assembly. In the Cape there was only one honorary minister in the Council. In the Transvaal there was the Prime Minister, who was Minister of Agriculture; Colonial Secretary, Attorney-General and Minister of Mines, Colonial Treasurer, Minister of Lands and Minister for Native Affairs, and Minister of Public Works. In the Orange River Colony the Prime Minister was Colonial Secretary; the other ministers were the Attorney-General, Colonial Treasurer, Minister of Agriculture, and Commissioner of Public Works, Lands, and Mines. In both cases not a single member of the Ministry sat in the Upper House, and there were no honorary ministers.

In the Union after its constitution on May 31, 1910, ten ministries were established, namely agriculture; the interior, mines, and defence; native affairs; education; finance; lands; public works, posts, and telegraphs; railways and harbours; justice; commerce and industries. The ministries were divided among the provinces so that four fell to the Cape, three including the Prime Ministry and the Treasury, two of the most important, to the Transvaal, two to Natal, and two to the Orange River Colony, one being an honorary ministry, making up a Cabinet of eleven. On presenting themselves for election one of the Natal ministers, the ex-Premier, Mr. Moor, who had been given the portfolio of commerce, failed to secure election, but he was appointed a senator,[1] another ministerial appointment being made. The salaries are £3000, with £4000 for the Premier.

[1] For a criticism of this action see *The State of South Africa*, iv. 787.

§ 4. Instability of Dominion Ministries

For the greater part Colonial Ministries are not of prolonged duration, and indeed in some cases the instability has been almost ludicrous; Ministry after Ministry comes into office and disappears in the course of a few weeks or months. In Canada things have been very different in this regard from the state of affairs in the Commonwealth of Australia. In the Dominion, the Ministry formed by Sir John Macdonald [1] in 1867 lasted until 1873, when the scandal in connexion with the Pacific Railway alienated the country and brought Mr. Mackenzie's Ministry into office. That Ministry again lost the support of the country in 1878 on the question of tariff policy, and from 1878 to 1896 Conservative Governments remained in office, first under the leadership of Sir John Macdonald, then on his death in 1891 under that of Mr. (later Sir J.) Abbott, then under Sir John Thompson, and on his death in 1894 under Sir Mackenzie Bowell, and finally, for a very brief period at the end, after the unceremonious ousting of Sir M. Bowell, under Sir Charles Tupper. In 1896 the differences between the Federal Government and Manitoba added to a change in the views of Quebec,[2] secured the return of the Liberals, who have since held office, and even in 1908 their strength was not much weakened despite the difficulties in British Columbia on account of Asiatic exclusion, and the scandals raised by discoveries which showed that the standard of public morality in regard to contracts and patronage in Canada was not as high as it should have been.[3]

[1] It was a continuation of an administration formed in 1858 in the United Provinces which lasted, with a break in 1862–4, until federation. See Pope, *Sir John Macdonald*, and Willison, *Sir Wilfrid Laurier*, for the political history of Canadian parties down to 1902.

[2] The views of Quebec since seem again to have changed slightly in view of the naval policy of the Government, which is unpopular, as shown by the defeat of the Government candidate in the Drummond and Arthabaska division election in 1910. Cf. *Parl. Pap.*, Cd. 5582, p. 38.

[3] Cf. *Canadian Annual Review*, 1908, pp. 396 seq.; Macphail, *Essays in Politics*, pp. 164 seq. An election is now to be held on the reciprocity issue.

In the provinces things have been different, and Ministries have been less clearly divided on political grounds and so less stable, but even there of recent years matters have changed. Nova Scotia is steadily Liberal under Mr. Fielding's influence, and Mr. McBride's Ministry, which replaced the chaos of politics on personal grounds by the party system, has maintained itself since 1903 in overwhelming strength in 1907 and 1910 in British Columbia; from 1871 to 1905 the Liberals under Sir O. Mowat and Colonel Ross ruled Ontario, but since then the Conservatives under the lead of Sir James Whitney in Ontario, and of Mr. Roblin since 1900 in Manitoba, have held office for considerable periods, while the Conservative Opposition in Quebec is still very weak, though it held office for a period after Mr. Mercier's dismissal by Mr. Angers in 1891. On the other hand, in 1908[1] the Conservatives overthrew the Liberal reign in New Brunswick, which had lasted since 1883. There has already been one change of Premier in Alberta, and Prince Edward Island has in the past wavered a good deal.[2] Saskatchewan, since its creation, has remained Liberal.

In Newfoundland, after several changes, Sir R. Bond's Ministry lasted from 1900 to 1909, and the next Ministry, of Sir E. Morris, appears to be firmly seated in office.

In the case of the Commonwealth, changes have been incessant since 1901. The first Ministry, that of Sir Edward Barton, came to an end through his resignation in 1903, but the Government to which Mr. Deakin succeeded was in effect unchanged in politics. It was overthrown in 1904 on the question of the inclusion of railway servants in the Conciliation and Arbitration Act by a coalition between the Labour party and Mr Reid's party.[3] The Labour Ministry which followed only lasted from April 27 to August 17, 1904,

[1] Even in Nova Scotia the Conservatives gained seats in 1911.

[2] It has been Liberal since 1891, but the 1908 election was a shock; Macphail, *Essays in Politics*, pp. 441 seq. It is curious that when the Dominion Government is Liberal the provinces tend to be Conservative, and vice versa. Sir J. Macdonald seems to have preferred this condition of affairs.

[3] *Parliamentary Debates*, 1904, p. 1243; Turner, *Australian Commonwealth*, pp. 73 seq.

when it was overthrown by a coalition between Mr. Reid's party and that of Mr. Deakin,[1] who proceeded to form the Reid–McLean administration, which lasted from August 18, 1904, to July 4, 1905, when on the meeting of Parliament it was overthrown by a coalition of Labour and Mr. Deakin's party. The new administration of Mr. Deakin lasted till November 12, 1908, but the retirement of Sir J. Forrest on July 29, 1907, caused a considerable change in the constitution and attitude of the Ministry, Sir. W. Lyne, his successor as Treasurer, being much more closely in touch with Labour ideals. Mr. Deakin's administration was overthrown by the desertion, mainly on tactical grounds in view of the general election in 1910, of the Labour party, which formed a Government lasting from November 13, 1908, until June 2, 1909, when it was overthrown on the opening of Parliament on the question of naval assistance to the United Kingdom. A new administration was then formed by Mr. Deakin and Mr. Cook, who had taken command of Mr. Reid's party, Mr. Reid having resigned sometime previously in order to facilitate a coalition. Mr. Reid was appointed High Commissioner for the Commonwealth in England, but the combined party was defeated decisively at the general election in April 1910, and a Labour administration under Mr. Fisher took office with, for the first time in the Commonwealth, absolute majorities in both Houses of Parliament.

In the case of the states there has been the same lack of political continuity, and the average life of a Government has been extremely short. There have been thirty-four Ministries in New South Wales since 1856, twenty-six in Queensland since 1859, forty-one in South Australia since 1856, thirty-three in Victoria, and twenty-seven in Tasmania. The average duration of a Ministry has thus been very short, save in a few cases of coalitions, and in some cases comically so; thus in 1899 Mr. V. L. Solomon was Premier of South Australia from December 1 to 10 only, and Mr. Earle's Government in Tasmania in 1910 rivalled Mr. Solomon's in brevity. The rise of Labour as an organized force resulted in coalitions,

[1] *Parliamentary Debates*, 1904, p. 4265.

and the few long Ministries, which include those of Mr. Gillies with Mr. Deakin in Victoria from 1886–90, of Mr. Reid in New South Wales from 1894 to 1899, which was upset by an indiscretion of the Premier, of Sir G. Turner in Victoria from 1894 to 1899, and from 1904 to 1908 of Sir T. Bent, whose personal blunders again terminated the régime. In Queensland since 1903 the party led first by Mr. (now Sir A.) Morgan, since 1906 by Mr. Kidston and now by Mr. Denham, has held office with the exception of a brief break in November 19, 1907, to February 18, 1908, when their opponents were in a minority in the House and the country, but since 1909 the Government has rested on a Conservative alliance, reminiscent of the alliance of Sir S. Griffith and Sir T. McIlwraith in 1890. In South Australia, since the Liberal administration of Mr. Jenkins from 1901 to 1905, the Labour Party have held office with a short break after Mr. Price's death, when Mr. Peake led a party which ultimately accepted a Conservative alliance. In Western Australia governments have of late been short-lived mainly for personal reasons, and the parties are now fairly evenly divided between the Liberals and Labour, but Sir N. Moore's retirement in 1910 has weakened his side, which on a vote of censure had only a majority of one vote. In Tasmania, since the long Ministry of Sir E. Braddon from 1894 to 1899 all has been in flux, and the Government still is very feeble. Sir E. Lewis held office from 1899–1903, and is now again in power, Labour being definitely in a minority. In New Zealand the Liberal party has been in office since 1891, first under Mr. Ballance (1891–3), then under Mr. Seddon (1893–6), and now under Sir J. Ward. It sprang into being under Sir G. Grey in 1877–9, and held office from 1884–7. In the Cape Ministries have been less unstable than in Australia. There were ten Ministries from 1872 to 1910, and of these Sir G. Sprigg was Prime Minister in four (1878–81, 1886–90, 1896–8, 1900–4), while Mr. Rhodes's Ministry of 1890, which rested on a Bond alliance, ended only in 1896, through his participation in the Raid in 1895. The Bond itself first took office on defeating Sir G. Sprigg in 1898, but Mr. Schreiner resigned on the

failure of his supporters to carry his measures against treason. Sir G. Sprigg then very skilfully conducted affairs until 1904, when the general election placed him in a minority, and the Progressives held office until forced out of it in 1908 by the general election, which had been brought on somewhat prematurely by the loss of a majority in the Upper House. Mr. Merriman then led a party under Bond influence until the Union in 1910. Natal has been very unstable, but one Government held office in the Transvaal and Orange River Colony respectively from the grant of responsible government to 1910.

The causes for these changes are no doubt the lack of questions on which parties could divide on party lines. The Labour[1] party is the only one in Australia which is organized so as to be an effective and united instrument; so too the Bond party and its followers in South Africa; all other parties are very disloyal to their chiefs, and prevent any Ministry having the complete control of legislation which a Ministry in this country usually has.

Moreover, the small size of the Dominion Parliaments is, as was pointed out long ago by Lord Elgin,[2] a source of great difficulty; the absence from illness or other causes of a few members in a small House may utterly upset Government policy, and there can be no question that it renders effective legislation more difficult.

One remedy which has been suggested, and to a certain extent insisted upon in recent years, is to have elective ministries, in the hope that in this way, with fewer changes in the Ministry, administration at least can be effectively carried on. The subject has been discussed a good many times,[3] and was examined in New Zealand in 1891 by a committee, which

[1] Labour predominates in the Commonwealth, in South Australia, and since 1910 in New South Wales. It is also growing in strength in Victoria, and in Western Australia all but equals the Government; in Tasmania it is not likely soon to hold office, and in Queensland the personality of Mr. Kidston holds it in, but his retirement in 1911 may alter matters.

[2] Walrond, *Letters and Journals of Lord Elgin*, pp. 39, 40.

[3] See especially Western Australia *Parliamentary Debates*, xxvii. 535 seq.; Victoria *Parliamentary Debates*, 1910, pp. 1804 seq.; Commonwealth *Parliamentary Debates*, 1910, pp. 3624 seq.

issued a long report, but so far nothing has resulted from the discussions, though several prominent statesmen have pronounced themselves as being definitely opposed to it. It is difficult to see how elective ministries can be harmonized with effective parliamentary government, and it is very doubtful whether after experience of full parliamentary government any dominion or state would care to confine itself to a position in which the Ministry of the day was independent of votes in Parliament, and could not be displaced for a fixed period.[1] Moreover, it would complicate, though this is not a very important matter, the relations of the Crown with the Dominion Governments and Parliaments.

On the other hand, it must be admitted that constant changes of Ministry, such as happen in the Commonwealth, are opposed to all efficient administration; the remedy appears to lie not in making ministries elective, but in refraining from changes in the administration except on substantial grounds, and when changes are made, in appointing new members to the vacated posts rather than in transferring existing members to them, thereby upsetting the whole scheme of the Government.

One result of the small size of parties is that the rule, perhaps too strictly observed in the Imperial Parliament, that a Government will go out if defeated on any measure of any importance at all in the Lower House has not been

[1] The Sydney *Bulletin* advocates it, and it is more or less of a plank in the Labour party's programme; cf. Walker, *Australasian Democracy*, pp. 26, 277; Reeves, *State Experiments in Australia and New Zealand*, i. 64 seq. The Labour party has itself, as has been noted, adopted the caucus system of deciding on ministers and policy, a practice somewhat vehemently resented by their opponents, but one which it is difficult to avoid and which secures effective legislation. Then should be noted here the extraordinary influence in Victoria of the late Mr. David Syme, proprietor of the *Age*, who was admittedly consulted, and in many cases obeyed, by practically every Victorian Ministry, as is proved beyond doubt by his *Life*. Elective Federal ministers were deemed necessary, because of the curious character of the Upper House in Australia, by Sir S. Griffith, Sir R. Baker, and others; see Quick and Garran, *Constitution of Commonwealth*, pp. 708, 709.

rigidly followed in Australia or even in Canada. It is recognized that with a small House and with Colonial conditions of independence it is not a serious matter to be defeated in some matter not of the very first-rate importance. Thus in the tariff debates of 1907–8 the Government of Mr. Deakin was on several occasions defeated in the Lower House without in any way being compelled to resign its position, even after the Minister of Trade and Customs had declared certain of the amendments of vital importance; apparently the party understood that the Treasurer was only bluffing, for they did not obey his hints to vote solid. Even the Labour Ministry of 1910 suffered without resigning a defeat on the question of eligibility for entrance to the military college. On the other hand a Ministry may be disposed to insist on having the full confidence of the party; thus in 1909, when the vote for a special payment to Mr. Pember Reeves, late High Commissioner, on account of his services as financial adviser to the Government, was placed before the Lower House in New Zealand and was rejected, the Prime Minister lost no time in calling together a meeting of his followers and insisting that they should rescind the vote, which they did, but they felt no doubt that they had achieved their purpose by inducing the officer in question to give up the position of financial adviser in London. In all the Australian states and in New Zealand and in the Canadian provinces there have been cases of ministries which cling to office despite repeated defeats, or defeats averted only by casting votes of the Speaker; for example, Sir George Grey's Ministry in New Zealand probably, as Lord Normanby remarked in a dispatch in 1878,[1] never commanded a majority in the Lower House at all. Mr. Joly's Ministry in Quebec lasted from 1878 to 1879 on the most insecure basis, with practically no support in the Lower House and with a decided majority against it in the Upper House.[2] The Ministry in British Columbia in 1899–1900 was helpless, and was defeated on several occasions, but would not resign until the Lieutenant-Governor decided

[1] New Zealand *Parl. Pap.*, 1878, A. 1, p. 3.

[2] *Parl. Pap.*, C. 2445.

to turn it out.[1] In 1903 in the same province the Ministry retained office though supported on a motion for a dissolution only by the Speaker's vote.[2]

There is no fixed rule in the Colonies, just as there is hardly yet one in England, as to whether a Ministry should resign when a general election turns against them, or wait to be turned out on the meeting of the House. The older custom (as, for example, in Canada in 1848 and Ontario in 1871) was no doubt to meet the House and be ejected by a vote of no confidence, as was usual in England up to 1868, when Mr. Disraeli retired on defeat at the polls followed by Mr. Gladstone's resignation in 1874, and this new precedent was followed by Mr. McCulloch's Ministry in Victoria in 1877, and by Mr. Mackenzie's Ministry in Canada in 1878. So in 1884 the Atkinson Ministry and in 1887 the Stout Ministry in New Zealand resigned on the result of the polls. On the other hand, Sir C. Tupper did not resign on the defeat of his party at the polls in 1896 until he found that the Governor-General was no longer prepared to accept his advice as to appointments and so forth.[3] But he may have intended to resign before Parliament met, as he based his retention of office in part at least on the fact that all the results of the polls were not certain owing to recounts. In British Columbia in 1900 Mr. Martin's Ministry clung to office for months, though it had no parliamentary support at all. In 1891 the Atkinson Ministry in New Zealand resigned when the

[1] Canada *Sess. Pap.*, 1900, No. 174. On the other hand, in 1874 Mr. Molteno wished to resign on a defeat (Wilmot, *South Africa*, i. 244, 245), and Mr. Daglish resigned office in Western Australia in 1905 as he could not command a really undivided support in the Lower House for his followers; see *Parliamentary Debates*, xxvii. 803; and in 1909 Sir E. Lewis in Tasmania resigned, with the result that after a very brief period of Labour rule the party reunited and turned that party out. In the Cape, Sir G. Sprigg retired similarly in 1881 and 1890 (Wilmot, *South Africa*, i. 142; iii. 18), and Sir T. Scanlen in 1884.

[2] *Canadian Annual Review*, 1903, p. 213. Cf. ibid., 1902, p. 74; 1901, pp. 333, 334.

[3] Canada *Sess. Pap.*, 1896, Sess. 2, No. 7. Cf. a similar case in New Brunswick, *Canadian Annual Review*, 1908, p. 402; and in Ontario, ibid., 1905, p. 489.

result of the polls was known. In 1908, also Mr. Philp resigned office in Queensland as soon as his defeat at the polls was a *fait accompli*, and similarly at the general election of the Commonwealth in April 1910, the polls being decidedly for the Labour party, Mr. Deakin resigned office. In 1909 in Newfoundland the election having resulted in an equality of votes, the Premier resigned office just before the Legislature met, in order apparently to secure that the Legislature should be unable to proceed to business through the impossibility of electing a Speaker, with the result that the Government might be deemed to be beaten and required to resign, when he could have stepped in and asked successfully for a dissolution of Parliament. But though the Government were unable to obtain the election of a Speaker, even when they offered to appoint one of their own men, they asked for and obtained a dissolution, and were sustained by the country at the polls. In the same year Sir T. Bent obtained a dissolution at the end of the year, and on being defeated at the polls resigned without facing Parliament.[1] In October 1910 Mr. Wade, in New South Wales, being defeated by a narrow majority of two at the polls at the general election, at once placed his resignation in the hands of the Governor, and it may be said, in view of that case[2] and of others, that the practice is, on the whole, to resign rather than be dismissed by an adverse vote, but the principle is by no means without exception: for example, in 1910, despite their defeat in the elections, the Government of South Australia carried on until defeated by Parliament on the meeting of the Houses.

There is a good deal to be said for resignation on the result of the elections as the general rule: it at once puts the Government of the country into the hands of those who should control it as having been sustained by the popular vote, and the retention of authority in the hands of a

[1] The Government announced their resignation at the opening of the House.

[2] Cited with approval in South Australia *House of Assembly Debates*, 1910, p. 777. Cf. *Parl. Pap.*, Cd. 5582, p. 40.

defeated body is hardly ever desirable: it may also create very complicated relations between the Governor and his ministers if he is asked to do anything at all unusual by the Government which has lost its hold on the people, as was seen in Sir C. Tupper's case, and the cases of Ontario in 1905 and New Brunswick in 1908. On the other hand, ministers must claim the right to meet Parliament if they think that it is in the public interest to do so, and, if they confine themselves to measures of ordinary administration in that period the Governor is certainly not compelled to take steps to secure other advisers. But it is certain he could not consent to delay the opening of Parliament longer than was usual or proper, and if the majority against the Government were a great one he would probably be justified in trying to secure that there should be an early meeting of Parliament, or that ministers should resign:[1] in the South Australian case the majority for the Opposition was very small, two votes at best, and it was hoped or thought that by forcing the Opposition to place one of its members in the chair the result might be brought about that it would have either no majority or a majority of one, while in the Upper House nearly all the members were members of the governmental party.

Ministries, of course, also resign when they cannot find adequate support in the Lower House, and either do not ask for, or if they ask for, do not receive a dissolution.[2]

As in England, as a normal rule, the Lower House alone determines the Government of the day, and the Upper House has no voice in its selection. This is obviously the case with all the Legislatures which have nominee Upper Houses, and it is no less so with those which have elective Upper

[1] Cf. New Zealand *Parl. Pap.*, 1879, A. 1 and 2.

[2] So in 1905 Mr. Daglish resigned in Western Australia without even asking for a dissolution (*Parliamentary Debates*, xxvii. 803), as the party would not work harmoniously; in three of the cases of the Commonwealth changes a dissolution has been asked for but refused. Sir J. Macdonald in 1873 resigned before an adverse vote, which was certain, could actually be passed (Pope, ii. 184 seq.).

Houses. For this there are various reasons: the Lower House has alone the power of originating Money Bills, and this would leave a Government which had not their support in a helpless condition: then the Upper House has never quite equal powers in regard to Money Bills, while, in all cases save that of the Commonwealth, it does not represent so much democratic feeling as the Lower House. In the latter case the Upper House is more democratic than the Lower, but even there the Government depends on the Lower House. It is indeed conceivable that the Upper House might, in virtue of its position as at once a democratic House and a representative of the states, decide that a Government must depend on it also for its existence, but such a claim has not yet been made by that House, and if made would be very inconvenient in result. The Upper House does not divide on purely party lines, but exercises an independence which would be quite impossible if the Government were to depend on it for its existence.

The nearest approach to the control of the Government by the Upper House is perhaps to be seen in the case of the Legislative Council of the Cape. In 1907, by its tactics as to refusing to form the appropriations for the year, it caused Dr. Jameson to agree to a dissolution, and in 1898, according to Wilmot,[1] it compelled the Government to pass a Redistribution Bill, by threatening to prevent legislation. In the former case the Council had an equal number of members and the Bond was in opposition: in the latter Sir G. Sprigg's supporters formed the majority of that House.

It may be added that it is beyond question[2] the right of the Governor to decide whom he shall select as Prime Minister. This was asserted by Governor Head in Canada on May 22, 1856,[3] when on receiving certain advice he acknowledged it, but pointed out that it was not a matter on which he was bound to act on advice. Again, in 1908, the Speaker of the Commonwealth House of Representatives

[1] *South Africa*, iii. 347.

[2] Cf. Baker, *Constitution of South Australia*, p. xxv.

[3] Pope, *Sir John Macdonald*, i. 336.

ruled that the matter was a personal act of the Governor-General which was not subject to the usual rule of ministerial responsibility.[1] It may be said, however, that it is more common in the Colonies to offer advice unasked than in England, where the practice is not to suggest unless a suggestion is asked for: thus Mr. Gladstone was not consulted on laying down office for the last time. The power of suggestion is often useful: Sir E. Lewis in Tasmania, in 1909, defeated the malcontents of his party by resigning and advising the Governor to send for the leader of the Labour Party and not for the leader of the malcontents, with the result that Mr. Earle was allowed only a few days of office, the dissidents hastening to submit.

§ 5. The Conduct of Business with the Governor

The procedure with regard to the conduct of actual business between the Governor and ministers varies considerably in the different Dominions or states.

It is the rule in the Commonwealth and under the royal instructions in New Zealand and the States that the Governor should preside in Council[2] for the transaction of all business which requires to be transacted there. Meetings are therefore held once a week, or as often as may be required, at which such business as is necessary to be transacted in Council is carried out. Of course these meetings are quite distinct from Cabinet meetings, in which policy is discussed and determined, but they assure a most effective and com-

[1] *Parliamentary Debates*, 1908, p. 2796.

[2] For cases of the Governor's absence, cf. New Zealand *Interpretation Act*, 1908, s. 22; Forsyth, *Cases and Opinions in Constitutional Law*, p. 81. In the famous decision of the Executive Council of New South Wales to seize the wire netting detained by the Commonwealth Customs, the Lieutenant-Governor was present, *vice* the Governor, who was ill. In the Colonies of South Africa the Governor was also expected to preside and often did so, and sometimes, as in 1906 in the case of the rebellion in Natal, the Council with the Governor acted as a Cabinet for purposes of discussion; *Parl. Pap.*, Cd. 2905, p. 3. But Sir Bartle Frere's attempt to insist on this in the Cape was in great measure prevented by Sir J. Molteno; see Molteno, ii. 190, 191, 353, 390, note 1.

plete means of keeping a Governor informed of the important acts of his Ministry. A Governor should always be present at such meetings if it is at all possible.

In the case of Newfoundland also the same practice is followed, and in all these instances no matter is expected to be brought before the Governor, of other than formal moment, with which he has not been made aware beforehand, in order that he may have an opportunity of considering whether or not the question is one in which his consent should be withheld. The withholding of consent is, of course, governed by the principle stated on March 13, 1911, in the House of Commons that except on legal or on Imperial grounds the refusal of assent means that the Governor is prepared to obtain other ministers to replace those which he has at the time, if they insist, as may be the case, on resigning their offices.

In the case of the Dominion of Canada the presence in Council[1] of the Governor-General is now practically unknown, except on formal occasions, such as the Proclamation of the Royal Accession or other cases of high ceremonial, but the same control is assured by the practice of transacting all the important business of the Government in Council, and of requiring that each Order in Council should be submitted for the Governor-General's sanction before it can take effect. The chief occasion on which sanction to such Orders in Council has been refused is, of course, that with regard to the appointments proposed to be made by Sir Charles Tupper after his defeat at the general election of 1896, before he actually left office.[2] But the practice secures to the Governor-General an adequate means both of knowing what is being transacted and of asserting his control over it; thus, for example, it would be impossible for the Dominion Government to dismiss an official without the Governor-General's

[1] So also in the provinces, which likewise adopt the practice of the Lieutenant-Governor signing the Orders in Council. See Canada *Sess. Pap.*, 1877, No. 13, p. 8. The Governor once sat with ministers even in Cabinet; see Walrond, *Letters and Journals of Lord Elgin*, p. 116.

[2] Canada *Sess. Pap.*, 1896, Sess. 2, No. 7. In 1908 the appointments proposed by the Provincial Government of New Brunswick were likewise refused; above pp. 220, 329, note 3.

formal sanction, as in the case of the termination in 1904 of the appointment of Lord Dundonald for insubordination as head of the Militia of Canada.

The Governor's relation with his Ministry must needs be a very close and confidential relation, and it is obviously the duty of both sides to see that it shall be as cordial as possible. It is not, of course, the right of the Governor to require information from his ministers of all the measures they propose to adopt: that was formally laid down long ago,[1] though lack of such information was one of the grounds on which Mr. L. Letellier dismissed his ministers in Quebec in 1878,[2] and something of the same kind influenced the decision of the Governor of the Cape in dismissing the Molteno Ministry in the same year.[3] But the Governor ought to be on such terms with the Premier that he will normally discuss with him his legislative plans and projects: he need not discuss his party politics with the Governor, but he should keep him well informed of all public matters of any importance. He may obtain from a Governor with whom he is in close touch much useful advice: there are many Governors who have experience far exceeding that of their Premiers, and in any case a first-hand knowledge of what is going on is essential to the discharge of the duty of the Governor as an Imperial officer. But while in these matters the question is in the end one of courtesy and the co-operation which is essential between the head of the Government and the representative of the Sovereign, the matter is different when the Governor is called upon to perform any official act whatever: he is then entitled to the fullest information which he can desire: there is nothing that can properly be kept back from him, and to withhold information is conduct which would justly deserve the severest censure. It does not matter that the Governor will normally act on the advice of his ministers:[4] he must be allowed to decide if he will

[1] See Lord Carnarvon's dispatch to Sir G. Bowen, November 20, 1864, in Queensland *Legislative Assembly Votes*, 1867, p. 64.

[2] *Parl. Pap.*, C. 2445. [3] Ibid., C. 2079.

[4] Cf. *Fulton* v. *Norton*, [1908] A. C. 451.

do so, and he cannot decide if he is not able to obtain all the information he needs.

Normally a Governor will, of course, be justified in accepting the advice which he receives from his ministers as being a correct statement of facts and law,[1] but he is not bound to be so satisfied if he has reason for suspicion, and in matters of law he has been definitely told that he must exercise his own judgement if he is in doubt. In cases where, for any reason, a Governor might distrust the statements made by ministers he would be entitled[2] to get information from any source which was available, but the responsibility on a Governor who did this would be very great, and of course he would require to be prepared to face the resignation of his ministers: happily in modern times the case is not very likely to arise.

It is, of course, grossly improper to anticipate, except in some urgent necessity, the decision of the Governor:[3] there have occurred from time to time in Australia cases of releases of criminals before the formal sanction of the Governor has been accorded, but on no occasion has the action been defended by ministers, and its lack of propriety is so obvious that a Governor who dismissed his ministers on the ground of any such action would have popular sympathy with him. There has recently been seen in a Canadian case the danger of an officer of the Government declining to submit a petition to the Lieutenant-Governor, on the ground that the decision taken would be that of the Ministry not to grant the petition: in the case in question it was held by the Supreme Court of Canada and the Privy Council that damages were recoverable, though Sir R. Finlay, for the defence, urged that the decision being that of ministers the necessity of actually submitting it to the Lieutenant-Governor did not exist.[4]

[1] Cf. Lord Crewe in House of Lords, July 25, 1910, vi. 406–12; *House of Commons Debates*, June 29, 1910; *Parl. Pap.*, C. 2173, p. 81.

[2] See the report of the Victoria Commission on Sir T. Bent's illegal expenditure, *Parl. Pap.*, 1909, Sess. 2, No. 1. Cf. *Parl. Pap.*, C. 3382, pp. 139 seq.

[3] Cf. New South Wales *Legislative Assembly Journals*, 1859–60, i. 1131; *Parl. Pap.*, C. 3382, p. 268.

[4] *Fulton* v. *Norton*, [1908] A. C. 451; 39 S. C. R. 202. Cf. also Rusden, *New Zealand*, iii. 446.

It is also clear that if ministers and the Governor are to be harmonious the Governor must not—unless under Imperial instructions for an Imperial end—hold language disagreeing with the policy of his ministers. Thus if a Governor comes to South Australia, where his Government have decided against religious training in the schools, and makes a speech in favour of religious influences in education, the position will be a difficult one for the Governor and for ministers also with their ultra followers, and not every Governor will be lucky enough to find so able a minister as Mr. Jenkins to defend him,[1] and to explain away his action as due to ignorance of local circumstances. Nor, again, must a Governor express himself as an entity in political matters beside his ministers in normal circumstances. There is almost an extreme case of that in the effective attack made by Mr. (now Sir George) Reid on the Governor-General of the Commonwealth on January 30, 1902, an attack which doubtless helped to induce the Governor-General to decide that he would not remain on in the Commonwealth. The Governor-General, Lord Hopetoun, with his usual generosity, felt that the Government were being unfairly attacked in Parliament and out of it, because of their failure to send further forces to South Africa to take part in the Boer war. He took, therefore, the opportunity of a speech at a public occasion on January 27 to declare that the Ministry and himself had carefully considered the whole situation, and decided that more troops were not necessary, clearly intending to show that as an Imperial officer he was accepting a full share of the responsibility for the decision not to send more men for the time being. But Mr. Reid[2] censured the speech as a grave breach of etiquette and as improper, and

[1] Cf. *Journal of the Royal Society of Arts*, lvi. 346, and Mr. Martin's attack on Lord Grey, *Debates on Colonial Affairs*, 1910, pp. 73, 75. Cf. Sir John Macdonald's remarks, Canada *House of Commons Debates*, 1877, p. 373. Lord Dudley's support of his ministers' views on naval defence was censured in some quarters; see Hobart *Mercury*, April 27, 1909. Mr. Verran, in South Australia, publicly attacked the Governor; see *Register*, December 29, 1910, which censures his action; above, p. 269, note 1.

[2] Commonwealth *Parliamentary Debates*, 1901–2, pp. 4976 seq.

the effect was very great: no doubt the opportunity was too good a one for a party attack to be resisted by a veteran politician, and Lord Hopetoun had certainly gone beyond the boundaries of what was permitted: he was making himself into a partisan, and though the generosity of his motive was clear and was acknowledged by all, the feeling of the House of Representatives was evidently that, though very venial, there had been a breach of propriety. On the other hand, valedictory speeches may without harm go beyond the limits permitted to ordinary speeches, and therefore Lord Northcote's valedictory addresses were generally approved in Australia, though they were given as expressions of his own views as to the future and the needs and duties of Australia.

Normally, of course, the rule applies in the self-governing Colonies no less than at home that the Ministry is responsible for all the Governor's actions, and must either defend them or resign and leave the way open for the selection of other persons who will accept responsibility. Thus Lord Normanby, who had the unhappy knack of being at variance with his ministers, found himself censured by the New Zealand House of Representatives because he declined to add a member to the Legislative Council while a vote of censure against his ministers was pending. Ministers declined either to resign or to defend the Governor, and he complained bitterly of their attitude but without any success, as they remained firm in their refusal to act in accordance with his wishes.[1] But the rule cannot be pressed too far: if the Governor as an Imperial officer desires to act in any matter contrary to the wishes of ministers, they cannot be held to be bound to defend his actions: they are bound to defend the advice they have tendered, but they cannot be held responsible for their advice not having been successful, and the Governor cannot expect a defence from those whose advice he has declined to follow, while, on the other hand, ministers are not justified in leaving the post of duty because they cannot get all their own way. These principles were laid down as

[1] New Zealand *Parl. Pap.*, 1877, A. 1; *Gazette*, June 21, 1878.

regards the prerogative of mercy by Lord Carnarvon, and acted on, greatly to the annoyance of Lord Glasgow, by his ministers in 1892, when they refused to accept all his suggestions that they should resign over the dispute as to the Upper House, and stuck to their posts awaiting the decision of the Secretary of State in their favour.[1] In the later case of Lord Chelmsford in Queensland the party of Mr. Kidston took pride in the fact that they had been more considerate to Lord Chelmsford, and had resigned office so as to avoid placing him in the position of awaiting a decision from home against his ruling in the matter of the proposed appointments to the Upper House.

The speeches of the Governor to the Houses of Parliament are matters for his ministers, and he has no responsibility for them. Still, on the other hand, the Governor has the right to ask that he be not compelled to make attacks on the Imperial Government: thus in 1875 the Governor of the Cape insisted on softening the tone of the speech from the throne as regards Lord Carnarvon's federation policy.[2] In 1897 the Governor of Newfoundland, Sir H. Murray, actually altered in reading a part of the speech, but the references were only to local matters in that case, although he deviated from them, and the local press criticized his action severely.[3] But in 1908 the speeches in Newfoundland and in Queensland both showed due consideration for the position of the Imperial Government and the Governor respectively, though feeling ran high, in the first case against the 'Imperial rescript' of 1907 regarding the fisheries,[4] and in the second case against the Governor's action in refusing Mr. Kidston's advice as to the swamping of the Upper House and his grant of a dissolution to Mr. Philp.[5]

[1] See above, chap. vi.

[2] Molteno, *Sir John Molteno*, ii. 4.

[3] *Evening Herald*, May 13, 1897.

[4] See *Parl. Pap.*, Cd. 3765.

[5] In such circumstances the Governor's private influence could always be properly exercised. It is a fixed rule in England not to use violent terms in the King's Speech, e.g. the speeches of 1910 and 1911 are models of calmness.

§ 6. The High Commissioners and Agents-General

A curious and now important part of the Dominion Government consists in their representation in London. The Agents-General had in the main a business origin: the Crown Colonies no less than the other Colonies used to keep resident agents in London, often, of course, only slightly connected with the Colony, to transact all manner of business for them. Gradually the position of these ministers became more political and less commercial, and men of higher status were appointed to the posts. One of the foremost in pressing this question of status was Sir J. Vogel, Agent-General for New Zealand, who wrote an amusingly solemn dispatch in February 12, 1879,[1] to the New Zealand Government, setting out that the term Agent-General was apt to lead to misunderstandings: that an Agent-General for Victoria had found that when he ordered the term to be inscribed on some blinds the person entrusted with the duty turned it into General Agent, and the truth was that the agency was regarded as a general agency of a most enlarged description of a commercial character. He pressed for the recognition of the term minister resident, and that they should have a defined precedence and status, and be in all respects like ambassadors, subject to the fact that the Colonies were parts of the Empire. It was many years until New Zealand changed the style of her representative, not until 1905, when the term High Commissioner was adopted. But in the case of Canada the change had been made much earlier: on the occasion of the appointment of Sir Alexander Galt in 1879 they nominated him to act as minister resident in London, and the term High Commissioner was finally resolved upon as suitable[2] after consultation with the Imperial Government. At the same time no attempt was made to rank the High Commissioners among the official hierarchy or to place them with ambassadors, and the full recognition of their claims to be deemed representatives of the Dominions was hardly accorded until the arrival of Sir George Reid in

[1] New Zealand *Parl. Pap.*, 1879, Sess. 2, D. 3. [2] *Parl. Pap.*, C. 2594.

London in 1910,[1] and the recognition accorded them by the late King's desire on various formal occasions, and by order of the present King at the royal funeral in 1910, at the state opening of the Parliament, and at the Coronation of 1911.

The Australian Agents-General at one time showed considerable political activity in accordance with the suggestion of Sir J. Vogel, who thought that friction and fear of personal Government might thus be avoided, possibly a reference to Sir George Grey's quarrels with Lord Normanby, and the latter's vigorous measures to keep him in order. At any rate they on occasion appeared as forming a Council to express the views of the several Colonies : thus they attended on the Secretary of State to ask him to sanction the Divorce Act of Victoria, passed in 1889,[2] and they united in recommendations of the adoption of the principle of allowing the Colonies to know the names of proposed Governors before the final selection was made,[3] and they constantly pressed on the Colonial Office the question of the Western Pacific. They also appeared at the Colonial Conference of 1887 to represent their Governments along with other persons of distinction. In 1892 the Agent-General of New Zealand supported ministers' views against Lord Glasgow.[4] But their political energy was limited and still is limited by several essential facts : the Governor as the King's representative is clearly the proper person through whom any important communication should come. Thus the Secretary of State, in the case of the request from Queensland not to appoint Sir H. Blake, preferred to deal with the officer administering the Government and not with the Agent-General. Or again, in 1892, when the Agent-General for New Zealand called on the Secretary of State to endeavour to induce him to support the Ministry against the Governor, the Secretary of State gave the Governor instructions a day before the Agent-General was informed, so that the Governor could make his own arrangements with ministers instead of their learning

[1] Lord Strathcona's personal rank as a peer naturally satisfied for long the desires of Canada.

[2] *Parl. Pap.*, C. 6006 (1890).

[3] *Parl. Pap.*, C. 5828 (1889).

[4] *Parl. Pap.*, H. C. 198, 1893–4.

the decision from the Agent-General. Then again, apart from that difficulty, there is the fact that Colonial Governments change quickly, and that an Agent-General often accepts the post when his Government is about to fall: the result is that he cannot ever be said to be in the confidence of the Government—a good example of such lack of trust being the case of Mr. Jenkins, Agent-General for South Australia, who resigned in 1908, as the Government had unwisely attempted to negotiate a loan in London behind his back, an attempt which resulted in something like a fiasco, as owing to a premature divulgence by a minister the London firm with which the negotiations had been conducted broke them off. Nor can an Agent-General, except in exceptional circumstances, ever be really a member of the Government of the Dominion or State. There is inevitably the result that he becomes an official highly respected, but not exactly in the confidence of the Government. Such a general statement is, of course, subject to exceptions, but, broadly speaking, it will not be denied to be correct by any person who has observed recent political events in the Dominions.[1]

The appointment of the High Commissioner for the Commonwealth has simplified in one way the position of the matter. There are now in London representatives of the Dominions except Newfoundland, all with the status of High Commissioners, and all posts filled by men of high standing in the country, Lord Strathcona, one of the most remarkable men of the century, Sir George Reid, Sir W. Hall Jones, and Sir R. Solomon. Except Lord Strathcona, each of these officers has held high ministerial office in his Dominion: Sir G. Reid has been Prime Minister of the Commonwealth as well as of New South Wales; Sir W. Hall Jones has acted as Prime Minister of New Zealand; and Sir R. Solomon has been minister in the Cape and the leading figure in the Crown Colony administration of the Transvaal. It might therefore

[1] Cf. *House of Commons Debates*, April 19, 1911, xxiv. 961. A High Commissioner may of course be technically a member of the Executive Council (as in Canada, the Commonwealth, Victoria, and Tasmania), but he cannot be a member of the Cabinet.

be expected that a council of advice for Imperial purposes could be formed out of such material, but nothing has hitherto been done to carry out this end,[1] the responsibility for the failure to act resting with the Dominions and not with the Imperial Government. It is doubtful how far this difficulty can be overcome: if, of course, the appointment were purely ministerial, and the post were held from time to time by the minister appointed by the Government of the day, the result might easily be that the officer acting in the post would be able more nearly to express the sentiments of his Government, but it cannot be ignored that such an arrangement would have the disadvantage of resulting in more frequent changes of officers than at present, when several Agents-General or High Commissioners have been retained in office for many years,[2] thus, as far as the non-political interest of the places they represent are concerned, acquiring experience and knowledge superior to that which could ever be possessed by officers who were frequently changed.

The Provinces of Canada are represented in this country by Agents-General or minor agents, but these officers are not accredited to or officially recognized by the Imperial Government as is the Dominion High Commissioner, as the Dominion Government alone represents the Dominion. This state of affairs has recently elicited a vigorous protest from the Premier of Ontario, and is resented also in British Columbia and elsewhere.[3]

[1] This was one of the proposals for the Imperial Conference of 1911 made by New Zealand; see *Parl. Pap.*, Cd. 5513, p. 6; below Part VIII. At times Agents-General have tried to secure election to Parliament, but Sir J. Vogel's desire to do so led to his retirement, and of late there have been no cases where Agents-General have sat in the House of Commons.

[2] Lord Strathcona for Canada from 1896 to 1911; Mr. P. Reeves for New Zealand from 1896 to 1908, when he resigned, since then Sir W. Hall Jones; Sir R. Solomon for the Transvaal from 1906, and since 1910 for the Union. Several Agents-General have held office for long periods, e. g. Sir H. Tozer for ten years for Queensland, the late Mr. Dobson for several years for Tasmania, &c. The Australian States still have Agents-General with full status.

[3] Cf. the fact that ex-members of Provincial Executive Councils receive the term 'Hon.' only in Canada and England by courtesy, not officially; see *Canadian Annual Review*, 1905, p. 185.

CHAPTER VIII

THE CIVIL SERVICE

As in the United Kingdom, the Dominions all recognize the principle of a permanent Civil Service to conduct the executive and administrative work of the departments. But there are certain broad differences between the cases of the Dominions and the United Kingdom. In the first place, the ministers of the Dominions are expected, as is natural in view of the less complicated conditions prevailing there, to do much more routine work than is done in the United Kingdom, and, partly as a cause of this, partly as a result, the Dominions do not show a Civil Service comparable with the upper division of the Imperial Civil Service, nor normally do civil servants play so important a part in the Colonial Government. To some extent this may be attributed to the democratic desire to render all posts available to all, and to permit entry to the Civil Service by an elementary examination followed by routine work and eventual promotion. In the second place, the whole system, as applied in Australasia, is one of elaborate legal regulation, while the Home Civil Service depends on Executive Orders in Council, subject only to the Pension Acts and the ordinary law. An English civil servant holds still at pleasure,[1] but by practice he holds during good behaviour. There are no boards established or rules laid down as to his dismissal, but practically he has the fullest investigation, and is removed only on the decision of a minister of the Crown acting for the Crown. Again, in the Dominions promotions

[1] This is still the case in the Colonies save where otherwise expressly provided, and the royal instructions to the State Governors and New Zealand and Newfoundland require it when law does not otherwise provide. Canada generally is much less fond of legal regulation than Australasia in this as in other matters. See *Shenton* v. *Smith*, [1895] A. C. 229; *Dunn* v. *Reg.*, [1896] 1 Q. B. 116. Cf. [1897] 1 Q. B. 555; below, p. 349, note 2.

as a rule depend in part on an authority external to the minister; in the United Kingdom the minister is supreme, subject merely to the right of the aggrieved officer to appeal to the Treasury, not for a reversal of the decision to pass him over, which would not be possible, but for some consideration in other ways. The legal rules of the Dominions are rendered no doubt necessary by the greater influence possessed in small populations by a Civil Service, which has resulted in the determination to place the Civil Service beyond the ordinary sphere of politics so as to avoid the intolerable pressure else likely to be exercised on ministers, and it is significant that similar methods of dealing with the question of postal servants in England have been discussed.

Canada shows a somewhat unhappy record in the matter of the Civil Service system. In the very beginning it was found necessary to lay down in great detail to the Lieutenant-Governor of Nova Scotia[1] the outlines of the true system of a Civil Service exempt from political interference, and from the beginning Nova Scotia was unwilling to accept the doctrine. Things, however, gradually improved, though very slowly, and the principle was laid down that the tenure of office, though at pleasure, was also, as in the United Kingdom, during good behaviour—in fact if not in law. But this position was qualified by several facts. In the first place, the appointment of public officers was always a matter in which political influence had a good deal to do in the first place; then promotions were often influenced by political considerations, and if the holders of office were not dismissed when a new Government came in they might in other ways be made to feel that their presence in the office was not desired, as there were others whose claims demanded the close attention of ministers. In 1862,[2] in a dispatch to the Lieutenant-Governor of Prince Edward Island, stress was laid by the Secretary of State on the most unsatisfactory state of things which had prevailed in Nova Scotia, and the Provincial Government were urged to adopt the system of

[1] *Parl. Pap.*, H. C. 621, 1848, p. 29.

[2] New Brunswick *Assembly Journals*, 1862, p. 192.

having a permanent Civil Service. In 1857 steps were taken by the Parliament of the united Canada to organize a service with permanent deputy heads and grades, and on federation further Acts were passed to deal with the Civil Service of the Dominion. In 1882 a long Act was passed which regulated for many years the position.

The defects of the whole plan were brought out very clearly in 1908, when after much pressure from the Opposition the Commission which had been appointed to inquire into the situation presented their report.[1] It was severely criticized in many respects, especially by the Minister of Defence, who brought out in reply a very ably written report by General Lake,[2] in which he controverted the attacks made by the Commission on the large head-quarters staff of 220 officers for the management of a force which consisted of only about 3,000 permanent men, and which drilled some 40,000 militia annually. But the weight of the report was beyond doubt, and the points which it criticized were so wrong in principle that it would be impossible to defend them on any evidence. It appeared that nomination from a list of qualified candidates was the order of the day, that such nominations were political jobs, and that after appointment success depended on further political influence: there was little regular promotion, and all the best posts were reserved by ministers for rewarding their friends, with the result that the service was utterly disorganized—the members of the service who owed their posts to political nominations being indifferent to discipline. Moreover, the Commission reported that salaries were too low, and deplored the repeal of the old superannuation arrangements, recommending that they should be renewed, and provision made for the supply of pensions to widows and children. They also criticized in the freest manner the administration of the Marine Department, and made allegations of dishonest conduct with regard to the officials.

Civil Service reform accordingly was introduced in 1908 in anticipation of the general election, as public feeling had

[1] See *Canadian Annual Review*, 1908, pp. 56 seq. [2] Ibid., pp. 91–3.

clearly been stirred in no ordinary manner by the news of the report of the Commission and the preaching of the campaign of purity in the public service by Mr. Borden, leader of the Opposition, in 1907 and 1908 in the country. The new Act, which was passed with the concurrence of the Opposition, provides for a permanent Civil Service Commission which, at the desire of the Opposition, was made in tenure of office on an equal footing with the Auditor-General. This Commission is to hold examinations and decide the fitness of candidates for the posts for which they are recommended by them. They are also to give certificates for increases of salary and for promotions and improvement of status. Moreover, instead of the system of nomination from a list of passed candidates there is to be appointment by merit in the examinations. The Act applies only to the inside or Ottawa service, but the outside service may be brought under its provisions by Order in Council. There is no provision in the Act for pensions, though some salaries are increased and a new classification of posts is provided for.

That the Act terminates any possibility of political influence is impossible to say. It is true that it prohibits the attempt to influence the members of the Commission, and that it forbids Civil servants to take part in politics, a course rendered advisable by reason of the numbers of exceptions to the rule with resulting dismissals, as in Ontario in 1907.[1] But the extent to which the new system in its full form will be applied depends on ministers, and what ministers will do is uncertain.[2] It is unhappily clear that Government is expected to secure rewards for its followers in Canada, and the temptation to grant Civil Service posts as such rewards must be a great one.

Arising out of the Civil Service report there was held an

[1] *Canadian Annual Review*, 1907, pp. 502, 503.

[2] Sir Wilfrid Laurier personally has always insisted that after appointment an official should leave politics alone, but it is a rule of perfection. Cf. Goldwin Smith, *Canada*, pp. 185 seq.

investigation by Judge Cassels of the charges against the Marine Department; the evidence revealed a sad state of things, described by one witness as 'bribery, corruption, and boodling'. At Halifax evidence was given of the sale to Government of goods wholesale, but at retail prices and an additional profit. Government pays, it was said, for the hard times. The effect of the evidence was satisfactory: the minister told his officers to suspend action on the patronage lists from time to time supplied to them, which consisted of lists of firms from whom, on grounds mainly of politics, the Government desired to see purchases made; the Minister of Railways hastened to say that public advertisement would replace tenders as the means of procuring stores on the Intercolonial Railway; and Mr. Pugsley decided that he would abolish all patronage lists in his department, that of Public Works.[1]

It is to be noted that the Canadian Civil Service legislation includes no provision for pensioning officers, and this defect also is seen in the Act of British Columbia in the same year for regulating the Civil Service, which established new gradings and laid down that promotion should be by merit. The Bill as introduced provided for a superannuation fund based on contributions of 3 per cent. on the officer's salary and a grant from the Government, but the measure was energetically opposed, and Canada still suffers in the provinces as in the Federal Government from the disadvantages arising out of poorly paid service, which, unlike the Imperial Civil Service, has not the compensation, such as it is, of a pension at its close, and is not redeemed by social consideration and marks of royal favour.

In Newfoundland, as might be expected, the Civil Service, which is small, has been much open to political influence, and there also no pension system exists, a fact due mainly to the poverty of the Colony.

Things are very different in the Commonwealth, which had better models to follow than the Dominion, and which has not the evil influence of the United States to corrupt its

[1] See *Canadian Annual Review*, 1908, pp. 56-61, 65, 166, 173, 530.

practice. In the Act No. 5 of 1902[1] organizing the service, the most elaborate provisions are laid down to secure that the control shall be non-political, and be in the hands of a Commissioner who cannot be removed except on an address from both Houses of Parliament. The service is classified into four grades, administrative, professional, clerical, and general, and the principles of it are promotion by merit and seniority, but not by seniority alone, except in case of equal merit. The power is also given to take in outsiders if there is no one equally capable in the service, but the danger of political jobs is controlled by the requirement in the case of all promotions or new appointments of a recommendation from the minister in charge of the department in question, a recommendation by the Commissioner, and a decision by the Governor-General in Council; if the decision be to reject the candidate proposed by the Commissioner the only power is to reject him and ask for another, and the cause of this action must be laid before Parliament.

Further, the Civil Service in the Commonwealth holds not by a mere customary tenure but by a legal tenure, which negatives the ordinary idea of holding at pleasure.[2] Officers

[1] See also Harrison Moore, *Commonwealth of Australia*,[2] pp. 187–96, and the annual reports of the Public Service Commissioner.

[2] Cf. the New South Wales cases on the Civil Service Act of 1884; *Gould* v. *Stuart*, [1896] A. C. 575; *Young* v. *Adams*, [1898] A. C. 469; *Young* v. *Waller*, [1898] A. C. 661; and see *Stockwell* v. *Ryder*, 4 C. L. R. 469 (cf. 9 C.L.R. 140). For the ordinary rule, see *Malcolm* v. *Commr. of Railways*, [1904] T. S. 947 (cf. [1907] T. S. 557; [1910] T. S. 1077); *Skelton* v. *Government of Newfoundland*, 1897 *Newfoundland Decisions*, 243. In the case of the Commonwealth the same rule applies as in New South Wales, under the *Public Service Act*, 1902. So in *Williamson* v. *Commonwealth* (5 C. L. R. 174) it was held that a dismissal must strictly follow the terms of s. 46 of that Act, and that an action lay where by a mistake a man had not first been suspended on the charges for which he was dismissed, but the importance of the case is diminished by the rule that in assessing damages the Court will take into consideration the fact that the officer was liable to be dismissed forthwith under the correct practice. *Stockwell* v. *Ryder*, 4. C. L. R. 469, was decided under the *Public Service Act*, 1896, ss. 40–2, of Queensland. On the other hand, a police constable in Queensland, under the *Police Act*, 1863, still holds at pleasure; see *Ryder* v. *Foley*, 4 C. L. R. 422 (reversing (1906) St. R. Qd. 225). For New Zealand see *Reynolds* v. *Attorney-General*, 29 N. Z. L. R. 24. Cf. *Williams* v. *Giddy*, [1911] A.C. 381.

can be retrenched, but only for bona fide retrenchment purposes, and they, if accused of important offences, must be tried by a board of inquiry, when they may be deprived of leave or fined by the departmental head, reduced in status by the Commissioner, or dismissed by the Governor-General in Council, according to the enormity of the offence. Moreover, they have civil claims for the salaries payable to them just as ordinary persons have against their employers, though in the Defence Department the rule is that no contract exists, but members can sue for sums due if deprived of office. On the other hand, the Government does not provide pensions, a serious error which is hardly made up for by the practice of requiring officers to insure their lives. But to compensate for this there is a minimum wage of £110 for officers over twenty-one years of age and a report on a pension scheme has been issued.

As in the case of Canada, and in the case of all the states, the scheme is defective in not providing for any regular Civil Service which shall contain men of superior education: in the Commonwealth service the members of the clerical service are admitted by an elementary examination, and work up through the grades and subdivisions of the grades, in each of which a year at least must normally be spent. Thus for the posts of deputy heads, and so on, it is necessary to go outside the service and to choose men who are not trained civil servants.[1] The result is that no Dominion contains such a Civil Service as that of England.

In the states also the practice of leaving the Civil Service to the control of a local public service commission which is supreme over first appointments, and also over promotions and so forth, is in force. It is successful in its aim of securing that as a whole the service is free from political jobbery; if, as is the case, there are from time to time disputes of some seriousness between the commission and the Government, as, for instance, in the case of the determination of the Government of the Commonwealth to make the post of

[1] e.g. in the case of Mr. Atlee Hunt, deputy head of the Department of External Affairs.

Assistant-Postmaster an administrative one, still that does not interfere with the general principle, and the creation of a few posts exempt from Civil Service conditions of entry is not common, and has very recent and not very clearly justified precedents in England.

It cannot be said in Australia any more than in this country, that the difficulty of resisting the demands of civil servants when they exist in large bodies has been successfully met. In the case of the railways, the difficulties of the Civil Service plus the question of the pressure of the public as regards railway rates, has led to the entrusting of the railways to commissioners, who hold for a term of years by a statutory tenure and can only be removed by Parliament. A commission was set up first in Victoria in 1884, then by South Australia in 1887, then by New South Wales and Queensland in 1888, and finally, after a strike which brought about the resignation of the general manager, by Western Australia in 1902. The original commissions consisted of three members save in Western Australia, but there were difficulties and friction, so that the number is now only one in Queensland; of the three in New South Wales one has, since 1906, authority over the other two; and in South Australia there is one who is advised by a board of three, the engineer-in-chief, general traffic manager, and the locomotive engineer, and in cases of difference between him and the board the minister must decide. In Victoria, after several years' trial of a single control, three commissioners were appointed in 1903 after the railway strike of that year. The strike resulted also in the extraordinary device of disfranchising for the ordinary constituencies the railwaymen and other civil servants, and in requiring them to vote for members of their own,[1] an arrangement which was changed in 1906, when the old system was re-introduced.

[1] See Act No. 1864, ss. 25–9; one member was elected to the Council by both sets of men, and one by each set separately for the Assembly, and members of the Service were eligible as members. The provisions were repealed by Act No. 2075. For the Civil Service in New South Wales, see the Acts of 1902 as amended by Act No. 25 of 1910. See for further information the Commonwealth *Year Book*, and for the railways, *The Government of South Africa*, ii. 131–8; for New Zealand, the *Official Year Book*.

In the opinion of observers best qualified to form a judgement, in practice there is some political influence in reference to railway and civil servants, but it appears to be on the whole within bounds. It is true that the Civil Service Commissioners, who control the Civil Service independently of the Government of the day, may be to some extent subject to political influence, but in many cases they are personally strong enough to be practically independent of the Government, as probably was intended by the Public Service Acts. The authority of a Public Service Commissioner is often evaded by the creation of temporary appointments or by the use of the powers reserved to the Governor in Council for exceptional cases, and the application of those powers to everyday contingencies. But, on the other hand, Ministries have seldom much margin of support, and Governors are able to exercise considerable pressure. Again, the public press has no special interest in the public service, and is not likely to support it against all the other interests which press for popular support. Moreover, with an expanding population there is rapid promotion both in the Railway and the Civil Service, and the competition of the Federal Service makes conditions fairly satisfactory in the lower and the intermediate grades, though in the higher grades salaries are not adequate to attract the best men. The loss of the franchise, so often advocated, is hardly effective, for it would be difficult to disfranchise the wives, sons, and daughters of the public servants, and impossible to disfranchise their less immediate connexions and friends.

In South Africa the Civil Service was not specially treated, as in Australia, until the Transvaal adopted in 1908 the principle of a public service board which controlled all appointments under £600 a year, the limit being fixed to avoid undue formality with regard to selections for the higher posts. In the Union Act certain arrangements are made regarding the control of railways and harbours which will have the effect of removing these services from the normal governmental control. The coming of Union renders necessary a complete reorganization, and the existing system

under the old régime need not further be considered; it is recorded in *The Government of South Africa.*

The rules regarding political action by civil servants differ greatly. In Canada there are many cases of political action both in province and Dominion, and every now and then retribution in the shape of dismissals.[1] In the Commonwealth the rules have varied with varying Ministries, and in New South Wales, after the Wade Ministry rigidly limited political action, the Premier in the new Government in 1910 at once asserted the right of civil servants to full political action. In Queensland[2] also a resolution to this effect marked the close of the session of 1910. In South Australia the Labour Government is in favour of political propaganda by civil servants. In Victoria, Tasmania, and Western Australia there are more stringent rules, at any rate in theory. In New Zealand civil servants are in effect apparently free from restraint.

It is as yet impossible to attribute to the Dominion Civil Services the importance which attaches to the Imperial Civil Service,[3] but the trend of events and the growth of the Dominions will, it may be presumed, ultimately render the Civil Service more and more worth the attention of the best educated classes of the community.

[1] There were some in 1905 on the defeat of the Ross Government in Ontario, and a good many dismissals when the Liberal Government took office in the Dominion in 1896; see *Canadian Annual Review*, 1905, pp. 283, 284. But in the latter case at least there had been at the last moment many party appointments; see above, pp. 213–20.

[2] *Parliamentary Debates*, 1910, pp. 3122, 3210.

[3] See e. g. Lowell's account in *The Government of England.*

PART III. THE PARLIAMENTS OF THE DOMINIONS

CHAPTER I

THE POWERS OF DOMINION PARLIAMENTS

§ 1. The Plenary Authority of the Parliaments

The question as to the position of Colonial Parliaments was first dealt with in the case of *Reg.* v. *Burah*,[1] which referred to the Legislative Council of India, but which enunciated principles applicable in their full extent to Colonial Parliaments. In that case it was stated that the Legislature in India was a delegation of the Imperial Parliament, and that the maxim *delegatus non delegare potest* applied to such Parliaments. That contention was accepted by the majority of the High Court of Calcutta, but was rejected by the Privy Council. It had been provided in that case by the Legislature that certain special laws which had the effect of excluding the jurisdiction of the High Court should apply to certain districts specified, and to certain other districts if and when the Lieutenant-Governor, by notification in the

[1] 3 App. Cas. 889. The legislative power in every case in the self-governing Dominions now rests on Imperial Acts save in the case of Newfoundland, where it exists under the Royal Commission of 1832 authorizing the summoning of a legislature. For Canada and the Provinces, see 30 Vict. c. 3, ss. 91–5; for the Commonwealth, 63 & 64 Vict. c. 12, Const. s. 51; for New South Wales, Act No. 32 of 1902, ss. 5–9, repeating 18 & 19 Vict. c. 54; for Victoria, 18 & 19 Vict. c. 55, sched. s. 1; for Queensland, Act 31 Vict. No. 38, s. 2, repeating the statutory Order in Council of June 6, 1859; for Western Australia, 53 & 54 Vict. c. 26, sched. s. 2; for South Australia and Tasmania, 13 & 14 Vict. c. 59, s. 14 (the local Acts change the form, not the powers of the Legislature); for New Zealand, 15 & 16 Vict. c. 72. s. 53; and for the Union of South Africa, 9 Edw. VII. c. 9, s. 59. Formerly the constitutions of the Maritime Provinces of Canada, and of the four South African Colonies rested on the prerogative.

Calcutta Gazette, should declare that it should so apply, and it was argued that the power given to the Lieutenant-Governor was *ultra vires* the Legislative Council of India.

In giving the decision of the Judicial Committee, Lord Selborne pointed out that it was left to the Lieutenant-Governor to determine both whether the law should apply and if so when, and he added that legislation which did not fix the period for its own commencement, but left that to be done by an external authority, might with quite as much reason be called incomplete as that which did not itself immediately determine the whole area to which it was to be applied, but left this to be done by the same external authority.

If it was an act of legislation on the part of the external authority, so trusted, to enlarge the area within which a law actually in operation was to be applied, it would seem *a fortiori* to be an act of legislation to bring the law into operation by fixing the time for its commencement. It had never been doubted that the latter power might be conferred by the Legislature upon the Lieutenant-Governor in Council. It was in fact a power continually exercised, and it had never occurred to any one to dispute it. Lord Selborne went on to say:—

Their Lordships think that it is a fallacy to speak of the powers thus conferred upon the Lieutenant-Governor (peculiar as they undoubtedly are) as if when they were exercised the efficacy of the acts done under them would be due to any other legislative authority than that of the Governor-General in Council. Their whole operation is directly and immediately in and by virtue of this Act (22 of 1869) itself.

The proper Legislature has exercised its judgement as to place, person, laws, powers; and the result of that judgement has been to legislate conditionally as to all these things. The conditions having been fulfilled the legislation is now absolute.

Where plenary powers of legislation exist as to particular subjects, whether in an Imperial or in a Provincial Legislature, they may in their Lordships' judgement be well exercised either absolutely or conditionally. Legislation conditional on the use of particular powers, or on the exercise

of a limited discretion entrusted by the Legislature to persons in whom it places confidence, is no uncommon thing; and in many circumstances it may be highly convenient. The British Constitution book abounds with examples of it, and it cannot be supposed that the Imperial Parliament did not, when constituting the Indian Legislature, contemplate this kind of conditional legislation as within the scope of the legislative powers which it granted.

The same principle was also laid down in the case of *Hodge* v. *The Queen*.[1] In that case it was held by the Judicial Committee of the Privy Council that the powers possessed by the Provincial Legislatures, under s. 92 of the *British North America Act*, were not in any sense to be exercised by delegation from, or as agents of the Imperial Parliament, but that they had authority as plenary, and as ample within the limits prescribed, as the Imperial Parliament in the plentitude of its power possessed and could bestow. Within the area and limits of subjects mentioned in that section, the Provincial Legislatures were supreme and had the same authority as the Imperial Parliament, or the Dominion Parliament would have in like circumstances to bestow on a municipal institution or body of its own creation authority to make by-laws or regulations as to subjects specified in the enactment, and with the object of carrying the enactment into operation and effect.

It was held that the Ontario Legislature had power to entrust to a Board of Commissioners, authority to enact regulations in the nature of by-laws and municipal regulations of a merely local character for the good government of taverns.

The same principle was enunciated once more in the case of *Powell* v. *The Apollo Candle Company*,[2] where the question raised was as to the power of the Legislature of New South Wales to delegate to the Executive authority to impose and levy duties. The Supreme Court of New South Wales held that the Legislature could not delegate its powers, but the Privy Council reversed that decision and laid it down that

[1] 9 App. Cas. 117.

[2] 10 App. Cas. 282.

the two cases quoted had put an end to the doctrine which appeared at one time to have been concurred in that a Colonial Legislature was a delegate of the Imperial Parliament. It was a Legislature restricted to the area of its powers, but within that area unrestricted, and not acting as an agent or a delegate. Again, in *Dobie* v. *The Temporalities Board*,[1] the Privy Council held that within the limits prescribed to them by the British North America Act, Provincial Legislatures were supreme, and there was no limit to the authority of a supreme legislature except the lack of Executive power to enforce its enactments.

If the Legislatures do not act by delegated authority, it is entirely within their discretion by what means and in what manner they shall carry out the duties to legislate for the peace, order, and good government entrusted to them. This was asserted clearly in the case of *Riel* v. *The Queen*,[2] where it was contended that the Canadian Act 43 Vict. c. 25, which provided for the administration of criminal justice in the North-West Territories, was *ultra vires*, and that the Imperial Parliament could not have intended to permit the Dominion Parliament to legislate with regard to the high crime of treason, or as to altering the rights, under an English statute, of a man accused of the crime, and further, that the Dominion Act was not necessary for peace, order, and good government.

It was clearly laid down by the Court that this doctrine was not tenable. They said :—

It appears to be suggested that any provisions different from the provisions which in this country have been made for administering peace, order, and good government,[3]

[1] 7 App. Cas. 136. Cf. *Lafferty* v. *Lincoln*, 38 S. C. R. 620. On the other hand, according to *North Cypress* v. *Canadian Pacific Railway Co.*, 35 S. C. R. 550, the North-Western Territories Legislature was a new delegate of the Canadian Parliament. [2] 10 App. Cas. 675.

[3] This is the technical phrase now always used in conferring legislative power. The older phrase prefixed the needless word 'public', and had 'welfare' for 'order'; so e. g. the Royal Commission to the Governor-General of Canada in respect of each of the Maritime Provinces as late as 1861, and see 3 & 4 Vict. c. 35, s. 3. But though the change was presumably

cannot as matters of law be provisions for the peace, order, and good government in the territories to which the statute relates, and further, that if a Court of law should come to the conclusion that a particular enactment was not calculated as a matter of fact and policy to secure peace, order, and good government, they would be entitled to regard any statute directed to these objects, but which the Court should think likely to fail of that effect, as *ultra vires* and beyond the competence of the Dominion Parliament to enact. Their Lordships are of the opinion that there is not the least colour for such a contention; the words of the statute are apt to authorize the utmost discretion of enactment for the attainment of the objects appointed to them. They are words under which the widest departures from criminal procedure have been authorized in Her Majesty's Indian Empire.

Mr. Justice Clark[1] raises an interesting question as regards the position of the Colonial Parliaments in delegating their authority. The cases above do not cover all possible cases: they all deal with matters which seem a reasonable mode of carrying out legislative authority. But could the Parliament of the Commonwealth delegate the power to legislate regarding divorce to a committee of persons elected or summoned in some manner? The answer seems clearly to be in the negative, and it is easy to feel that this is correct, but the line might be hard to draw in any given case.

The question as to whether the power of a Colonial Parliament is exercised as a delegation of power from the Imperial Parliament was nevertheless raised again before the High Court of the Commonwealth of Australia in 1909, in the case of *Baxter* v. *Ah Way*.[2] It was there contended by the defendant that s. 52, sub-section (g) of the *Customs Act*, 1901, which provided that goods, the importation of which should be prohibited by proclamation, should be prohibited imports, was *ultra vires*. It was a delegation of legislative power by

deliberate (cf. Lefroy, *Legislative Power in Canada*, pp. 210, note 1; 314, note 2), it had apparently no legal effect or difference. 'Welfare' and 'order' are both subjective, to be judged by the Legislature enacting, not by the Courts. In Australia 'welfare' is used in the case of New South Wales, Queensland, South Australia, and Tasmania; 'order' in the Commonwealth and Western Australia; in Victoria the power is to make laws in all cases.

[1] *Australian Constitutional Law*, pp. 41–51. [2] 8 C. L. R. 626.

Parliament, and such delegation was repugnant to s. 1 of the Constitution, which provided that the legislative power of the Commonwealth should be vested in a Federal Parliament consisting of the Sovereign and the two Houses. They quoted the American Courts as laying down that it was an axiom in constitutional law universally regarded as a principle essential to the integrity and maintenance of the system of government, that no part of the legislative power could be delegated by the Parliament to any tribunal or body. The Commonwealth had not the power which the State Governments had under their constitutions, to create subordinate bodies with powers of general legislation.

To the objection that the State Parliaments had legislated in a similar manner without having any expressed power to create subordinate bodies with powers of general legislation, it was replied that the State Parliaments, like the Legislatures of the Provinces of Canada, had power to alter their constitutions by legislation in the ordinary way, and a delegation of legislative power would in effect be an alteration of the constitution which vested that power in the Parliament itself.

They did not contend, however, that the Parliament was a delegation of the Imperial Parliament and that the maxim *delegatus non delegare potest* applied, but that this particular provision was repugnant to the Constitution. The High Court decided unanimously against the contention of the limitation of the power of Parliament. They relied upon the case of *Reg.* v. *Burah*.[1] They could see no difference between the powers that were exercised with regard to Customs by the State Parliaments before the Commonwealth Constitution came into operation, and the powers conferred on the Parliament of the Commonwealth by the Constitution itself.

The argument as to the power of the states to alter their constitutions was expressly noted by Isaacs J., who pointed out that as a matter of fact the power of the Legislature to alter the constitution depended on the terms of the constitution as it existed at any given moment, and he referred to the case of *Cooper* v. *Commissioner of Income Tax*,[2] as showing

[1] 3 App. Cas. 889.

[2] 4 C. L. R. 1304.

clearly that it was not a sound argument that, because a change might be deliberately made by Parliament in a constitution, therefore any ordinary Act whatever might be passed, though in contravention of constitutional provisions as they stood.

On the other hand, there may be cases in which the Parliament has really delegative powers, as under the *Coinage (Colonial) Offences Act*, 1858, the *Extradition Act*, 1870, the *Mail Ships Act*, 1891, the *Army Act*, 1881, ss. 156 (8) and 169, in which cases the usual rules as to delegated power would apply.[1]

§ 2. The Limitation of the Powers of the Parliaments

Although within their own sphere plenary, there are imposed on the legislative powers of Dominion Parliaments certain restrictions which may be classed under four heads: (1) those arising from the essential character of a Parliament of a dependency as not sovereign in the full sense; (2) the territorial limits of their authority; (3) the rule of non-repugnancy to Imperial law, and (4) the limitations as to constitutional change.

From time to time, and in various forms, there has appeared the doctrine that there are certain subjects which are of so Imperial a character that they cannot be regarded as falling within the purview of any Colonial Legislature whatever, however august. Thus Robinson C.J. held in the case of *Tully* v. *The Principal Officers of Her Majesty's Ordnance*,[2] that it was simply impossible for the Colonial Legislature to affect a right of the Ordnance, a department not in the country at all, though officers of it might be. The same point of view is represented by certain passages in the

[1] Harrison Moore, *Commonwealth of Australia*,[2] pp. 271, 272.

[2] (1847) 5 U. C. Q. B. 6; Lefroy, *Legislative Power in Canada*, pp. 333, 758; 30 S. C. R., at pp. 47, 48. In this particular case the doctrine can be defended on the ground that the consent of the Imperial Government is necessary for proceedings against the Crown in its Imperial capacity; cf. pp. 144, 145, and *Cape Town Council* v. *Hoskyn and others*, 14 C. T. R. 586; *Palmer* v. *Hutchinson*, 6 App. Cas. 619, *Fraser* v. *Sivewright*, 3 S. C. 55.

works of Professor Harrison Moore [1] and of Sir H. Jenkyns.[2] It is suggested, for example, that it would not be possible for a Colonial Legislature to enact that the enemies of the country should not be regarded as enemies while in the limits of the Colony. Or again, can a Colonial Legislature enact that a colonial bishopric can only be filled by colonial-born clergymen? Or that the Governor should exercise his prerogative of pardon only in accordance with the voice of a *plébiscite*? Or can a Colonial Legislature alter the relations between the Governor and the Legislature? The latter question must, in the opinion of Sir H. Jenkyns, be answered totally in the negative as wholly beyond the powers of any Colonial Legislature. As will be seen elsewhere, it was the opinion of Mr. Boothby that the Imperial Parliament alone could pass an Act establishing a legislative council which the Crown could not dissolve, or setting up a limit to the royal choice of its legal advisers by requiring that they should be or become in three months members of the Legislature and so forth, and he also denied the power of the Colonial Legislature to allow a Court consisting of the Governor and his Executive Council to act as a Court of Appeal from the Supreme Court of the Colony.[3]

In this connexion there may be considered the doctrine of *majora* and *minora regalia* which, as laid down by Chitty,[4] distinguishes between the attributes of the king such as sovereignty, perfection, and perpetuity, which are inherent in and constitute his Majesty's political capacity, and which prevail in every part of the territories subject to the Crown, by whatever peculiar or internal laws they may be governed, and the minor prerogatives and interests of the Crown which must be regulated by the local law of such places as have peculiar laws. The distinction in the feudal writers was clearly based on the different capacities of the Crown as a sovereign and as a land-owning corporation, and in some cases there has been a tendency to treat the matter as if

[1] *Jour. Soc. Comp. Leg.*, ii. 280 seq.

[2] *British Rule and Jurisdiction beyond the Seas*, pp. 69 seq.

[3] *Parl. Pap.*, August 1862.

[4] On the Prerogative, p. 25. Cf. Chalmers, *Opinions*, pp. 50, 373.

these minor prerogatives alone were regulated by the local law, and that others could not be so regulated. But the distinction seems to be absolutely without warrant, and the only true doctrine seems to be that the power to affect any prerogative depends on the use of appropriate language in dealing with it: it is probable that any prerogative whatever can be barred by the use of suitable terms in dealing with it.

It is of course a question what terms are sufficient to bar the prerogative. Thus it has been held in a series of cases that the prerogative of priority in payment in cases of bankruptcy is existing in Canada [1] and Australia [2] generally, but, on the other hand, it has been decided by the Privy Council [3] that it does not exist in Quebec because of the fact that the civil code of that Province expressly provides that there shall be only a preference to the Crown in regard to this matter when special circumstances exist, viz. the insolvent being an officer under obligation to account to the Crown; and the law of Quebec is, according to the Imperial Act of 1774, the old colonial French law, save as modified by legislation since. But there is no trace in the decision of the Privy Council that they regarded one prerogative as less important than another, or that they accepted the view that the barring of a minor prerogative was other than the barring of a major prerogative; the words barring the general right of the Crown are not expressly set out in the civil code, but that the right is meant to be barred is evident from the express grant of it in one case, and the rule is not that the prerogative can only be barred by express words; it can also be barred by necessary intendment as in this case.

[1] *The Queen* v. *The Bank of Nova Scotia*, 11 S. C. R. 1. Cf. [1892] A. C. 437, at p. 441. See above, pp. 145, 146.

[2] *New South Wales Taxation Commissioners* v. *Palmer* [1907] A. C. 179; *Attorney General of New South Wales* v. *Curator of Intestate Estates* [1907] A. C. 519.

[3] *Exchange Bank of Canada* v. *Reg.*, 11 App. Cas. 157. Cf. *Colonial Government* v. *Laborde*, 1902, *Mauritius Decisions*, 20 seq., where the same doctrine is applied to Mauritius. There the French law is in force in virtue of the terms of capitulation and allowance by the Crown, not by an Imperial Act as in Quebec, but the fact of such an Act is not in point; the local law can bind the Crown if it tries to do so.

There may also be mentioned the dictum of Strong C.J. of Canada in the pardoning case, where he seemed to lay down the rule that no statute regarding the prerogative of pardon would be possible unless passed by the Imperial Parliament.[1] It is impossible to adopt this view, and the Provincial Legislatures of Canada, as a matter of fact, delegate the power of pardoning offences against local enactments to the Lieutenant-Governors. The cases alluded to by the Chief Justice tell in no way in favour of his view: they were *Cushing* v. *Dupuy*,[2] and *in re Louis Marois*[3] decided by the Privy Council. In both cases the decision merely was that a law would not be held to take away the prerogative unless it was clearly intended to take it away, and in the case of *Cuvillier* v. *Aylwin*[4] it was actually held that the power to take away the prerogative lay in the Colonial Legislature, though the Crown itself could not divest itself of its rights by any voluntary action alone. Nor is there any doubt that the Canadian Act of 1888, which takes away the prerogative of allowing an appeal to the Privy Council in cases of criminal law, is valid as far as the prerogative right to grant leave to appeal goes, but it is liable to be overridden by the statutory right under the Act of 1844[5] to grant leave to appeal.

Nor can it be successfully argued that the Legislature of a Colony is unable to affect the position of the Governor, though this argument undoubtedly derives some strength from the fact that the federal constitution of Canada removes from all power of alteration by the federal or provincial Parliaments alike the position of the Lieutenant-Governor.[6] It is clear that in that case the intention is to secure that there shall be an executive officer with a power as to legislation whatever the form of legislature shall be. Can it be said that this is merely a laying down formally of what follows inevitably from the very position of the Governor? That

[1] *Attorney-General of Canada* v. *Attorney-General of Ontario*, 23 S. C. R. 458, at pp. 468, 469. See Lefroy, *Legislative Power in Canada*, pp. 180–2.

[2] 5 App. Cas. 409.

[3] (1862) 15 Moo. P. C. 189.

[4] (1832) 2 Knapp, 72.

[5] 7 & 8 Vict. c. 69, s. 1.

[6] Cf. Lefroy, op. cit., pp. 100–2, 295, 296.

seems very difficult indeed to maintain. The act of altering the post of Governor and its duties can hardly be said to be beyond the powers of a Colony to legislate for peace, order, and good government. Again, any misuse of legislative authority can be corrected, whether by the action of the Imperial Parliament or by disallowance of an Act. The Colonial Legislatures are constantly imposing new duties on the Governor; can it be said that an Act affecting his position so as to make it elective would be invalid? In the old North American Colonies in some cases the proprietors could select the Governor, subject to royal assent.[1] In Tasmania it was proposed in 1853, in drafting the Constitution Act, to make the Governor removable by reason of a two-thirds majority of the two Houses of the Legislature; could it have been held beyond the powers of the Crown to assent to such an Act, and for that Act then to be valid?

On the other hand, it is fair to say that a Colonial Legislature must remain within the bounds of colonial legislation. It might indeed allow enemy subjects to trade with Colonial British subjects, and the permission would be valid within the territory, assuming of course that the Crown sanctioned any Act for this purpose, since such trading is illegal at common law. It could resolve (as some politicians desired to do in the Cape during the Boer war and now do) to remain neutral in war to the extent that it would not assist the Mother Country[2]; it is then for the Mother Country to say whether it will acquiesce in that decision; if it does not it can of course apply force to compel participation: but no amount of declarations will create neutrality in international law if the other power concerned does not care to accept such neutrality, and Mr. Gavan Duffy's attempt to obtain a resolution in 1870 from the people of Australia in favour of the neutralizing of the Colonies was properly laughed out of court by his colleagues as impracticable and utopian. Moreover, the legislatures are legislatures for a Colony, and

[1] Chitty on the Prerogative, pp. 25, 26, 31, 33.

[2] Cf. Sir W. Laurier's remarks on the Imperial Conference on June 1, 1911, Cd. 5745, pp. 116, 117; Ewart, *Canadian Independence*, pp. 17 seq.; *Times*, July 21 and 22, 1911.

they cannot abolish the status of the Colony as a Colony, nor the existence of the Legislature. It has indeed been argued on the analogy of the power of the Legislatures of Scotland and England to extinguish themselves in uniting into the Legislature of Great Britain that this power can be exercised, but that is to forget that a Colony is not a sovereign state. That a sovereign state may decide, as did Scotland and as did England, to forgo in part its sovereignty by uniting with another part of the world is not an argument for a subordinate legislature throwing up the duties imposed upon it by the Imperial Crown or Parliament.

This view, however, does not merely rest on theory, however strong. It is supported by the actual practice in many cases. Thus, for example, when Jamaica desired to entrust the framing of a new constitution to the Crown in 1866 it did not merely pass an Act for this end, but the Act was confirmed and ratified by an Imperial Act, 29 & 30 Vict. c. 12, the law officers having advised that this course was necessary. Or again in 1876, when it was decided by St. Vincent and Grenada to abandon for financial reasons their autonomy, the surrender was ratified by an Imperial Act, 39 & 40 Vict. c. 47. On the other hand, it may be urged that the Legislature of the Virgin Islands has reduced itself since 1902 to the Governor of the Leeward Islands, and this merely by local acts, but there again the fact remains that a Governor is the Legislature endowed with all the powers which formerly the Legislature possessed, and that not by any reason of the prerogative, but by the vesting in him of all the rights possessed by the old legislatures. He legislates, but he is a legislature in himself, and he can change his own composition, though he is a single person and not a representative legislature within the meaning of the *Colonial Laws Validity Act*, 1865, because he has had conferred upon himself the powers formerly possessed by the representative legislature of the Colony in the days when it possessed an elective assembly. Or again, in British Honduras the Legislature has reduced itself since 1870 to a nominee body, but that body has all the powers of the old Legislature, and can change its constitution; it has not abolished itself nor attempted to deprive itself of its old

powers, though it has altered its composition. The same remark applies to Antigua, Dominica, Montserrat, St. Kitts, and Nevis, which all have shorn themselves of their former greatness, but still retain constituent powers.

The question of the power of a Colony to alter its constitution was considered when the correspondence was proceeding as to the grant of self-government to the Cape. There was a movement in the Colony in favour of federation, and that movement included proposals on the one hand for the division of the Colony into provinces, and on the other hand for union with the Dutch republics in South Africa.

The Governor[1] found to his embarrassment that the Attorney-General declared that it was possible for a Colonial Legislature to make provision for the division of the Colony into provinces, and also to make provision for its entering upon a federation. The Governor therefore applied to the Secretary of State for instructions. He pointed out that it appeared clear that there was no such power in the Colonial Legislature as was attributed to it by the Attorney-General. In the case of Canada it had always been assumed that an Imperial Act[2] was requisite to create federation, and in the case of New Zealand, the power of the New Zealand Parliament to establish new provinces, though it might seem to be intended to be given by the Constitution Act,[3] was so doubtful that it had been found necessary to validate Acts passed in respect of the provinces by Imperial legislation.[4]

The Secretary of State consulted the law officers, and informed the Governor in a dispatch of November 16, 1871,[5] that he was right in thinking that the views of the Attorney-General were incorrect. It was impossible for a Colony to create provinces except in the sense of setting up municipal institutions; it could not delegate the legislative power granted to it, and the power which it possessed was to

[1] See *Parl. Pap.*, C. 508, pp. 10–3. [2] 30 Vict. c. 3. [3] 15 & 16 Vict. c. 72.
[4] 24 & 25 Vict. c. 30; 25 & 26 Vict. c. 48; 31 & 32 Vict. c. 92.
[5] *Parl. Pap.*, C. 508, pp. 13, 14. So in 1871 the Leewards Federation was created by Imperial Act.

legislate within the limits of its constitution. Nor could it so legislate as to permit itself to become a member of a federation. It was clear that for this purpose an Imperial Act was required.

This principle was maintained steadily in Australia, where, however, it might have been held to be rendered necessary by the fact that Imperial legislation was required to create a federation in view of the fact that all the Colonies in the Commonwealth owed their constitutions to Imperial legislation. But it was equally held to be necessary in the case of the South African Colonies when they formed a Union in 1910. In that case the Colonies all owed their position to letters patent, and it could not be maintained that the need for an Imperial Act was due to existing Imperial legislation. It was clear that the need was simply based on the essential position that a Colony cannot alter its Colonial status by becoming part of a federation, and that no concert of neighbouring Colonies can produce this effect.[1]

If a Colonial Legislature cannot extinguish itself it cannot abolish the Colonial Governor as the representative of the Crown controlling the executive authority of the Colony. It is indeed still regarded as important not to insert provisions in Colonial laws defining in any way the appointment of the Executive Government; thus in the case of the Natal Constitution the proposal of the select committee of the Legislative Council which drafted it to insert a clause providing for the appointment of the Governor by the Crown was omitted at the request of the Imperial Government, as it was not a convenient manner in which to legislate,[2] and in 1906 the Parliament of South Australia[3] would not proceed with a Bill introduced at the suggestion of the Chief Justice to regularize the position of the Deputy Governor because it was held to be a matter of prerogative and not a fit subject for legislation. The Chief Justice's doubts were of course

[1] *The Government of South Africa*, i. 452–4.

[2] *Parl. Pap.*, C. 6487, pp. 42 (Clause 3 of Bill No. 2, 1890–1) and 72.

[3] See *House of Assembly Debates*, 1906, p. 141; *Legislative Council Debates*, 1906, p. 191.

due to the absence of any legal authority for the appointment of deputies other than the authority in the letters patent, but it can hardly be said that his doubts were necessary or natural. The Bill as introduced was certainly objectionable, for it purported to confer upon the Governor's deputy all the power of the Governor, while the letters patent expressly allow the Governor to limit the power in such manner as he thinks fit. If the Bill had been passed the Governor would of course have reserved it, and it is hardly likely that it would have become law, but it is worth mentioning as a good example of the happy-go-lucky character of the Colonial Constitution, that the Governor is not required to reserve such a Bill, though a Bill affecting the Governor's salary must under the Imperial Act of 1907 be reserved. The Bill, modified to avoid the objections raised to its predecessor, was passed through both Houses in 1910 and reserved for the royal assent.

Some doubt was felt in South Australia in 1855 as to whether it was within the powers of the Colonial Legislature to make provisions as to the proposed constitution of the Executive Council by making certain officials members in virtue of their offices, and to require that warrants for expenditure and appointments or dismissals to office should be signed by the Governor and countersigned by the Chief Secretary. The Law Officer of South Australia [1] advised, however, that the power existed; that these were matters which by the Imperial Parliament for the United Kingdom could and might be regulated by law, and that there was no reason why they should not be regulated similarly as far as legal considerations were concerned for the Colony of South Australia. He, however, drew attention to the matter, leaving it for the Imperial Government to decide whether to approve of the terms of the Act or not. The terms of the Act were not criticized by the Imperial Government, and it is clear that it would be impossible to take exception on legal grounds to such legislation. On the other hand, there are good grounds of convenience for not dealing in any way with executive matters by law.

[1] *Parl. Pap.*, July 24, 1856, p. 86; cf. p. 68.

Again, the Colonial Legislatures are, like the British Parliament,[1] truly representative bodies, not delegates of the electorate in any sense. There was some feeling when the Commonwealth Parliament increased its pay to £600 from £400 in 1907 without any previous consultation of the electorate, and South Australia in 1910 made the increase dependent on the will of the people at a referendum which was taken in April 1911. Western Australia again in 1910 proposed to provide that the increase should only be effective from the beginning of the next Parliament, but Tasmania boldly fixed on January 1, 1911, as the date for the new provision operating under Act No. 53 of 1910, and Western Australia adopted that date also. Again, the Ontario Legislature in 1901 prolonged for a couple of months the term of its existence despite some protests,[2] and their action is not isolated. The remedy for any wrong action is the will of the people at the next election, and that must be relied upon if anything is to be found a check.

There is no tendency in the Colonies to introduce a referendum in the Swiss sense of the word, or to solve thus their difficulties. For deadlocks between the two Houses referenda are prescribed in the Commonwealth in cases of disagreements as to the Constitution only, just as all amendments of the Constitution require referenda to confirm the action of Parliament. In Queensland the procedure may, by Act No. 16 of 1908, be adopted in any case of a deadlock between the Houses, but a similar proposal in New South Wales was indignantly repudiated in 1910 by the Labour party and the project was dropped. No other state has adopted it, nor is it known in New Zealand or in Canada, Newfoundland, or South Africa. The constitutional referendum has been used in the Commonwealth already on five[3] occasions, and South Australia held in 1911 a referendum on the question of members'

[1] Cf. Mr. Churchill in House of Commons, February 22, 1911; Lord Morley in House of Lords, March 28, July 4, 1911.

[2] See *Canadian Annual Register*, 1901, p. 429.

[3] In 1906 as to date of Senate election (see Act No. 1 of 1907); in 1909 as to state debts (Act No. 3 of 1910) and as to payments to states (rejected); in 1911 as to industrial powers, and nationalisation of monopolies (rejected).

salaries which resulted in a decision against an increase, while in 1903 under Act No. 13 a referendum in New South Wales resulted in the reduction of the number of members of the Assembly to ninety.

In addition there have been a few cases of referenda on special topics. Thus in 1896 a referendum was held in South Australia as to religious education: three questions were put, that of continuance of the existing system, that of the adoption of religious instruction, and that of state aid to denominational schools. The results were decisively in favour of the existing system. On the other hand, the referendum taken in 1910 under the Act No. 11 of 1908 in Queensland resulted in a distinct majority (74,228 to 56,681) in favour of a system of undenominational teaching supplemented by access for denominational purposes, and this vote, though not cordially accepted by the Government, was loyally carried out by them by Act No. 5 of 1910, Mr. Kidston arguing that the decision of the people must in fairness be obeyed. An informal referendum on education was taken in Victoria in 1904, but every effort since to pass a Bill for that end has been rejected, including an attempt to introduce such a clause in the last Education Act of 1910. In Manitoba in 1892, under Act c. 24, in Ontario under the Act 56 Vict. c. 35, and in other provinces, a referendum was taken as to the manufacture, sale, and importation of intoxicants, and a general referendum on these topics was held in Canada under the Act 61 Vict. c. 51, but in both cases the motion in favour of prohibition was not strong enough to effect much.

The use of the referendum in the Dominions for constitutional alterations has not been usual even in the case of the formation of federations. In the case of Canada there were no referenda at all, and only in New Brunswick was there a general election on the question. In the case of the Union of South Africa only in Natal was a referendum held. In Australia, on the other hand, referenda were held in all the six states, and it was not until all the six states had concurred that federation was adopted.[1]

[1] See below, Part IV, ch. ii, note A.

CHAPTER II

THE TERRITORIAL LIMITATION OF DOMINION LEGISLATION

§ 1. The Nature of the Limitation

The power given to Dominion Parliaments to legislate is in all cases now for the peace, order (welfare), and good government of the Dominion in question. In the case of Queensland the intention is made more clear by the express use of the word 'within' in the power given to legislate;[1] but this exact wording is unusual. No deduction can therefore be drawn from the fact that the word 'within' is not expressed in the other cases, for the whole history of the matter shows that the territorial limitation has existed throughout.

In granting powers of legislation to the Colonies, it is obvious that nothing but chaos would result if each Colony could legislate without regard to the limits of the Colony. The Imperial Parliament can legislate for any part of the world over which it chooses to legislate,[2] subject to the possibility of it being unable to enforce the laws beyond the limits of its own territory, but to claim for the Colonies a similar power of legislation would end in hopeless confusion. This view has repeatedly been asserted by the law officers of the Crown. For example, with reference to British Guiana, they advised in February 1855:[3] 'We conceive that a Colonial Legislature cannot legally exercise its jurisdiction beyond its territorial limits—three miles from the shore—or at the utmost can only do this over persons domiciled in the Colony who may offend against its ordinances, even

[1] See 31 Vict. No. 38, s. 2; in Victoria, see 18 & 19 Vict. c. 55, sched. s. 1 where 'peace' &c. do not occur; in the Canadian Provinces, 30 Vict. c. 3, s. 92.

[2] *Trial of Earl Russell*, [1901] A. C. 446.

[3] Forsyth, *Cases and Opinions on Constitutional Law*, pp. 24, 25, 217–38. Cf. Jenkyns, *British Rule and Jurisdiction beyond the Seas*, p. 70; Ewart, *Kingdom of Canada*, p. 10.

beyond this limit, but not over other persons.' In an opinion given by the Queen's Advocate in August 1854, on the question within what distance of the Falkland Islands foreigners might be legally prevented from whale or seal fishing, he advised that they could be prevented from fishing within three miles of the coast, such being the distance to which, according to the marine interpretation and usage of nations, a cannon-shot is supposed to reach.

The view of the law officers is shown to have been shared by the Government in many Acts; for example, it was considered necessary to resort to Parliament to make arrangements for the hearing of appeals in the West Indies by the Courts of a distant Colony. This was done in the case of making provisions for appeals from British Honduras to lie to the Courts of Jamaica, by the Act 44 & 45 Vict. c. 36, and with regard to appeals in the Windwards by 52 & 53 Vict. c. 33.

Similarly it is due to the territorial limitation of Colonial jurisdiction that Acts have been passed from time to time to provide for the extradition of offenders, including their legal custody while beyond the limits of the Colony from which they are extradited, and for the custody of fugitive offenders during removal from one part of the Empire to another.[1] Again, by the Act 6 Will. IV. c. 17, it is laid down that whereas by reason of the separation of the Governments of the said islands it was not possible to arrange for the erection of two Courts of Judicature in the West Indian Islands, therefore Imperial legislation had to be passed.

In the Canadian prisoner's case, Lord Durham had, with his nominee Council in Lower Canada, which was a special body established by Act of the Imperial Parliament in view of the recent rebellion and the necessity for suspending the constitution, decided that certain political offenders should be banished to Bermuda. It was then advised by the law officers of the Crown that the ordinance for effecting

[1] *Fugitive Offenders Act*, 1881 (44 & 45 Vict. c. 69); *Colonial Prisoners Removal Acts*, 1869 and 1884 (32 Vict. c. 10 and 47 & 48 Vict. c. 31); *Extradition Acts*, 1870 and 1873 (33 & 34 Vict. c. 62, 36 & 37 Vict. c. 60).

this could not be held to be *intra vires*: the banishment was legal, but not the confinement beyond Lower Canada.[1] The case of *Leonard Watson*[2] is an apparent exception to this rule: he was a prisoner under a statute of Upper Canada who was being transported to Van Diemen's Land, and in England it was held in his case that the return to a writ of *habeas corpus* was not invalid, on the ground that the Colonial Legislature could not authorize transportation *intra fines* of another territory. But in the case in question it appears from the judgement that the point was not dealt with by the Court, and that even if the Court be deemed to have accepted to the full the argument of the prosecution the matter would merely show that the combined effect of the Quebec Act of 1774, which introduced English law, and the Act of 1824, which mentions transportation among the Colonies, had validated what else might have been an abuse of power by the Legislature.[3] So Sir John Macdonald, in 1873, pronounced against the validity of an Ontario Act which authorized the Lieutenant-Governor to remove any insane person who had come into the province back to the other province or country whence he had come. He laid it down that for removal from one province to another a Dominion Act was required, and for removal to another country an Imperial Act was necessary.[4] So in an Australian case, *Ray* v. *McMakin*,[5] it was held by the Supreme Court of Victoria that a statute which purported to authorize detention beyond the limits of New South Wales was not valid. In the same year Lord Carnarvon,[6] in the House of Lords, laid it down that no Colony could transport to another part of the Empire, and Lord Belmore, who had been Governor of New South Wales, agreed, but distinguished between deportation and exile. In the *Brisbane Oyster Fishery Co.* v. *Emerson*,[7] the Chief Justice of New South Wales laid it

[1] Forsyth, *Cases and Opinions on Constitutional Law*, pp. 465, 466.

[2] 9 A. & E. 731; cf. 1 P. & D. 516.

[3] Lefroy, *Legislative Power in Canada*, pp. 323, 324.

[4] *Provincial Legislation*, 1867–95, p. 103.

[5] 1 V. L. R. 274. Cf. also *Hazelton* v. *Potter*, 5 C. L. R. 445, at p. 471.

[6] *Hansard*, Ser. 3, ccxxiii. 1074.

[7] Knox (N. S. W.), 80.

down that, whatever might be the power of the Imperial Parliament, no Colonial Legislature could bind persons resident outside the territory, and he instanced the fact that difficulty had always arisen when it was sought to establish a Colonial navy because of the limited extent of Colonial jurisdiction. It was decided by the Supreme Court of New Zealand *in re Gleich*,[1] that the Colonial Legislature had no power to authorize the conveyance on the high sea to another Colony, and the detention outside its own jurisdiction of any person whatsoever, such power requiring Imperial authority. On the other hand, Higinbotham J., in the Victorian case of *Regina* v. *Call, ex parte Murphy*,[2] declared that though as a matter of abstract speculation the Legislature of Victoria might have no authority outside the Colonial limits, still its enactments were binding on all Colonial Courts in Victoria.

Other early cases on this question affect the attempt to give effect to criminal laws of a Colony beyond the territorial limits. Thus in *Regina* v. *Brierly*[3] it was held by the Chancery Division of Ontario that a Canadian law was valid which made it an offence for a British subject resident in Canada to commit bigamy anywhere, provided that he had left Canada in order to commit the offence. But this case was overruled or dissented from by the Queen's Bench of Ontario in *Regina* v. *Plowman*,[4] on the strength of *Macleod* v. *Attorney-General for New South Wales*,[5] and it is impossible to follow Mr. Lefroy[6] in his ingenious attempt to distinguish the cases by the fact that the enactment of New South Wales did not restrict its operation to British subjects resident in that Colony as did the Act of Canada.

The whole question was elaborately considered by the

[1] 1 O. B. & F. S. C. 79; New Zealand *Parl. Pap.*, 1880, A. 6.

[2] 7 V. L. R. 113, at p. 123; cf. also *Reg.* v. *Pearson*, 6 V. L. R. 333; Lefroy, op. cit., p. 263, note 1; above, p. 170, note 1.

[3] (1887) 14 O. R. 525; 4 Cart. 665. Cf. *Reg.* v. *Giles*, 15 C. L. J. 178.

[4] (1894) 25 O. R. 656.

[5] [1891] A. C. 455. Cf. *Reg.* v. *Mount*, 6 P. C. 283; *Low* v. *Routledge*, 1 Ch. App. 42; *Reg.* v. *Keyn*, 2 Ex. D. 63.

[6] Op. cit., pp. 336–8.

Supreme Court in the case *in re Criminal Code, Bigamy Sections*.[1] The Code of 1892 by ss. 275, 276, punished bigamy committed anywhere by any British subject who left Canada for the purpose. The validity of the enactment was upheld by four judges, Gwynne, Sedgewick, King, and Girouard. The last-named judge rested his decision on the highest grounds: the Dominion Parliament was, he said, a subordinate legislature, but subordinate only to the Imperial Parliament, and it had all the legislative authority of the Imperial Parliament so long as it did not contravene the positive prohibition of repugnancy enacted by the *Colonial Laws Validity Act*, 1865; and the other judges held that at any rate the actual exercise of power in this case, one of a Canadian resident, was justified, adopting the view that *Macleod's* case depended on the wideness of the terms of the Act. On the other hand, the Chief Justice pronounced the sections invalid, and held that the limitation of the Act to cases of persons who left Canada for the purpose of committing bigamy did not render it valid. He cited *Macleod's* case as decisive of the view, and reminded the Court of his judgement in *Peek* v. *Shields*,[2] in which he had held that an act committed in England could not be an offence under the insolvency law of Canada.[3] It seems probable that in the actual decision the majority of the Court were right and the Chief Justice wrong, but only on the ground that the offence penalized was leaving Canada with intent. Clearly the law could punish any leaving of Canada—the crime is committed at latest at the last moment of departure within the territory —and if it punished *sub modo* the fact that the act which proved the intent was done elsewhere could not be said to invalidate the penalty on the leaving.

In one very interesting case, *The Ship 'D. C. Whitney'* v. *St. Clair Navigation Co.*,[4] the question was whether Canadian

[1] 27 S. C. R. 461. [2] 8 S. C. R. 579.

[3] Overruling the Ontario Appeal Court decision in 6 O. A. R. 639; 3 Cart. 283.

[4] (1907) 38 S. C. R. 303, on appeal from the Exchequer Court, Toronto Admiralty Division, 10 Ex. C. R. 1.

Courts could exercise an admiralty jurisdiction over a vessel which was arrested while on the Canadian side of the boundary in the St. Lawrence, but in a channel which was open to free passage under the Ashburton Treaty of 1842. There were various other questions at issue; whether by the Act of 1891 the jurisdiction of the Supreme Court and the Exchequer Court was not restricted to vessels and happenings in Canadian waters—in this case the accident occurred in Rio de Grande, outside Canada—and whether the objection to the jurisdiction was taken too late in the Supreme Court on appeal, as Idington J. held. But the majority of the Court (Davies, Maclennan, and Duff, JJ.) held that the exercise of the right of innocent passage was not ground for an arrestment, and Davies J. thought that a mere passage through territorial waters was quite inadequate in any case to found an arrestment, as distinct from the case of entry into a harbour, where such entry gave a certain claim to jurisdiction *in rem*. Idington J.,[1] on the other hand, insisted that the Canadian Courts had the full admiralty jurisdiction over all foreign vessels for accidents in foreign waters as exercised in Great Britain,[2] and that arrest was a proper mode of procedure.

Of Colonial cases there may be noted also two Newfoundland cases of considerable interest: in *Rhodes* v. *Fairweather*,[3] decided in 1888, the question was whether the Colonial Act of 1879, which fixed a close time for seal-fishing, could be applied to a Scottish sealer which caught seals outside the boundaries of the Colony during a prohibited time. The vessels cleared from St. John's for the fishery, and returned thither for manufacture and shipment of the skins. It was expressly held by Carter C. J., that even if the vessel, which

[1] (1907) 38 S. C. R., at pp. 323 seq.

[2] *The Diana*, Lush. 539; *The Courier*, Lush. 541; *The Jassy*, 95 L. T. 363. See 24 Vict. c. 10. But he did not meet the point that the vessel was never in a Canadian port and never really in Canadian waters proper.

[3] 1897 *Newfoundland Decisions*, 321. It may be noted that the Court of Newfoundland (*not* the Legislature) has a jurisdiction over offences on the Grand Banks by 5 Geo. IV. c. 67, which, however, would equally exist under the Act of 1849 (12 & 13 Vict. c. 96) as to admiralty matters.

was registered in Scotland, had been registered in Newfoundland the Legislature could not affect acts done on the high seas beyond its territorial limits. He said :—

The *Terra Nova* is a ship of the British nation, and as such the Imperial Parliament would unquestionably be competent to give effect to an Act prohibiting with penalties the killing of seals or such like at a specified time anywhere over the seas by persons on board said ship, but that is from supreme and unlike Colonial limited authority.

Little J.[1] on the whole agreed in this view, though perhaps slightly less decisively; and on the other hand, Pinsent J.[2] held that the case was one in which the Court had jurisdiction, though it would not have had jurisdiction over a foreign ship pursuing the business from a foreign port: he held, however, that the Legislature could affect things within its limits, even if the action dealt with took place outside the limits, and this view has so much truth in it, and Carter C. J. agreed with it in this regard, that it cannot be denied that laws can be so worded as to effect pretty much what would have been effected by a direct exercise of extra-territorial legislation. For example—and this is no doubt what was at the back of Mr. Pinsent's remarks—if the Legislature enacted, as it did in 1887 (50 Vict. c. 26), that it should not be legal to bring into the ports of Newfoundland seals caught on the high seas in the close season the legislation could not have been held to be invalid.[3] So to avoid extra-territorial legislation over foreigners, an Imperial Act of 1909[4] was passed by which the landing in England of fish caught by foreign vessels trawling in the Moray Firth was forbidden, and thus in great measure the aim of the law could be effected. There is an excellent example of the same principle in the legislation of the Federal Council of Australasia in 1888 and 1889 regarding the pearl fisheries in Queensland and Western Australia. Under

[1] 1897 *Newfoundland Decisions*, at p. 343. [2] Ibid., at pp. 333, 334.

[3] Carter C. J. held that this Act did not apply to the case as it was passed after the capture of the seals in question. Pinsent J. held it did not, but relied on it as showing that the Act of 1879 on which the case proceeded was intended to operate extra-territorially. [4] 9 Edw. VII. c. 8.

the wide power given in that Act it was possible to prevent all British ships from engaging in the fisheries, however far out at sea, without taking out a licence, and in effect, as the fishery could only be carried on by vessels which could rely on the use of the shore for stores and shelter, it was possible, as shown in 1911, to require all foreign vessels to take out a licence and pay the fees as a condition of using the shore at all.

The other case is that of *The Queen* v. *Delepine*,[1] in which, as in the former case, the waters of Newfoundland were held in the case of bays to extend from a line drawn three miles from headland to headland, quoting the decision of the Chief Justice of Newfoundland and of the Privy Council in *Anglo-American Telegraph Co.* v. *The Direct United States Co.*,[2] where it was laid down that Conception Bay was territorial waters of Newfoundland. The well-known Canadian case of the *Frederick Gerring*[3] illustrates, however, only the ordinary three-mile limit if the evidence is to be accepted as correct. At the same time it may be noted that in a recent case[4] the Canadian Supreme Court has adopted the doctrine that capture of a vessel which has just infringed some local law in territorial waters while it is being hotly pursued from these waters is lawful even if the capture is outside the three-mile limit, as it is recognized as legal in international law, and there seems nothing to justify us in supposing that the doctrine would not be upheld if an appeal had been brought to the Privy Council on the question. The Court evidently considered the usual question of the limitation of authority and decided against it, on the ground that the power of the fishing regulation could not be exercised effectively without it. It may be noted also that the Natal Treason Court held that it could punish treason committed outside

[1] 1897 *Newfoundland Decisions*, 378. It arose out of an alleged contravention of the *Bait Act*, 50 Vict. c. 1.

[2] 2 App. Cas. 394. See also the Hague Arbitration Award of 1910, which accepts the judgement, Cd. 5396, p. 23. Chaleurs Bay is territorial according to *Mowat* v. *McFee*, 5 S. C. R. 66.

[3] (1897) 27 S. C. R. 271, a decision much resented in the United States.

The Ship 'North' v. *The King*, 37 S. C. R. 385; and cf. Hall, *International Law*,[5] p. 246.

Natal,[1] under its inherent jurisdiction, and not, as of course it might have done, under the Imperial Acts which were not cited.

There are other cases sometimes cited in this connexion which have really nothing to do with the question, but deal with questions of civil rights in a Colony of persons residing abroad. It is absurd to say absolutely, as in the doctrine ascribed by Lefroy to *Low* v. *Routledge*,[2] that an alien's rights outside Canada cannot be affected by a Canadian Act. That case is no authority for any such proposition: it is an authority merely for the proposition that an Imperial Act conferring certain privileges cannot be rendered invalid by any Colonial legislation, if such privileges are expressed to extend to the Colonies, as was the privilege of obtaining copyright imperially by publication in England in that case. The real position is clearly laid down in *Ashbury* v. *Ellis*,[3] where the Privy Council held clearly that the power given to New Zealand by s. 53 of the Constitution Act of 1852 enabled the Legislature to make rules subjecting to the jurisdiction of its tribunals persons neither themselves nor by their agents resident in the Colony, in respect of actions founded on any contract made or entered into wholly or in part to be performed in the Colony, 'for their lordships are clear that it is for the peace, order, and good government of New Zealand that the Courts of New Zealand should in any case of contracts made or to be performed in New Zealand have the power of judging whether they will or will not proceed in the absence of the defendant.' The Court carefully distinguished in that case between the validity of the law in the Colony and its effect outside in other Courts, which of course is quite a different thing, and depends on the doctrines of private international law. Thus the cases which treat of the effect in England of judgements obtained in Colonial Courts in these cases are not directed to the effect of Colonial laws outside the territory, but to the principles of law which apply if a Court proceeds with a case in the

[1] *R.* v. *Bester*, 21 N. L. R. 238, where Dutch law only was cited foreign; cf. Anson, *Law of the Constitution*[3], II. i. 242–5.

[2] 1 Ch. App. 42.

[3] [1893] A. C. 339.

absence of the defendant, or where the cause of action has nothing to do with the Colony. To put an extreme case, if a Colony should allow cases to be brought in its Courts against persons in England in respect of causes of action arising in England under English law, the judgements of the Courts would be probably invalid in any other Court of the world by private international law, but they would not be invalid on the more restricted ground that a Colony cannot legislate for more than its territorial limits. But if it subjects persons resident in England to actions in its Courts for matters affecting the Colony, as, for instance, a contract to be performed therein, it certainly does not exceed the boundaries of its valid jurisdiction, though the amount of consideration to be paid to its judgements will depend on private international law. The principle can be illustrated by two recent cases. In one [1] the High Court of the Commonwealth decided that an Act taxing property would not be read to apply to property situated in England, but insisted that the right was beyond doubt to tax property, the proceeds of which were either actually present in Queensland or were under contract to be present there, so that they must be regarded as being in Queensland. In another case [2] the Privy Council held that the express limitation of the wording of s. 92 of the *British North America Act*, 1867, was such as to forbid any Provincial Legislature to levy death duties on any property whatever not within the province *de facto*, even if the deceased had died domiciled there, although it is the general rule that a Colonial Legislature can impose death duties on property outside when a man is domiciled in a place, on the ground that in law the assets are where the man is domiciled, though this does not apply to landed property, which cannot be taxed if outside the Colony, unless under contract to be

[1] *Hughes* v. *Munro*, 9 C. L. R. 289. Cf. on the *situs* of assets, debts, &c., *Beaver* v. *Master in Equity of Supreme Court of Victoria*, [1895] A. C. 251; *Harding* v. *Commissioners of Stamps for Queensland*, [1898] A. C. 769; *Stamp Duties Commissioner* v. *Salting*, [1907] A. C. 449.

[2] *Woodruff* v. *Attorney-General for Ontario*, [1908] A. C. 508. Cf. *Lovitt* v. *R.*, 43 S. C. R. 106 and in the Privy Council.

converted into cash.[1] It may be noted that the Transvaal Legislature, in Act No. 28 of 1909 regarding death duties, insisted on taxing shares in mining companies, wherever registered, carrying on their business in South Africa, though the persons owning these shares were not domiciled in South Africa: it treats them as assimilated to land as being the proceeds of such land; but the provisions, though not technically *ultra vires*, are such as could hardly be held to be binding in England if an attempt were made to compel transfer of shares without payment of duty, though of course the law could require all transfers to be local on pain of exclusion from transacting business locally at all.

§ 2. The Recent Interpretation of the Doctrine

The general doctrine has been of late at once asserted and more closely examined by several important judgements of the Privy Council, the High Court of Australia, and the Supreme Court of New Zealand.

The most important of these cases is unquestionably *Macleod* v. *Attorney-General for New South Wales*.[2] In that case the interpretation of s. 54 of the *Criminal Law Amendment Act*, 1883, of New South Wales was brought into question. That section enacts that 'whosoever being married marries another person during the life of the former husband or wife, wheresoever such second marriage takes place, shall be liable to penal servitude for seven years'. A Court of Quarter Sessions at Sydney in New South Wales convicted Macleod for bigamy. It was contended for the appellant that the Court had no jurisdiction to try the appellant at all. The Act under which he was tried must be interpreted as relating to offences committed within the jurisdiction of the local Legislature by persons subject at the time of the

[1] The power to tax is recognized by s. 20 of the *Finance Act*, 1894, and the attempt to deny the power to tax property outside in the case of a domiciled person failed in the case *Re Tyson*, (1900) 10 Q. L. J. 34; Harrison Moore, *Commonwealth of Australia*[2], pp. 335–7. But the effect of such laws elsewhere is a different matter; cf. *Spiller* v. *Turner*, [1897] 1 Ch. 911; *Municipal Council of Sydney* v. *Bull*, [1909] 1 K. B. 7. See Dicey, *Conflict of Laws*[2], pp. 746 seq.

[2] [1891] A. C. 455.

offence to its jurisdiction. Upon any other construction it would be *ultra vires*, the local Legislature deriving from the Imperial Parliament a jurisdiction limited to the extent of the Colony.

It was argued, on the other hand, that the Colony had full jurisdiction, and it was pointed out that the Imperial Parliament by 24 & 25 Vict. c. 100, s. 57, had made similar provision to that made by the Parliament of New South Wales. It appeared that Macleod had married in the Colony of New South Wales one woman in 1872, and in her lifetime in 1889 he was married at St. Louis, in the State of Missouri in the United States of America, to another woman, and his conviction for bigamy was in respect of that second marriage.

The Privy Council advised Her Majesty that the judgement of the Supreme Court of New South Wales, which had dismissed the appeal brought from the Court of Quarter Sessions, should be reversed. They held that the word 'wheresoever' in the section was universal in its application, and they continued as follows :—

Therefore, if their Lordships construe the statute as it stands, and upon the bare words, any person, married to any other person, who marries a second time anywhere in the habitable globe, is amenable to the criminal jurisdiction of New South Wales, if he can be caught in that Colony. That seems to their Lordships to be an impossible construction of the statute; the Colony can have no such jurisdiction, and their Lordships do not desire to attribute to the Colonial Legislature an effort to enlarge their jurisdiction to such an extent as would be inconsistent with the powers committed to a Colony, and, indeed, inconsistent with the most familiar principles of international law. It therefore becomes necessary to search for limitations to see what would be the reasonable limitation to apply to words so general; and their Lordships take it that the words 'whosoever being married' mean 'whosoever being married, and who is amenable, at the time of the offence committed, to the jurisdiction of the Colony of New South Wales'.

Further, interpreting the section as intended to make the offence of bigamy justiciable all over the Colony, and to secure that no limits of local venue were to be observed in

administering the criminal law in that respect, they thought that this construction of the statute received support from the arrangements made in the statute for the trial, the form of the indictment, &c. It was plainly implied in their opinion that the venue, which was New South Wales, and the jurisdiction should be sufficient unless the contrary were shown.

Upon the face of this record the offence is charged to have been committed in Missouri, in the United States of America, and it therefore appears to their Lordships that it is manifestly shown, beyond all possibility of doubt, that the offence charged was an offence which, if committed at all, was committed in another country, beyond the jurisdiction of the Colony of New South Wales.

The result, as it appears to their Lordships, must be that there was no jurisdiction to try the alleged offender for this offence, and that this conviction should be set aside. Their Lordships think it right to add that they are of opinion that if the wider construction had been applied to the statute, and it was supposed that it was intended thereby to comprehend cases so wide as those insisted on at the bar, it would have been beyond the jurisdiction of the Colony to enact such a law. Their jurisdiction is confined within their own territories, and the maxim which has been more than once quoted, *Extra territorium jus dicenti impune non paretur*, would be applicable to such a case. Lord Wensleydale, when Baron Parke, advising the House of Lords in *Jefferys* v. *Boosey*,[1] expresses the same proposition in very terse language. He says: 'The Legislature has no power over any persons except its own subjects—that is, persons natural-born subjects, or resident, or whilst they are within the limits of the kingdom. The Legislature can impose no duties except on them; and when legislating for the benefit of persons, must, *prima facie*, be considered to mean the benefit of those who owe obedience to our laws, and whose interests the Legislature is under a correlative obligation to protect.' All crime is local. The jurisdiction over the crime belongs to the country where the crime is committed, and, except over her own subjects, Her Majesty and the Imperial Legislature have no power whatever. It appears to their Lordships that the effect of giving the wider interpretation to this statute necessary to sustain this indictment would be to comprehend a great deal more than Her Majesty's

[1] 4 H. L. R. 815, at p. 926. Cf. Lefroy, *Legislative Power in Canada*, p. 321.

subjects; more than any persons who may be within the jurisdiction of the Colony by any means whatsoever; and that therefore, if that construction were given to the statute, it would follow as a necessary result that the statute was *ultra vires* of the Colonial Legislature to pass. Their Lordships are far from suggesting that the Legislature of the Colony did mean to give to themselves so wide a jurisdiction. The more reasonable theory to adopt is that the language was used, subject to the well-known and well-considered limitation, that they were only legislating for those who were actually within their jurisdiction, and within the limits of the Colony.[1]

Though some of the expressions which have been quoted are not without some slight ambiguity, it is really clear that the Privy Council were of opinion that the legislation of the Colony must be restricted within its territorial limits, including, of course, the territorial waters.

There are recent colonial cases which entirely bear out this view. The Chief Justice of the High Court of Australia in the case of *McKelvie* v. *Meagher*[2] has expressly asserted the limitation of the jurisdiction of the Parliament of the Commonwealth to the territorial waters of the Commonwealth. Moreover, in a judgement in the case of *The Merchant Service Guild of Australasia* v. *Archibald Currie and Company Proprietary, Limited*,[3] the Chief Justice held in the clearest terms that, apart from the effect of s. 5 of the *Commonwealth of Australia Constitution Act*, the legislation of the Commonwealth was restricted within the three-mile limit. The Chief Justice said: 'Of course, the jurisdiction

[1] Contrast *Trial of Earl Russell*, [1901] A. C. 446, where the Earl was convicted of bigamy because of his marriage in America after an invalid divorce based on an imaginary change of domicile. The judges who advised were all of opinion that there was no substance in the argument for the defence that the Act (24 & 25 Vict. c. 100, s. 57) did not apply to a marriage outside the Dominions. This shows the difference of colonial and Imperial law.

[2] 4 C. L. R. 268, at p. 274. Cf. also *D'Emden* v. *Pedder*, 1 C. L. R. 91, at p. 118; *Hughes* v. *Munro*, 9 C. L. R. 289, at p. 294 (per Griffith C.J.), at p. 297 (per O'Connor J.); Keith, *Journ. Soc. Comp. Leg.*, xi. 236, 237.

[3] 5 C. L. R. 737, at pp. 742–4. See *Commonwealth of Australia Constitution Bill* (Wyman, 1900), pp. 142, 150; Commonwealth *Parliamentary Debates*, 1904, pp. 2069 seq.; Harrison Moore, op. cit., pp. 260 seq.; below, pp. 400, 401.

of the Commonwealth Courts and the operation of the Commonwealth laws extend only to places within the Commonwealth except so far as a larger jurisdiction or operation is given to them by law.' O'Connor J. said: 'The jurisdiction of that Court (the Commonwealth Court of Conciliation and Arbitration), as of any other Commonwealth Court, must, of course, be confined within the territorial limits over which the laws of the Commonwealth extend, and it is conceded that, apart from the provisions of s. 5 of the covering clauses of the constitution, those laws could have no operation beyond the three miles sea limit around Commonwealth territory.'

It has sometimes been thought that there is an exception to this rule in the case of *The Peninsular and Oriental Steam Navigation Company* v. *Kingston*.[1] The circumstances of the judgement in that case are important and may be given at length.

The action out of which this appeal arises was brought by the Minister of State for Trade and Customs of the Commonwealth of Australia against one Charles Gadd, the master of the British merchant ship *Oceana*, belonging to the Appellant Company, for penalties under two sections of the Act No. 6 of 1901 of the Commonwealth of Australia, being the *Customs Act*, 1901.

The facts are not in dispute, and are set out in the statement of claim and admitted by the defence.

The *Oceana* had on her arrival in the Port of Sydney goods liable to duty, and, after her arrival, more goods were shipped on board. Upon none of the goods in question were duties paid, although all of them were liable to duty, but by the arrangement contemplated and in pursuance of the Customs Act in question, the goods were secured on board the *Oceana* by the Customs officer by placing Customs seals upon parts of the ship in which they were stored.

After the ship left the Port of Sydney for Melbourne, and while on the voyage, the defendant caused the receptacles for these goods to be opened and the Customs seals to be broken. During the voyage, and afterwards during the ship's stay in the Port of Melbourne, the stores were used by the passengers and crew and for the service of the ship.

[1] [1903] A. C. 471, on appeal from the Supreme Court of Victoria, 27 V. L. R. 418.

The ship arrived from Sydney at the Port of Melbourne having the seals broken without the authority of an officer of the Customs.

The plaintiff's claim was for £100 by reason of the ship's entering the Port of Melbourne with the seals broken; and for £50 for using the stores while the ship was within territorial waters or in the Port of Melbourne.

The sections under which the action was brought were the 127th and 192nd. Section 127 is in these words:—

'Use of ships' stores.'

127. 'Ships' stores whether shipped in parts beyond the seas or in the Commonwealth, unless entered for home consumption or except as prescribed, shall only be used by the passengers and crew and for the service of the ship and after the departure of such ship from her last port of departure in the Commonwealth.'

The language just quoted prohibits the use of ships' stores by the passengers and crew or for the service of the ship unless duty is paid for them, or until the ship has departed from her last port of departure in the Commonwealth.

So far as this section is concerned the meaning is obvious enough. All goods being liable to duty upon being imported, ships' stores, which are treated as being privileged from the payment of duty, are only to be used by the passengers and crew of the ship, and even then not until after the departure of the ship from her last port of departure in the Commonwealth.

It is difficult to see what objection can be made to the authority to inflict the penalty of £50 which is claimed in respect of the use of stores while the ship was within the territorial waters or in the Port of Melbourne, in respect of which use alone the penalty is alleged by the statement of claim to have been incurred.

But the plaintiff claimed £100 in respect of the offence created by section 192. That section is in these words:—

192 'No fastening, lock, mark, or seal placed by an officer upon any goods or upon any door, hatchway, opening, or place for the purpose of securing any stores upon any ship which has arrived in any port from parts beyond the seas and which is bound to any other port within the Commonwealth shall be opened, altered, broken, or erased except by authority, and if any ship enters any port with any such fastening, lock, mark, or seal opened, altered, broken, or erased contrary to this Section, the master shall be guilty of an offence against this Act.'

'Penalty: One hundred pounds.'

The objection urged appears to be that because the breaking of the seals took place on the high seas and outside

the jurisdiction of the Australian Commonwealth, section 192 was beyond the power of the Australian Commonwealth to enact if applied to such a case as that now under debate.

Their Lordships think that the objection is founded on a misapprehension of what the section enacts. The section assumes the lawful imposition of the Customs seals for the purpose of exempting from duty goods upon which the Commonwealth might have exacted import duties. But in case of trade and commerce, and as a regulation for navigation, all of which subjects are within the competence of the Commonwealth Legislature, the shipowner is permitted to have on board and in Australian ports goods so sealed up that they cannot be used while the seals remain unbroken. This is a privilege accorded to the shipowner who might be compelled to pay duties in respect of all goods on board his ship. The offence created by section 192 is the composite act of breaking the seals and coming into an Australian port with the seals broken.

When the arrangement referred to has been permitted to the shipowner for the purpose of exempting him from paying duty, it is immaterial where the act of breaking the seals takes place. When he comes back into an Australian port with the seals broken, the offence is complete.

As Mr. Justice Hood points out, the ship is, by arrangement, converted into a bond so that the stores cannot lawfully be used till the final departure of the ship.

As has been pointed out by counsel, the legislation proceeds on precisely the same lines as section 135 of the Imperial Customs Consolidation Act, 1876, and under that section, if a foreign ship were to take goods so sealed from one bonded warehouse in the United Kingdom to another, although in the course of her voyage she might go outside the territorial limits of the United Kingdom, the very same question might arise, and upon her arrival at any other port in the United Kingdom the master would undoubtedly, in their Lordships' opinion, be liable to the penalties created by that Section.

For these reasons their Lordships will humbly recommend to His Majesty to dismiss this appeal. The appellants must pay the costs of it.

It will be seen from this case that the matter was complicated by the actual facts. It was perfectly true that the seals were broken while out beyond the three-mile limit, but there were obviously two grounds on which the ordinary

rule might be held to be valid, and yet, on the other hand, the condemnation take place. In the first place, it might be that, to make the power to legislate for territorial waters effective, the ancillary power must be assumed to legislate for a vessel which, having come into the territorial waters, departed thence and came back again into territorial waters, having endeavoured to evade the law of the country by an action done outside territorial waters. Then again, it was not clear whether or not s. 5 of the Constitution Act applied to the case. It is clear from the judgement that the matter was not actually settled by the Court. Moreover, the offence was only complete by entry into port with the seals broken. It may be that the judgement establishes no more than that it was legal for the Commonwealth Parliament to enact that entry with the seals broken should be an offence, though the breaking of the seals took place at sea. This seems to be the interpretation placed on the case by the Government of the Commonwealth, for in their Navigation Bill, to strengthen legislation with regard to the wages payable on vessels while engaged in the coasting trade, a clause (s. 288) is proposed under which the wages in question shall not be deemed to have been paid if deductions are made outside Australia, to make up for the higher wages paid while engaged in the coasting trade, and in the notes accompanying the Bill reference is made to the Peninsular and Oriental case as justifying such legislation.

The matter has further been considered in connexion with the question of the expulsion of aliens under the Immigration Act of the Dominion Parliament. It was held in the Court of King's Bench of Ontario by Mr. Justice Anglin, that such expulsion could not be justified, on the ground that it involved extra-territorial legislation, and the legislation of the Dominion was essentially territorial in character. He relied on the case of *Macleod*, which has been already quoted, and on several other cases, none of which, however, is of equal value to that case. He thought that the expulsion could not take place across the frontier without involving compulsion beyond the frontier.

The decision of the Court was reversed by the Privy Council in the cases of *The Attorney-General for Canada* v. *Cain* and *The Attorney-General for Canada* v. *Gilhula*.[1] This case again is of sufficient importance to justify quotation of the judgement.

The question for decision in this case is whether section 6 of the Dominion Statute 60 & 61 Vict. c. 11 (styled in the respondents' case 'The Alien Labour Act'), as amended by 1 Edw. VII. c. 13, section 13, is, or is not, *ultra vires* of the Dominion Legislature.

In the events which have happened the question has in this instance become more or less an academic one, inasmuch as the two persons arrested under the Attorney-General's warrant granted under the authority of section 6 were on the 17th of June, 1905, discharged from custody by order of Mr. Justice Anglin, and a year having therefore elapsed since the date of their entry into Canada they cannot be re-arrested.

Section 9 of 60 & 61 Vict. c. 11 has been amended by 61 Vict. c. 2, and sections 1, 6, and 9 of the Alien Labour Act, as amended, are in the terms following:—

'(1) From and after the passing of this Act it shall be unlawful for any person, company, partnership or corporation, in any manner to prepay the transportation, or in any way to assist or encourage the importation or immigration of any alien or foreigner into Canada, under contract or agreement, parole or special, express or implied, made previous to the importation of such alien or foreigner, to perform labour or service of any kind in Canada.'

'(6) The Attorney-General of Canada, in case he shall be satisfied that an immigrant has been allowed to land in Canada contrary to the prohibition of this Act, may cause such immigrant, within the period of one year after landing or entry, to be taken into custody and returned to the country whence he came, at the expense of the owner of the importing vessel, or if he entered from an adjoining country, at the expense of the person, partnership, company, or corporation violating Section 1 of this Act.'

'(9) This Act shall apply only to the importation or immigration of such persons as reside in or are citizens of such foreign countries as have enacted and retained in force, or as enact and retain in force, laws or ordinances applying to Canada, of a character similar to this Act.'

The validity of section 6 was impeached on several grounds, and was held to transcend the powers of the Dominion Parliament, inasmuch as it purported to authorize the Attorney-General or his delegate to deprive persons against whom it was to be enforced of their liberty without

[1] [1906] A. C. 542. Followed as regards the deportation of Kanakas from Queensland by the High Court in *Robtelmes* v. *Brenan*, 4 C. L. R. 395.

the territorial limits of Canada, and upon this point alone the decision of the case turned. It was conceded in argument before their Lordships, on the principle of law laid down by this Board in the case of *Macleod* v. *Attorney-General for New South Wales*,[1] that the statute must, if possible, be construed as merely intending to authorize the deportation of the alien across the seas to the country whence he came, if he was imported into Canada by sea, or, if he entered from an adjoining country, to authorize his expulsion from Canada across the Canadian frontier into that adjoining country. The judgement of the learned Judge was, in effect, based upon the practical impossibility of expelling an alien from Canada into an adjoining country without such an exercise of extra-territorial constraint of his person by the Canadian officer as the Dominion Parliament could not authorize. No special significance was attached to the word 'return'. The reasoning of the judgement would apply with equal force if the word used had been 'expel' or 'deport' instead of 'return'.

In 1763, Canada and all its dependencies, with the sovereignty, property, and possession, and all other rights which had at any previous time been held or acquired by the Crown of France, were ceded to Great Britain (*St. Catherine's Milling and Lumber Company* v. *The Queen*).[2] Upon that event the Crown of England became possessed of all legislative and executive powers within the country so ceded to it, and, save so far as it has since parted with these powers by legislation, Royal Proclamation, or voluntary grant, it is still possessed of them. One of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter that State, to annex what conditions it pleases to the permission to enter it, and to expel or deport from the State, at pleasure, even a friendly alien, especially if it considers his presence in the State opposed to its peace, order, and good government, or to its social or material interests: Vattel, *Law of Nations*, Book I. sec. 231; Book II. sec. 125. The Imperial Government might delegate[3] those powers to the Governor or the Government of one of the Colonies, either by Royal Proclamation which has the force of a statute (*Campbell* v. *Hall*)[4] or by a statute of the

[1] [1891] A. C. 455, at p. 459. [2] 14 App. Cas. 46, at p. 53.

[3] This doctrine of delegation is curious and infelicitous; it is contrary to the general trend of decisions of the Privy Council (see § 1), and is probably merely an unhappy use of language. See Harrison Moore, *Commonwealth of Australia*,[2] pp. 251–5; Keith, *Journ. Soc. Comp. Leg.*, xi. 237.

[4] 1 Cowper, 204.

Imperial Parliament, or by the statute of a local parliament to which the Crown has assented. If this delegation has taken place, the depositary or depositaries of the executive and legislative powers and authority of the Crown can exercise those powers and that authority to the extent delegated as effectively as the Crown could itself have exercised them. The following cases establish these propositions: *In re Adam*,[1] *Donegani* v. *Donegani*,[2] *Cameron* v. *Kyte*,[3] *Jephson* v. *Riera*.[4] But as it is conceded that by the Law of Nations the supreme power in every State has the right to make laws for the exclusion or expulsion of aliens, and to enforce those laws, it necessarily follows that the State has the power to do those things which must be done in the very act of expulsion, if the right to expel is to be exercised effectively at all, notwithstanding the fact that constraint upon the person of the alien outside the boundaries of the State or the commission of a trespass by the State officer on the territories of its neighbour in the manner pointed out by Mr. Justice Anglin in his judgement should thereby result. Accordingly it was in *In re Adam* definitely decided that the Crown had power to remove a foreigner by force from the Island of Mauritius, though, of course, the removal in that case would necessarily involve an imprisonment of the alien outside British territory, in the ship on board of which he would be put while it traversed the high seas.

The question, therefore, for decision in this case resolves itself into this: has the Act 60 & 61 Vict. c. 11, assented to by the Crown, clothed the Dominion Government with the power the Crown itself theretofore undoubtedly possessed to expel an alien from the Dominion, or to deport him to the country whence he entered the Dominion? If it has, then the fact that extra-territorial constraint must necessarily be exercised in effecting the expulsion cannot invalidate the warrant directing expulsion issued under the provisions of the statute which authorizes the expulsion.

It has already been decided in *Musgrove* v. *Chun Teeong Toy*,[5] that the Government of the Colony of Victoria, by virtue of the powers with which it was invested to make laws for the peace, order, and good government of the Colony, had authority to pass a law preventing aliens from entering the Colony of Victoria. On the authority of this case section 1 of the above-mentioned statute would be *intra*

[1] 1 Moo. P. C. 460, at pp. 472–6.
[2] 3 Knapp, 63, at p. 88.
[3] 3 Knapp, 332, at p. 343.
[4] 3 Knapp, 130.
[5] [1891] A. C. 272.

vires of the Dominion Parliament. The enforcement of the provisions of this section no doubt would not involve extra-territorial constraint, but it would involve the exercise of sovereign powers closely allied to the power of expulsion and based on the same principles. The power of expulsion is in truth but the complement of the power of exclusion. If entry be prohibited it would seem to follow that the Government which has the power to exclude should have the power to expel the alien who enters in opposition to its laws. In *Hodge* v. *The Queen*[1] it was decided that a colonial legislature has within the limits prescribed by the statute which created it 'an authority as plenary and as ample . . . as the Imperial Parliament in the plenitude of its power possessed and could bestow'. If, therefore, power to expel aliens who had entered Canada against the laws of the Dominion was by this statute given to the Government of the Dominion, as their Lordships think it was, it necessarily follows that the statute has also given them power to impose that extra-territorial constraint which is necessary to enable them to expel those aliens from their borders to the same extent as the Imperial Government could itself have imposed the constraint for a similar purpose had the statute never been passed.

Their Lordships therefore think that the decision of Mr. Justice Anglin was wrong, and that the appeal should be allowed, and will so humbly advise His Majesty.

Having regard to the arrangement as to costs made with the Attorney-General at the hearing of the petition for special leave to appeal, and to all the circumstances of the case, their Lordships direct the appellant to pay the costs of the respondents as between solicitor and client.

It will be seen that the Privy Council in this case in no wise derogate from the principle of the limits of the legislation within the territorial jurisdiction. As a general rule, what they do hold is in substance that the limitation must not be insisted upon in such a manner as to render the grant of legislative power ineffectual. That, it would seem, it is only fair to concede. The case, therefore, does not carry us beyond what is reasonably clear. A difficulty, however, is presented by this case in its relation to the case of *Reg.* v. *Lesley*.[2] That case arose out of a revolution in South America.

[1] 9 App. Cas. 117. [2] (1860) 1 Bell C. C. 220; 29 L. J. M. C. 97.

The Revolutionary Government put on board a British vessel several of their opponents, and the British vessel took them to England. It was assumed in the case in question, that the placing on board was legal, but it was held that the detention on board after territorial waters had been passed was not legal, and that the master of the vessel might be liable in damages. This difficulty would hardly arise in the ordinary case of deporting from Canada over the boundary into the United States, but it might easily arise in the cases provided for in the Canadian Immigration Law, where persons are deported from Canada to their native countries involving a long sea-voyage. The question might be raised by an action in England for false imprisonment, and on the analogy of *Lesley's* case it may be held that damages should be awarded. But though the judgement of the Privy Council is not binding upon the English Courts, it would nevertheless be strange if those Courts did not find some means of explaining away the difficulty. For example, if a man deported from Canada sued the captain of the vessel on which he was deported for damages for false imprisonment, it would be a sufficient answer that he had been legitimately removed from Canada by the Dominion Government, if the master were under an obligation by law of the Dominion, as is now the case, to return him to the country from which he came. In *Lesley's* case it may be noted the captain contracted to take the Chilian Revolutionists expelled from Chili by the Government to England, and thus took upon himself more or less voluntarily the onus of assisting in their detention.

It will be noted that in the opinion of the law officers in 1855[1] there was a suggestion that the laws of a Colony might be applied outside its limits to persons domiciled in the Colony. The dictum was probably based on some misunderstanding or lack of full consideration, and it may have been induced by the fact that by private International Law a Colony could, for example, levy estate duties on the whole of the personal property, wherever situated, of a person who

[1] Above, pp. 372, 373. Cf. also pp. 375, 376.

died domiciled in the Colony.[1] In any case there is no evidence of the principle being accepted at that date, but with regard to merchant shipping, the question has

[1] This fact has given rise to a good deal of confusion as to extra-territorial legislation, whereas it really rests on a doctrine of *situs* of goods; see e.g. Dicey, *Conflict of Laws*,[2] pp. 753 seq. There is a classical example of this confusion in the protests of the High Commissioner of Canada and the Agents-General in 1894 against the Finance Act of that year; see *Parl. Pap.*, C. 7433, 7451. They contended that it was taxation of the Colonies in the sense that a tax was levied on the Colonial assets directly; that was not the case: no proceedings under the Act could have been taken in the Colonies; the only liability was in England, nor was this objection pressed later in the discussions *re* double income tax (cf. *Parl. Pap.*, Cd. 3523, pp. 183 seq., 3524, pp. 161 seq.). The matter has again received new life from the resolution of South Africa for discussion at the Imperial Conference of 1911 (see *Parl. Pap.*, Cd. 5513, p. 16), which recommended that the Imperial Government should in assessing death duties make an allowance of the amount paid on assets situated in the Colonies, the intention being to secure the reduction of the assessment on shares in Transvaal and Cape mining enterprises on which death duties are payable in every case, though not regarded by the Imperial Government as being assets situated in South Africa. The principle adopted by the Imperial Government as to the *situs* of shares in companies is that the share is situated where the title is situated, namely in the place where the share is registered or in the place where it actually is transferred, if it is in a form transferable by simple delivery. There is only an exception to this by the rule that shares in companies which open branch Colonial registers are held to be situated for purposes of death duties in the United Kingdom. On the other hand, the Cape and the Transvaal adopt the criterion of the places where the company exercises its operations irrespective of any other consideration, except that the Transvaal adopts also the criterion that shares in all Transvaal companies, wherever they carry on their operations, are assets in the Transvaal; see Act No. 28 of 1909, s. 10.

A conflict immediately arises in case of death duties. The *Finance Act* of 1894 levies such duties on the personal property, wherever situated, of a person who dies domiciled in the United Kingdom, and makes an allowance only in respect of duties paid in a Colony on assets *situated therein*. There is, therefore, a conflict in cases of the assets in the Transvaal and the Cape in the shape of shares in companies which transact business there, and accordingly the Order in Council applying s. 20 of the Finance Act to the Cape had to be revoked, and it is impossible to apply that section to the Transvaal at all.

There is no possible doubt as to the legal right of a Dominion parliament to tax all the assets which are physically within the Dominion, and it may also, it seems clear, tax those assets which, as in the case of the personal

recently received new life from a judgement of the Chief Justice of New Zealand.

It was held by the Chief Justice of New Zealand, in the case *In re Award of Wellington Cooks' and Stewards' Union*,[1] that colonial legislation has much more than a mere territorial effect. The question there at issue was whether an award by the New Zealand Court of Arbitration as to the minimum rate of wages to be paid to cooks and stewards on vessels trading between New Zealand and Australia was binding upon two steamship companies, the one registered in New Zealand, and the other registered in Victoria. Neither company obeyed the award, for in Australian and Fijian ports they called upon the employees to do certain work, which under the agreement should have been paid for as overtime and which was not so paid for. The Chief Justice decided that as regards vessels registered in New Zealand the award was binding. It is very possible that the decision was correct as regards registered vessels under s. 735 of the *Merchant Shipping Act*,[2] 1894, but he did not base it upon that section but upon the general power of the New Zealand Parliament, under s. 53 of the Constitution Act of 1852, to make laws for the peace, order, and good government of New Zealand. He held that unless such laws had some extra-territorial effect the power given would be defeated. Was there no power to punish a prize-fight between New Zealanders on a foreign vessel four miles from the coast, or could a duel between New Zealanders be fought with impunity on a foreign ship four miles from land? It was also pointed out by another member of the Court that prisoners on board vessels in transit from one prison of the Colony to another were within the jurisdiction of the New Zealand Courts. He held that the case *In re Gleich*[3] was overruled

estate of a domiciled person, are notionally present in the Dominion. On the other hand, the last power does not belong to a provincial legislature, according to the decision in *Woodruff* v. *Attorney-General for Ontario*, [1908] A. C. 508. Cf. *Lambe* v. *Manuel*, [1903] A. C. 68.

[1] 26 N. Z. L. R. 394.

[2] Keith, *Journ. Soc. Comp. Leg.*, ix. 208 seq.; xi. 294–9; cf. 29 N. Z. L. R. 660.

[3] 1 O. B. & F. S. C. 79.

by the case of *The Attorney-General for Canada* v. *Cain and Gilhula*.[1] As regards *Macleod's*[2] case he rested on the argument that the result would have been other had the accused been a citizen of New South Wales, and he pointed out that a person naturalized in a Colony under the Naturalization Act of that Colony was only a British subject in respect of the Colony, and he would not be subject, unless colonial legislatures had power to bind colonial citizens, to any legislative restrictions outside British territory. He also relied on the fact that a ship could be considered as part of the territory of the state whose flag she flies, and he held that the laws of New Zealand applied to persons on board a New Zealand ship as distinct from a British ship when beyond the territorial limits of New Zealand. He admitted that the doctrine which he laid down was a development of the doctrine of self-government, but he referred to the fact that it had been the glory of the British Constitution that, unlike the Constitution of the United States, it allowed growth, development, and adaptation, and he held that the fact that the power had not hitherto been claimed was no proof that the Constitution Act did not contain a potency, both of legislation and administration, hitherto not exercised in the Colony. It is difficult to accept the views of the Chief Justice. The case of the conveyance of a prisoner from one prison in a Colony to another outside territorial limits is really covered, as the Court seemed to have forgotten, by the *Fugitive Offenders Act*, 1881, s. 25. The overruling of *In re Gleich* by the Privy Council extends only to the precise point there decided, namely, the power of a Dominion legislature to make adequate provision for the removal of undesirable persons from within the Colony. It cannot be used as an argument for the existence of an extra-territorial authority in Dominion parliaments. Nor does it seem reasonable to assume that on a foreign ship not in territorial waters the criminal laws of a Dominion should take general effect; if a duel were so fought then the offenders could be punished in England by virtue of the power given by

[1] [1906] A. C. 542. [2] [1891] A. C. 455.

the *Offences Against the Person Act*, 1861, which was expressly intended in this regard to put a stop to the practice of duelling by British subjects all over the world. Nor can it be held that the attempt to dispose of the case of *Macleod*[1] was satisfactory. There is no trace in the judgement of the Privy Council of the view that they would have differentiated the matter had Macleod been domiciled in New South Wales instead, as was apparently the case, of not being domiciled there. Nor is there any justification for the theory that the general colonial legislation applies to a colonial vessel. The *Admiralty Offences (Colonial) Act*, 1849, and certain sections of the *Merchant Shipping Act*, 1894, confer on Colonial Courts jurisdiction to enforce the laws not of the Colony but the laws of England, which are assumed to prevail upon any British ship within the jurisdiction of the Admiralty. It is true that a doubtful case remains, namely, the position of a British subject by naturalization in a Colony. Colonial naturalization, both by the limitation of the legislative power of a Colony and by the *Naturalization Act*, 1870, can confer the status of a British subject only within the actual limits of a Colony, but as a matter of fact this anomaly is not of much importance, for if a man commits any offence on board a British ship in the high seas he is subject, under s. 686 of the *Merchant Shipping Act*, 1894, to the jurisdiction of any Court in His Majesty's dominions, which would have the power to try the case had the crime been committed within the ordinary jurisdiction of that Court. Even the few cases in which a British subject naturalized in a Colony may escape punishment because colonial laws do not apply beyond the territory may be safely neglected.[2]

While it cannot be held that the attempt of the Chief Justice is very satisfactory or convincing, at the same time it would be idle to ignore, in view of the cases of *Cain* and *Gilhula*, that the territorial limits of the jurisdiction of the Legislature of a Colony must be deemed to extend so far as

[1] [1891] A. C. 455.

[2] See e.g. the Acts 35 Hen. VIII. c. 2; 11 & 12 Will. III. c. 12; 33 & 34 Vict. c. 90; 52 & 53 Vict. c. 52; 46 & 47 Vict. c. 3.

is necessary for the proper enforcement of the powers given. In some cases it would be difficult to contend that these powers can be limited to territorial limits in the strict sense of the word. For example, the *British North America Act*, 1867, provides by s. 91 (7) for the Federation having power to legislate for the peace, order, and good government of Canada in respect of militia, military, and naval service and defence. The Parliament of the Commonwealth of Australia has power under the Constitution, s. 51 (vi), to legislate for the naval and military defence of the Commonwealth. Again, the Parliament of the Union of South Africa has the fullest powers to legislate for the Government of South Africa, and so also in New Zealand and Newfoundland.

In all these cases the effects of their Acts on military subjects are extended by the Imperial *Army Act*, 1881, s. 177, to have effect beyond their territorial limits in respect of their own forces, for the Army Act only applies to them where the Colonial Legislature has made no other provision.

It would be impossible clearly to confine within territorial limits the effect of these laws; naval defences would be quite ineffectual if the vessels ceased to be under any law when they left the three-mile limit. On the other hand, if they then fell under the Imperial Acts, which is not the case from the wording of these Acts, then the power of legislation given to the Dominions would cease to be a reality. It follows, therefore, that naval defence involves extra-territorial legislation, though to what extent it must be difficult to say in view of the absence of authoritative declaration in the Courts. Hitherto, the naval forces of the Colonies, that is to say, of the Australian Colonies, which alone until 1910 had independent naval forces, have been forces which have been in part raised under the terms of an Imperial Act, 28 & 29 Vict. c. 14, and have therefore been specially provided for by Imperial legislation. They are now regulated, since the passing of the Defence Acts of the Commonwealth and Canada, by their legislation, and it is impossible to hold that that legislation

has no effect except within territorial limits.[1] It is true that s. 5 of the Constitution Act exempts from the application of the laws of the Commonwealth the Queen's ships of war, but that exemption is evidently intended to refer to vessels of war under the control of the Crown, in its right of the United Kingdom, and not to forces raised under the authority of the Crown in Australia.

It is also clear that in other matters the Commonwealth Parliament has extra-territorial jurisdiction. For example, it is empowered to legislate by s. 51 (x) for the fisheries in Australian waters beyond territorial limits, by sub-section vii for light-houses, light-ships, beacons, and buoys, and by sub-section xxx for the relations of the Commonwealth with the islands of the Pacific. It is also authorized to legislate by sub-section xxix for external affairs, and by sub-sections xxvii and xxviii for immigration and emigration, and the influx of criminals, and these matters may require extra-territorial control.

Moreover, it is provided by s. 5 of the *Commonwealth of Australia Constitution Act* 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 that clause has been authoritatively interpreted by the High Court of the Commonwealth in the case of *The Merchant Service Guild of Australasia* v. *Archibald Currie and Company Proprietary, Limited*.[2]

It was sought in that case to establish a jurisdiction of the Commonwealth Court of Conciliation and Arbitration over vessels which made round voyages from Calcutta to the Commonwealth and returned to Calcutta. It was argued that this section brought the ships within the ambit of the law of the Commonwealth, and it was pointed out that s. 20 of the Federal Council Act (48 & 49 Vict. c. 60) gave wide powers to the

[1] See Australia Act No. 30 of 1910; Canada 9 & 10 Edw. VII. c. 43, and cf. Canada *Revised Statutes*, 1905, c. 111, which lays down a code of discipline for government vessels. See also *Parl. Pap.*, Cd. 5746–2.

[2] 5 C. L. R. 737. Cf. above, pp. 385, 386.

Federal Council. It was held by the Court, on the other hand, that the Commonwealth Court of Conciliation had no jurisdiction in the case. The section gave jurisdiction only over vessels whose first port of clearance and whose port of destination were in the Commonwealth. The port of destination meant the end of the voyage, and the Act applied only to cases where the beginning and end of the voyage were both in the Commonwealth. In the case in question the most favourable view was to assume that their first port of clearance was an Australian port, and that was extremely doubtful, but the port of destination could not be said to be in the Commonwealth. O'Connor J. said the words of s. 5 must be taken to describe a round voyage beginning and ending within the Commonwealth. It was no doubt intended to cover the shipping trade carried on by ships owned and registered in Australia, and manned and officered by Australian citizens, which for many years had extended to New Zealand and the islands of the Pacific and Indian ports. It was intended by Parliament to place vessels engaged on round voyages in the same position as regards Australian laws as a British ship held with regard to British laws, namely, that while on a voyage coming within the meaning of the section the Australian ships should be, for the purposes of Commonwealth laws, a floating portion of Commonwealth territory. That being the meaning of the section, it appeared to him that when once it was established that the voyage was of that description, it was immaterial to what part of the world it might extend, so that if it were established that the voyage of the respondent's ships was a round voyage, beginning at an Australian port, calling at Calcutta or any other foreign port, and ending in an Australian port, the ships during the whole of the voyage would be under the Commonwealth laws and under the jurisdiction of Commonwealth Courts. In the case in question it appeared rather that the commencement and the end of the voyage were in Calcutta.[1]

[1] Cf. Quick and Garran, *Constitution of Commonwealth*, p. 361; Keith, *Journ. Soc. Comp. Leg.*, x. 123–5.

CHAPTER III

REPUGNANCY OF COLONIAL LAWS

THE second great ground on which Colonial legislation may be invalid is that of repugnancy to English law. The rule used always to be that an Act of a Colonial legislature must not be repugnant to English law,[1] and the exact force of this term was wrapped in decent obscurity: few cases ever rose upon the point, and they were easily disposed of. But the whole question received a new importance when Mr. Benjamin Boothby was appointed a judge of the Supreme Court of South Australia. He promptly began to enunciate a series of doctrines which, though in part neutralized by the presence in the Colony of two other judges who did not in all points agree with him, were very awkward for all concerned in the administration of justice. Eventually the two Houses of the Parliament passed, as required by the Constitution Act, addresses for his removal, and the matter thus came before the Secretary of State for the Colonies.

The judge's views[2] are interesting because they show the high-water mark of distrust of Colonial law. He asserted that the Court was called upon to examine into the validity of the Acts which it was required to interpret: the Select Committee of the Legislative Council which examined him to ascertain his views differed from him in this regard, but the Select

[1] The Constitution of New Zealand still contains this formal rule (15 & 16 Vict. c. 72, s. 53), and as regards South Australia and Tasmania, see 13 & 14 Vict. c. 59, s. 14. Cf. *Bank of Australasia* v. *Nias*, 16 Q. B. 717.

[2] *Parl. Pap.*, August 1862. An Act, 6 Vict. c. 22, gave power to Colonial legislatures to pass laws regarding the admission of evidence of persons who could not take a Christian oath, but this was not considered a ground for admitting the validity of a law of Hong Kong in 1857 altering the law regarding perjury; Forsyth, *Cases and Opinions on Constitutional Law*, p. 23.

Committee of the Lower House, which evidently in great measure understood the position, allowed him the full right of such examination, as did the Governor. Then he impeached the validity of the Constitution Act itself, No. 2 of 1855–6, on various grounds. For one thing, he thought that it was not possible to abridge the prerogative of dissolving an elective House, viz. the Council, as was done by the Act, unless the Imperial Parliament gave express authority to do so. He also held that it was not possible for the Colonial Legislature to abridge the prerogative by requiring that the Attorney-General should be selected from officers in Parliament, and he criticized the provisions of the Act for omitting to require re-election of members who accepted office after being in Parliament. He also impeached the validity of the Real Property Act, because it deprived the suitor in real property cases of a jury trial as laid down in Magna Charta, and further because the Bill should, in his opinion, have been reserved under the royal instructions, and had not been reserved. He persisted in this view, though the Governor pointed out to him that Lord John Russell had expressly laid it down that the instructions were not a legal matter which if disobeyed would invalidate assent, but a direction to the Governor which he had a personal duty to obey, but disobedience to which did not render an assent invalid. He also held that the Electoral Acts were invalid because they had not been reserved as required by the constitution, and that all the Customs Acts were invalid for the same reason.

There can be no doubt that in some respects the judge was unreasonable and wrong-headed: he went so far as to declare that an Act was invalid which imposed a duty of ten shillings on the importation into the Colony of French brandy, because it was at variance with a treaty, the truth being that in the treaty with France the Queen had undertaken to recommend to Parliament the levying of a duty of eight shillings on brandy imported into the United Kingdom. On the other hand, the law officers in England upheld him on one point, and that unfortunately of cardinal importance: they held that it was necessary that the

Electoral Act, No. 10 of 1856, under which the Legislative Council and House of Assembly were elected should have been reserved under the Imperial Act, 13 & 14 Vict. c. 59, s. 32, and they laid it down that all the Acts passed by these bodies were therefore invalid. Accordingly, an Act, 25 & 26 Vict. c. 11, was hastily passed to validate *ex post facto* the laws of South Australia.

Then various questions were put to the law officers of the Crown and answered by them with great care: the questions and answers were as follows:—

1. Is the Supreme Court of South Australia bound, and at liberty to inquire into the validity of an Act passed by the Colonial Legislature, and assented to either by the Queen in Council, or by the Governor in behalf of Her Majesty, and in the case of an Act assented to by the Governor, does the fact that such an Act has, or has not, been left to its operation by Her Majesty make any difference respecting its validity?

2. Supposing the judge at liberty to pronounce on the validity of a Colonial Act, is he to pronounce such an Act invalid, if its provisions be, in his opinion, inconsistent with those of an Imperial Statute intended by the British Parliament to extend to the Colonies in general, or to South Australia in particular?

3. Is he to pronounce such an Act invalid, if its provisions be, in his opinion, contrary to the principles of British law which he deems fundamental, as by denying the sovereignty of Her Majesty, by allowing slavery or polygamy, by prohibiting Christianity, by authorizing the infliction of punishment without trial, or the uncontrolled destruction of aborigines, &c.?

4. Is he to pronounce such an Act invalid if its provisions be different from those which are in fact prescribed in respect of the same matter by British statutes in force in England, though not properly to be described as fundamental principles of British law, e. g., if the Colonial Act abolished grand juries, or allowed offences to be tried by a magistrate for which a jury is required in England, or dispensed with the unanimity of a jury, or varied the numbers of a jury, or altered the laws of evidence or the law of primogeniture, or introduced modes of transfering real property unknown to the British law?

5. If the first of the two preceding questions is to be

answered in the affirmative, and the second in the negative, are we able to suggest any principle which would regulate the distinction between fundamental principles of which the violation would vitiate a Colonial Act, and the non-fundamental rules or customs of legislation which a Colonial Legislature is at liberty to disregard?

6. To what extent would a single provision invalid on account of repugnancy with English law vitiate the rest of the Act?

7. Would a judge be at liberty to pronounce a Colonial Act invalid, though duly assented to by the Governor, on the ground that it fell within one of the classes to which he was forbidden to assent without urgent necessity?

8. In particular, do we see any reason to doubt the validity of the South Australian Constitutional Act?

9. Having special reference to the omission of any reference to South Australia in the 29th section of the Act 13 & 14 Vict. c. 59, do we see any reason to doubt the power of the South Australian Legislature to constitute courts of justice?

10. Do we see anything objectionable in Mr. Boothby's view of his own obligation to conform his own judgement to the decisions of the Supreme Court of which he is a member?

11. And, finally, whether we concur with the Committee of the House of Assembly in thinking Imperial legislation advisable or necessary in order to place beyond doubt all or any of the above questions.

The report was as follows:—

That 1. The powers of the Colonial Legislature being conferred by Act of the Imperial Parliament, and limited by the same enactment, and so, valid or invalid, as they keep within or transgress the prescribed limits, the Supreme Court of South Australia is, in our opinion, bound (and certainly at liberty) to satisfy itself of the legal validity of any Act of the Colonial Legislature, the provisions of which it is called upon to administer.

In the case of an Act assented to by the Governor, we think that the fact of its having been left to its operation by Her Majesty would not affect the question of its validity.

2. We answer this question in the affirmative, as in the case supposed an unquestionable 'repugnancy' would be apparent between the English law and the Colonial enactment, and the Colonial Legislature is debarred from the enacting of laws being thus repugnant (13 & 14 Vict. c. 59, s. 14).

3. This question we also answer in the affirmative, and on the same ground of an unquestionable 'repugnancy'.

4. This question we answer in the negative, subject to our observations in answer to the question next following.

5. We are unable to lay down any rule to fix the dividing line between fundamental and non-fundamental rules of English law, as referred to in questions 3 and 4, and our answers thereto. It may safely, however, be stated that no laws which do not rest upon principles equally applicable in the nature of things to all Her Majesty's Christian subjects in every part of the British Dominions can be deemed to be such as would make a departure from them by a Colonial Legislature void on the ground of repugnancy to the principles of English law. We may add that we can hardly anticipate any practical difficulty in the way of the Court deciding the question of repugnancy, if called on so to do. It is extremely improbable that the Colonial Legislature would pass, that the Governor would sanction, and that the Crown would leave to its operation any Act repugnant in the above sense, and we think that the tribunals should not under these circumstances be astute to discover such repugnancy, but ought to disaffirm existing Acts on this ground only in cases admitting of no reasonable legal doubt. Such cases, we think, are not likely to occur.

6. We think that in an Act containing various distinct and separable provisions, one of such provisions invalid on account of 'repugnancy' would not vitiate other portions of the Act, which might be free from that defect.

7. We answer this question in the negative. We understand the expression of the Governor, being 'forbidden to assent without urgent necessity', to refer to the Royal 'instructions', of which a copy is enclosed in the last enclosure in the accompanying paper, No. 511, and although the 13 & 14 Vict. c. 59. ss. 12 and 33, apply to certain Colonial Acts the provisions of the 5 & 6 Vict. c. 76 (*see* ss. 11, 31), empowering Her Majesty to issue 'instructions' and the Governor to assent in conformity with such instructions, yet we consider such instructions to be a matter between the Crown and the Governor, and to be to the latter directory only. The Governor alone can judge of the 'urgent necessity' in case of which, when the Statute does not expressly require the Act to be 'reserved', &c., he is at liberty on all occasions to assent.

8. We see no reason to doubt the validity of the South Australian Constitutional Act, *per se*, understanding thereby

the Act of the old Legislative Council, No. 2, 1855–6. Upon the invalidity of other and subsequent South Australian Acts, some of them intimately connected with the Constitutional Act, we have already expressed our opinion on another case submitted to us, and an Imperial Act has been passed to remedy their defects.

9. We understand that the express mention of New South Wales and Van Diemen's Land in the 29th section of the 13 & 14 Vict. c. 59, so far as relates to courts of justice, was or may have been considered to be rendered necessary by Imperial legislation on the subject of the courts of justice of those Colonies previous to the passing of that Act, and that no similar legislation had taken place with respect to courts of justice in South Australia. Under these circumstances we see no reason to doubt the power of the South Australian Legislature to constitute courts of justice.

10. We deem it to be the duty of a single judge in any particular case, generally speaking, to conform his own judgement to the decision on the same point of the Supreme Court of which he is a member. Such is the practice of single judges in the United Kingdom, and a departure from it, unless under extraordinary circumstances, would, as it seems to us, be highly inconvenient.

11. We have already answered this question in the affirmative, and would only add that we do not think it expedient to go further in the way of new Imperial legislation than is proposed to be done in the Bill now before Parliament.

The unhappy Colony was still to have another experience of invalidity on the ground of repugnancy, for while the Acts in question were validated, another serious blunder was made with regard to a subsequent Electoral Act of 1861, though reserved, by not seeing that the statutory majorities in the two Houses had been observed as required by s. 34 of the Constitution Act itself. The Acts subsequent to the operation of the Electoral Act were thus all invalid, and required to be validated, and moreover, the judges were inclined to believe that the Legislature could not alter its constitution as a whole.[1] An attempt was made to settle the question by the passing of the Act 26 & 27 Vict. c. 84.[2] But the Act was of

[1] See Blackmore, *Constitution of South Australia*, p. 60.

[2] South Australia *Parl. Pap.*, 1863, Nos. 23, 129, 130.

limited scope in the view of the Court, and the case of *Auld* v. *Murray* revealed new doubts and difficulties. The right of the Parliament to create judges, to establish a Court, was denied, and it was laid down by Judge Boothby that by repealing, by Act No. 10 of 1856, Ordinance No. 1 of 1851, the Mixed Council had destroyed its existence, and also the existence of the Legislature created by Act No. 2 of 1855–6. The law officers were consulted, and gave an opinion of September 28, 1864, which advocated the passing of an Act to remove the doubts—in some cases needless—of South Australian judges. There followed upon this correspondence the passing of the *Colonial Laws Validity Act*, 1865, which finally regulated and determined the position of the laws of the Colonies as regards Imperial legislation and repugnancy to the law of England.[1] The law recites that doubts have been entertained respecting the validity of diverse laws enacted, purporting to have been enacted by the Legislatures of certain of Her Majesty's Colonies, and respecting the powers of such Legislatures, and that it is expedient that such doubts should be removed, and in s. 1 defines Colony as including all of Her Majesty's possessions abroad, in which there shall exist a legislature, except the Channel Islands, the Isle of Man, and the territories from time to time vested in Her Majesty under any Act for the Government of India, and legislature is defined to mean the authority other than the Imperial Parliament or Her Majesty in Council competent to make laws for any Colony: the law then proceeds:

> The Term 'Representative Legislature' shall signify any Colonial Legislature which shall comprise a Legislative Body of which One Half are elected by Inhabitants of the Colony:
> The Term 'Colonial Law' shall include Laws made for any Colony either by such Legislature as aforesaid or by Her Majesty in Council:
> An Act of Parliament, or any Provision thereof, shall, in construing this Act, be said to extend to any Colony when it is made applicable to such Colony by the express Words or necessary Intendment of any Act of Parliament:

[1] The rule it laid down was that applied to Canada by 3 & 4 Vict. c. 35, s. 3. See Blackmore, op. cit., pp. 65 seq.; 72 *Lords' Journals*, 224.

The Term 'Governor' shall mean the Officer lawfully administering the Government of any Colony:

The Term 'Letters Patent' shall mean Letters Patent under the Great Seal of the United Kingdom of *Great Britain* and *Ireland*.

2. Any Colonial Law which is or shall be in any respect repugnant to the Provisions of any Act of Parliament extending to the Colony to which such Law may relate, or repugnant to any Order or Regulation made under Authority of such Act of Parliament, or having in the Colony the Force and Effect of such Act, shall be read subject to such Act, Order, or Regulation, and shall, to the Extent of such Repugnancy, but not otherwise, be and remain absolutely void and inoperative.

3. No Colonial Law shall be or be deemed to have been void or inoperative on the Ground of Repugnancy to the Law of *England*, unless the same shall be repugnant to the Provisions of some such Act of Parliament, Order, or Regulation as aforesaid.

4. No Colonial Law, passed with the Concurrence of or assented to by the Governor of any Colony, or to be hereafter so passed or assented to, shall be or be deemed to have been void or inoperative by reason only of any Instructions with reference to such Law or the Subject thereof which may have been given to such Governor by or on behalf of Her Majesty, by any Instrument other than the Letters Patent or Instrument authorizing such Governor to concur in passing or to assent to Laws for the Peace, Order, and good Government of such Colony, even though such Instructions may be referred to in such Letters Patent or last-mentioned Instrument.

5. Every Colonial Legislature shall have, and be deemed at all Times to have had, full Power within its Jurisdiction to establish Courts of Judicature, and to abolish and reconstitute the same, and to alter the Constitution thereof, and to make Provision for the Administration of Justice therein; and every Representative Legislature shall, in respect to the Colony under its Jurisdiction, have, and be deemed at all Times to have had, full Power to make Laws respecting the Constitution, Powers, and Procedure of such Legislature; provided that such Laws shall have been passed in such Manner and Form as may from Time to Time be required by any Act of Parliament, Letters Patent, Order in Council, or Colonial Law for the Time being in force in the said Colony.

6. The Certificate of the Clerk or other proper Officer of a Legislative Body in any Colony to the Effect that the Document to which it is attached is a true Copy of any

Colonial Law assented to by the Governor of such Colony, or of any Bill reserved for the Signification of Her Majesty's Pleasure by the said Governor, shall be prima facie Evidence that the Document so certified is a true Copy of such Law or Bill, and, as the Case may be, that such Law has been duly and properly passed and assented to, or that such Bill has been duly and properly passed and presented to the Governor; and any Proclamation purporting to be published by Authority of the Governor in any Newspaper in the Colony to which such Law or Bill shall relate, and signifying Her Majesty's Disallowance of any such Colonial Law, or Her Majesty's Assent to any such reserved Bill as aforesaid, shall be prima facie Evidence of such Disallowance or Assent.

And whereas Doubts are entertained respecting the Validity of certain Acts enacted or reputed to be enacted by the Legislature of *South Australia*: Be it further enacted as follows:

7. All Laws or reputed Laws enacted or purporting to have been enacted by the said Legislature, or by Persons or Bodies of Persons for the Time being acting as such Legislature, which have received the Assent of Her Majesty in Council, or which have received the Assent of the Governor of the said Colony in the Name and on behalf of Her Majesty, shall be and be deemed to have been valid and effectual from the Date of such Assent for all Purposes whatever; provided that nothing herein contained shall be deemed to give Effect to any Law or reputed Law which has been disallowed by Her Majesty, or has expired, or has been lawfully repealed, or to prevent the lawful Disallowance or Repeal of any Law.

It will be seen that, comparing the Act with the opinion of the law officers in Judge Boothby's case, there are two important concessions made as well as removing the doubts which were possible as to the correctness of the views of the law officers: in the first place, the condition of non-repugnancy to the general principles of English law disappeared for good[1]; then, in the second place, the question of the royal instructions was settled in law as it had been laid down to be by the Secretary of State. In both regards Colonial legislation was rendered less liable to useless criticism and avoidable doubt. On the other hand, the impossibility of the repeal

[1] See, however, *Eastern Rand Exploration Co. Ltd.* v. *Nel and others*, [1903] T. S. 42; *Globe Advertising Co.* v. *Johannesburg Town Council*, [1903] T. S. 335.

by the Colonial Parliaments of Imperial statutes was once and for all laid down.

There has been, however, some confusion as to the right of a Colonial Parliament to repeal clauses in an Imperial Act, which applied to the Colony not by reason of the Acts being put in force there by the Imperial Parliament by legislation for that place, but because in introducing English law there the statutes of general application were included. An obvious case is the Act 9 Geo. IV c. 83, which introduced English law into New South Wales as far as it was applicable: it has been contested that no local legislation could alter the law introduced, but the position is clearly absurd if for no other reason than that the Imperial statute of 1828 expressly contemplates changes being made by the local Legislature: it would have indeed been too terrible to suppose that the standard of 1828 was to be the permanent boundary of the legislation of the Colony. But the principle applies more widely still: where the statutes of general application[1] have been introduced into a Colony by local enactment or by Imperial enactment which contains power of amendment, the fact that the principle is embodied in an Imperial statute makes it no less possible to amend than if it were a part of the common law:[2] in the case of an Imperial Act applying directly to the Colony the case is quite different: the Imperial Acts could be modified which were introduced by the Act of 1828 whatever their terms; that Act could only be modified by express authority given by it and other Imperial Acts. The distinction seems obvious, yet in a Commonwealth Act, No. 11 of 1909, regarding marine insurance, the somewhat comic device was adopted to avoid repealing two Imperial Acts (19 Geo. II. c. 37; 28 Geo. III. c. 56) introduced by the Act of 1828, of declaring by s. 5

[1] These are statutes not locally suited only to English conditions. There are several decisions by the Commonwealth as to what statutes were introduced into New South Wales in 1828. See also *Attorney-General for New South Wales* v. *Love*, [1898] A. C. 679.

[2] Cf. *Vincent* v. *Ah Yeng*, 7 W. A. L. R. 145; *in re Reg.* v. *Marais, ex parte Marais*, [1902] A. C. 51.

that the Imperial Acts should not apply to transactions governed by that Act of the Commonwealth, a provision which would have been waste paper if the Act had applied to the cases as Imperial Acts and not as legislation introduced by an Imperial Act giving a power of modification.

One somewhat important point has been raised in Canada, namely that while it cannot be denied that Canada is subject to the operation of the law of 1865, yet the *British North America Act* really gives authority to the Parliament of the Dominion to repeal any Imperial Act whatsoever referring to Canada passed before 1867. It was held by Draper C. J. in the case of *Regina* v. *Taylor*,[1] that the word 'exclusive' in s. 91 of the *British North America Act* was intended to operate as a final renunciation by the Imperial Parliament of any intention to legislate for the Dominion of Canada. In this judgement it seems that Strong C. J. afterwards expressed his concurrence.[2] Lefroy[3] also quotes as supporting this view the case of *The Royal*,[4] in which it was held that the provision in the Imperial Merchant Shipping Act of 1854 which forbad a sailor to bring a suit for wages in the Vice-Admiralty Court for a sum under £50 had been repealed by s. 56 of the Dominion *Seamen's Act* of 1873, which fixed the amount as two hundred dollars in the case of ships registered in Quebec, Nova Scotia, and British Columbia. But this is a different case, and it falls under the rule that an Imperial Act can be altered in virtue of a power given thereby, viz. in the case in question the power to regulate registered vessels, which by s. 547 included the power to regulate these vessels in a manner other than that expressly provided for in the Act itself. In the case of *Holmes* v. *Temple*,[5] however, Chauveau J. in Sessions of the Peace of Quebec also interpreted 'exclusive' as meaning that the Imperial Parliament had abdicated its functions, but that opinion is one of so inferior a Court, and so little con-

[1] (1875) 36 U. C. Q. B. 183. See Lefroy, *Legislative Power in Canada*, pp. 208–31. [2] Lefroy, p. 211. [3] Op. cit., p. 212.

[4] (1883) 9 Q. L. R. 148. Contrast *The Farewell*, 7 Q. L. R. 380.

[5] (1882) 8 Q. L. R. 351; the actual decision in the case was correct.

sidered apparently that it is hardly an authority for anything except the danger of quoting judgements of inferior Courts on points of law. In the British Columbia case of *Tai Sing* v. *Maguire*,[1] Gray J. emphatically rejected the dictum of Draper C. J., and pointed out that the word 'exclusive' was clearly a word dividing power between the Dominion and provinces. So in *ex parte Worms*[2] it was said by Dorion C. J.: 'The Act of 1870 (as to extradition) is not inconsistent with s. 132 of the *British North America Act* of 1867, and if it were the last Act would prevail.' In *Regina* v. *The College of Physicians and Surgeons of Ontario*[3] the Ontario Court of Queen's Bench held that the Imperial Medical Act of 1868 applied to Canada, and gave a British medical practitioner a right to be registered in Ontario. It was there very neatly but ineffectually argued that as education was an exclusive power of the provinces the Imperial Act of 1868 must be read as not intended to interfere with the exclusive power, and so must not be held to exclude the Ontario authorities from requiring the applicant to pass an examination as a condition of registration.[4]

The question as to repugnancy of Colonial legislation has also been discussed in special connexion with the law of copyright in Canada.

When the question was brought to a head in 1889 the Canadian Government and their advisers did not deny the power of the Imperial Parliament to legislate regarding copyright for the whole Empire. Thus they did not deny that the Imperial Act of 1886 (49 & 50 Vict. c. 33), which was applied by the Order in Council of 1887 to Canada, was binding upon Canada. They contended, however, from a constitutional point of view, that such legislation should be passed by Canada and not by the Imperial Parliament, but there was no

[1] (1878) 1 B. C. (Irving), at p. 107.

[2] (1876) 22 L. C. J. 109, at p. 111; 2 Cart., at p. 315.

[3] (1879) 44 U. C. Q. B. 564; 1 Cart. 761. Cf. below, p. 666, n.

[4] Cf. also *Metherell* v. *The Medical Council of British Columbia*, (1892) 2 B. C. (Cassidy), at p. 189. The Imperial Act of 1886 (49 & 50 Vict. c. 48) modifies the law as to registration and only requires reciprocity, no longer giving a British degree Imperial validity *ipso facto*.

legal difference of opinion on this head. On the other hand, the Canadian Government held, differing from His Majesty's Government, that the Canadian Parliament had power to repeal any provisions as to copyright enacted prior to 1867, the year in which the *British North America Act* was passed. Section 91 of that Act empowers the Parliament of Canada to make laws for the peace, order, and good government of Canada in relation to all matters not coming within the classes of subjects assigned by the Act exclusively to the Legislature of the Provinces, and for greater certainty, but not so as to restrict the generality of these terms, it is declared that the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects thereinafter enumerated, which include as No. 23 copyrights.

It was argued by the Government of Canada, in a memorandum of August 3, 1889, that this section conferred upon the Canadian Parliament the right to legislate as to copyright without regard to any previous legislation whatsoever, whether passed by the Provincial or Imperial Parliaments, subject only to the Imperial right of disallowance and also to the control by Imperial legislation subsequent to the *British North America Act* and applicable to Canada.[1]

The interpretation placed by His Majesty's Government on the terms of the Act of 1867 was quite different; it was held that that Act conferred upon the Parliament of Canada exclusive powers as against the Provinces of legislation with regard to copyright, but that it did not confer upon Canada any larger power of legislation than the several provincial legislatures would have enjoyed had the Act of 1867 never been passed. This opinion was expressed at a very early date, on the 7th November, 1871, by Sir Roundell Palmer (afterwards Lord Selborne) and Mr. Herschell (afterwards Lord Herschell), who said :—

It is abundantly clear that the provision in the Act of the Imperial Legislature, 30 Vict. cap. 3, by which the

[1] *Parl. Pap.*, C. 7783, pp. 5, 6. This doctrine first came to light in Sir J. Thompson's defence of the refusal of Government to disallow the Jesuits' Estates Act of Quebec (51 & 52 Vict. c. 13); see Canada *House of Commons Debates*, 1889, pp. 958 seq.

Dominion of Canada was constituted, declaring that the exclusive legislative authority of the Dominion Parliament extends (amongst other things) to copyrights, has reference only to the exclusive jurisdiction in Canada of the Dominion Legislature as distinguished from the Legislatures of the Provinces of which it is composed.[1]

This opinion was adopted by His Majesty's Government in Lord Carnarvon's dispatch of June 15, 1874.[2] That dispatch was based on an opinion of the then law officers of the Crown (Sir Richard Baggallay and Sir John Holker), given on May 22, 1874, in which they accepted the views of Sir Roundell Palmer and Mr. Herschell. Moreover, a similar opinion was given by the same two law officers on June 7, 1875, and in consequence of this opinion the Canadian Act of 1875 with regard to copyright was expressly confirmed by an Imperial Act, 38 & 39 Vict. c. 53. Despite these facts, Sir John Thompson, in the memorandum above referred to, stated that the people of Canada could not accept the interpretation which had been placed upon the Act of 1867 by His Majesty's Government. In support of that opinion he urged not merely the view of the people and Parliament of Canada, but certain cases decided in the Privy Council. No answer to this argument was ever sent by the Imperial Government.[3]

In the case of *Hodge* v. *the Queen*[4] which was decided by the Judicial Committee of the Privy Council in 1883, it was held that the Legislative Assembly of Ontario, in the exercise of the legislative powers granted to it by Section 92 of the *British North America Act*, 1867, did not act as a delegate from, or an agent of, the Imperial Parliament, but with authority as plenary and as ample within the limits prescribed by Section 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow.

In the case of *Powell* v. *The Apollo Candle Company, Limited*,[5]

[1] *Parl. Pap.*, H. C. 339, 1872, p. 74.

[2] *Parl. Pap.*, H. C. 144, 1875, pp. 12, 13.

[3] Nor does Lefroy, *Legislative Power in Canada*, pp. 224, 227, deal with the argument drawn from these cases by Sir J. Thompson, though (p. 229) he seems to admit that the contention is not sound in law.

[4] 9 App. Cas. 117.

[5] 10 App. Cas. 282

decided in 1885, the Privy Council laid down a similar doctrine; that is to say that the powers conferred upon a Colonial legislature were not in any sense to be exercised by delegation from, or as an agent of, the Imperial Parliament, but within the limits and subject to the areas prescribed by the Imperial Parliament the local legislature was supreme and had the same authority as the Imperial Parliament.

These cases were evidently interpreted by Sir John Thompson to mean that Colonial Legislatures had the same power as the Imperial Parliament in the sense that they could repeal laws passed by the Imperial Parliament and applying to the Colonies in question. In this connexion it is sufficient to observe that this interpretation would render once and for all absurd the *Colonial Laws Validity Act*, 1865, which declares that Colonial statutes shall be void and inoperative if they are repugnant to the provisions of any Acts of Parliament extending to the Colonies, or repugnant to the provisions of any law or regulation made under the authority of such Acts and having in such Colony the force and effect of such Acts.

Sir John Thompson evidently felt the difficulty of this matter, for he suggests in paragraph 41 of his report that as the *British North America Act* was passed subsequently to the *Colonial Laws Validity Act*, it might be argued that it conferred a constitution more liberal than those to which the statute applied. In the alternative he suggested that the repugnancy indicated must exist in relation to some statute passed after the creation of the Colonial Legislature. He argued that if the view taken by the Imperial Government were correct, it would be impossible for the Parliament of Canada to make laws in regard to any of the subjects which were assigned to the Canadian Parliament by the Act of 1867, when such legislation was repugnant to any Imperial legislation which existed previously applicable to these subjects in the Colonies, and he asserted that such Imperial legislation had existed.

As a matter of fact, the assertion was, generally speaking, inaccurate, and in point of fact the Imperial legislation applicable to North America had either been expressly

repealed by the Imperial Parliament or the Colonial Legislatures had been empowered to repeal it. Sir John Thompson did not suggest, and in all probability could not have suggested, a concrete case to the contrary.

More importance attaches to two other cases cited by Sir J. Thompson.

In the case of *Harris* v. *Davies*,[1] the Judicial Committee of the Privy Council decided in 1885 that the Legislature of New South Wales had power to repeal a statute of James I (21 Jac. I, cap. 16, s. 6), and impliedly did so by an Act, 11 Vict. No. 13, s. 1, of that Colony, which, according to its true construction, placed an action for spoken words upon the same footing as regards costs and other matters as an action for written slander.

The section of the Imperial Act in question provided that in all actions for slanderous words, if the jury assessed the damages under 40*s*., the plaintiff should recover only as much costs as the damages so given by the jury.

In the case in question, in New South Wales, the verdict was for one farthing, and the Judge certified for costs. The prothonotary refused to tax and allow them on the ground that under the section in question the respondent could not recover more costs than damages. A *rule nisi* was obtained by the respondent calling on the prothonotary to show cause why he should not be directed to tax the costs, and the rule was afterwards made absolute. The Supreme Court of New South Wales held that the section of the Act of James ceased on the passing of 11 Vict. No. 13 to have any operation in the Colony. The Privy Council took the same view, and the decision was due to the fact that the Act of James, which of course was passed at a time before any part of Australia was a British Colony, was only introduced into New South Wales by an Imperial Act, 9 Geo. IV. c. 83, which expressly contemplates, by s. 24, limitations and modifications of that, and the other legislation introduced into the Colony under the Act, by the Legislature to be set up in New South Wales.[2]

[1] 10 App. Cas. 279.

[2] See Clark, *Australian Constitutional Law*, p. 301; above, p. 411.

The other case cited by Sir J. Thompson also does not really support his contention. It is that of *Riel* v. *The Queen*,[1] decided in 1885 by the Judicial Committee. Sir J. Thompson summarizes the case as follows in paragraphs 38 and 39 of his report :—

There had been three Imperial Statutes for the regulation of trial for offences in Rupert's Land, since known as the North-West Territories of Canada. The Statutes of Canada made other provision inconsistent with these statutes, and the conviction of the prisoner had taken place under the Statutes of Canada. The Lords of the Judicial Committee declined to admit an appeal, entertaining no doubt as to the correctness of the conviction.

But reference to the report of the case will show that the position was quite otherwise. Riel was tried for the crime of treason before a Stipendiary Magistrate and a Justice of the Peace, with the intervention of a jury of six persons, in the North-West Territories of the Dominion of Canada, and having been found guilty was sentenced to death. The Court of Queen's Bench for the Province of Manitoba, on appeal, confirmed the sentence. The petitioner applied for special leave to appeal on the ground that the Stipendiary Magistrate and the Justice had no jurisdiction to try him for treason; if they had, there were errors in procedure which vitiated the trial; viz. there was no indictment preferred by a Grand Jury, no coroner's inquisition, and the evidence was not taken down in writing as required by Statute. It was argued for the petitioner that the Statute under which he was tried (a Canadian Statute, 43 Vict. c. 25, s. 76), made under the authority of the Imperial Act 34 & 35 Vict. c. 28, was *ultra vires* the Legislature. Treason was in a peculiar manner an offence against the State, and the Imperial Parliament could not have intended that the Dominion Parliament should legislate upon it to the extent of altering the statutory right of a man put upon his trial regarding it. The petitioner was entitled to all the rights which he possessed under English law unless they had been specially taken away.

[1] 10 App. Cas. 675.

He possessed, under that law, a statutory right to trial before a judge and a jury of twelve, with a right of challenging thirty-five; and, moreover, it was argued that the Act was not necessary for peace, order, or good government. It was also argued that the Canadian Act of 1880 had not been fully complied with, as the evidence had been taken in shorthand and not in writing.

The decision of the Court, which was delivered by Lord Halsbury, was unfavourable to the contention on behalf of Riel. It was pointed out that the Imperial Statute of 34 & 35 Vict. c. 28 provided that the Parliament of Canada might from time to time make provision for the administration, peace, order, and good government of any territory not for the time being included in any province. It could not be held that because the provisions made by the Canadian Parliament differed from the provisions made in England they were not provisions for peace, order, and good government, nor was it open to a Court to substitute its own opinion as to whether any particular enactment was calculated as a matter of fact and good policy to secure peace, order, and good government for the decision of the Legislature. The Privy Council also dismissed the objection taken as to the use of shorthand instead of ordinary writing.

It is true that in the judgement no special mention is made of the fact that Imperial Statutes had formerly regulated judicial proceedings in the North-West Territories before they were merged with Canada. The reason for this was that s. 5 of the Rupert's Land Act, 1868 (31 & 32 Vict. c. 105), which was referred to in the discussion, and which was before the Court, expressly provides that from the date on which Rupert's Land was admitted to become part of the Dominion of Canada it should be lawful for the Parliament of Canada to make within the land and territory so admitted all such laws, institutions, and ordinances, and to constitute such Courts and officers as might be necessary for the peace, order, and good government of Her Majesty's subjects and others therein; provided that until otherwise enacted by the said Parliament of Canada all the powers, authorities, and juris-

diction of the several courts of justice then established in Rupert's Land, and of the several officers thereof, and of all magistrates and justices then acting within the said limits, should continue in full force and effect thereunder. That is to say, the Imperial Parliament expressly authorized the Canadian Parliament to alter the Imperial Acts relating to matters in Rupert's Land. It is indeed obvious that such a state of affairs was essential; Rupert's Land had been regulated in part by the authority of the Hudson's Bay Company and in part by special Imperial statutes, and when it was given over to Canada it was necessary that the Canadian Parliament should be given a free hand to legislate with regard to it. It will therefore be seen that the arguments adduced by Sir John Thompson are without validity.

The subject of copyright in Canada, although it has elicited certain legal decisions, has not, unfortunately, produced a final decision on the point discussed above; that is, the right of the Parliament of Canada to repeal an Imperial Act which extends to Canada but which was passed before 1867. The right, however, was discussed and was denied in a Canadian case by two judges, namely the case of *Smiles* v. *Belford*,[1] in the Appeal Court of Upper Canada. Their decision was to the effect that the Imperial Act of 1842 was in force in Canada, and had not been, and could not be, modified by Canadian legislation.

In the case of *Low* v. *Routledge*[2] it was held that an alien who during the time of his temporary residence in a British Colony published in the United Kingdom a book of which he was the author was entitled under the Imperial Act of 1842 to the benefit of English copyright, and that British copyright, when once it existed, extended, under the 29th section of the statute, over every part of the British Dominions. It was not, indeed, even contended, according to Lord Chelmsford, before the Court that any local law in Canada could prevent a native of Canada from acquiring an English copyright which would extend to Canada as well

[1] 1 O. A. R. 436. [2] 1 Ch. App. 42.

as to all other parts of the British Dominion, though the requisitions of the Canadian law had not been complied with.

In the more recent case of the *Imperial Book Company* v. *Black*[1] it was expressly held by the Supreme Court of Ontario[2] and by the Court of Appeal of Ontario[3] that the Imperial Act of 1842 was in force in Canada. This judgement was confirmed by the Supreme Court of Canada, but in giving the decision Sedgewick J. stated that the Court expressed no opinion one way or the other upon the question as to whether *Smiles* v. *Belford* was rightly decided. It was still open for discussion as to whether the Parliament of Canada, having been given exclusive jurisdiction to legislate upon the subject of copyright, might not, by virtue of that jurisdiction, be able to override Imperial legislation antecedent to the *British North America Act*, 1867. There has been no subsequent judicial decision to vary or modify the question in any way. The Judicial Committee of the Privy Council[4] declined to grant special leave to appeal from this decision, no doubt on the ground that it was correctly held that the Act of 1842 was still in force, but of course this leaves the wider issue untouched.

It should be noted, however, that a similar contention has been put forward by the Law Department of the Commonwealth of Australia in connexion with the question of merchant shipping. The Commonwealth Constitution (ss. 51 (i) and 98) confers upon the Parliament of the Commonwealth power to legislate with regard to merchant shipping; and as the Commonwealth Constitution, which depends on an Imperial Act of 1900, is subsequent to the *Merchant Shipping Act*, 1894, ss. 735 and 736 of which conferred upon Colonial Parliaments certain restricted powers of legislation with regard to vessels registered in the Colonies or engaged in their coasting trade, it was suggested by the Secretary to the Attorney-General's Department that the Act of 1900 enabled the Commonwealth Parliament to legislate without

[1] 35 S. C. R. 488.
[2] 8 O. R. 9.
[3] 10 O. A. R. 488.
[4] 21 T. L. R. 540.

regard to the restrictions contained in the Act of 1894.[1] The view adopted by the Secretary to the Law Department was accepted by the Government of the Commonwealth in a dispatch from the Prime Minister of June 15, 1908.[2]

The reply of His Majesty's Government was given in a dispatch of September 18, 1908,[3] and subsequently to the date of that dispatch the provisions of the draft Commonwealth Navigation Bill were in 1910 so amended as to remove the objections taken by the Imperial Government to its provisions. No such claim appears ever to have been made by the Government of the Commonwealth of Australia with regard to copyright, and it is admitted that the *Colonial Laws Validity Act* applies to Commonwealth laws.[4]

Of course it must not be lightly assumed that an Act is repugnant to an Imperial Act, and unless it is clear that the Imperial Act does extend it will be assumed not so to extend.[5]

It is a matter of contention in each case what Acts are in force by necessary intendment in the Colonies. It has been decided in the case of *New Zealand Loan and Mercantile Agency Co.* v. *Morrison*[6] that the *Joint Stock*

[1] *Parl. Pap.*, Cd. 3023, p. 61. Contrast Quick and Garran, *Constitution of the Commonwealth*, pp. 351, 352, 656.

[2] *Parl. Pap.*, Cd. 4355, p. 7. Cf. also Gen. Botha's view in Cd. 5745, p. 423.

[3] Ibid., p. 20. In the case of Canada the position is different, as the Act of 1894 is subsequent to the *British North America Act.* But also it is clear that after 1867 it was still held that the Act of 1854 as to registered vessels applied to Canada as well as that of 1869 regarding coasting vessels, for the Acts Nos. 128 and 129 of 1873 were both enacted not under any supposed power to repeal Imperial Acts, but under the Act mentioned as set out in the Acts in question; so in 1908 (c. 64) as regards the coasting trade. For older views as to power to alter Imperial Acts, see Lewis, *Essay on the Government of Dependencies*, pp. 91, 92.

[4] See Quick and Garran, *Constitution of the Commonwealth*, pp. 351, 352. The rule applies of course to the Canadian Provinces (cf. *L'Union S. Jacques de Montréal* v. *Bélisle*, 6 P. C. 31); and also to the Union Provinces, for it is a rule of common law as well as statutory.

[5] *Penley* v. *The Beacon Assurance Co.*, 10 Gr. 422.

[6] [1898] A. C. 349.

Companies Arrangement Act, 1870, is not applicable to the Colonies, people in which are therefore not bound by an arrangement under the Act, although in bankruptcy matters it is otherwise under the *Bankruptcy Act*, 1883.[1] Again, it has been held that the levying by Canada of a duty on foreign vessels which are imported into Canada to be registered there is not contrary to the *Merchant Shipping Act*, 1894.[2] The Mortmain Act of 1891, according to *Mayor, &c. of Canterbury* v. *Wyburn*,[3] does not apply to a Colonial will. The *Fine Arts Copyright Act* of 1862 does not apply to the Dominions according to the decision in *Graves & Co., Ltd.* v. *Gorrie*.[4]

[1] *Callender Sykes & Co.* v. *Colonial Secretary of Lagos*, [1891] A. C. 460; see Dicey, *Conflict of Laws*,[2] pp. 329 seq.

[2] *Algoma Central Railway Co.* v. *The King*, [1903] A. C. 478.

[3] [1895] A. C. 89. Cf. *Carrigan* v. *Redwood*, 30 N. Z. L. R. 244, where it is held that a grant for the purpose of saying masses was valid, the English law in force by adoption in New Zealand not including the Acts forbidding such grants. But see as to *Wyburn's* case, Dicey, *Conflict of Laws*,[2] p. 669, n. 1.

[4] [1903] A. C. 496. In *Phillips* v. *Eyre*, 6 Q. B. 1, it was discussed whether Magna Charta was not in force in Jamaica so as to render void the Indemnity Act passed for Eyre, but it was held otherwise. In *The Bishop of Natal* v. *Wills*, 1867 N. L. R. 60, and *The Bishop of Natal* v. *Green*, 1868 N. L. R. 138, will be found a discussion of the extension of the Imperial Acts regarding the ecclesiastical powers of the Crown to Natal.

CHAPTER IV.

THE ALTERATION OF THE CONSTITUTION

§ 1. The Constituent Authority of Dominion Parliaments

The next restriction on the powers of Colonial legislatures arises directly from the preceding, namely the need of not being repugnant to an Imperial Act. The *Colonial Laws Validity Act*, 1865, recognizes the constituent character of all representative legislatures, and allows it full play subject only to a proviso that the legislation by which the constitution is altered must observe any rules laid down by Act of Parliament, letters patent, Orders in Council, or Colonial Acts applying to the Colony. The Act makes it clear that a non-representative legislature has no power of constitutional change; it can in fact be altered only by the authority which created it in the original case: thus constitutions of ordinary Crown Colonies granted by letters patent in one form or another can only be altered by the same mode of procedure or Imperial Act, and it is only an apparent exception when the Cape was allowed by letters patent of May 23, 1850, to alter its constitution by an ordinance: the ordinance was merely a convenient means for allowing the constitution to be drafted locally, and it was specially ratified and altered by Order in Council of March 11, 1853, which is with the earlier instrument the real basis of the constitution. In some cases legislatures not now representative have been so in the past, and have by Act vested their full powers in legislatures now existing, which therefore have power in virtue of that fact to change their

constitutions, as indeed has been regularly done in the West Indies.[1]

This provision of the *Colonial Laws Validity Act* causes every constitutional alteration to be a matter of other moment than a mere change in an ordinary law. Thus in the case of an Imperial Act the legislature cannot fetter its successor. If, for example, it were enacted by an Imperial Act that a certain provision therein contained, and the section containing it, should only be repealed by two-thirds majorities in both Houses the provision would be a mere dead letter; the next Parliament could do what it liked by a simple majority, and the subsequent Act would implicitly overrule the former Act; it is not necessary for the Act to refer in any way to its predecessor: the two Acts would be taken together, and if they would not make a sensible whole so taken, the latter Act would prevail: a sovereign Parliament cannot be bound by any devices, and in the case of the Act fixing in 1907 anew the proportions of subsidy paid by Canada to the Provinces, the words 'final and unalterable', which it was proposed to insert at the request of Canada, were left out as improper to be inserted in an Imperial Act which had no right to attempt to set up anything which could not be altered, the wishes of the Dominion Government being met to the extent of allowing the address of the Provinces and Canada to appear as a schedule to the Act.[2]

On the other hand, though in some cases no form was necessary to be observed in altering the constitution, it was always necessary that a Colonial constitution should be altered expressly: it would never have been possible to alter such a constitution merely by an ordinary Act which incidentally enacted provisions which were in conflict with the constitution: the constitution was and is a solemn matter requiring formal change. This was laid down in

[1] For the dispute as to power of alteration, see Blackmore, *Constitution of South Australia*, pp. 64–8.

[2] *Canadian Annual Review*, 1907, pp. 609, 610; British Columbia *Sess. Pap.*, 1908, C. 1.

detail in the case of *Cooper* v. *Commissioners of Income Tax for the State of Queensland*,[1] decided in 1907 by the High Court of the Commonwealth.

The question there discussed arose from the refusal of Sir Pope Cooper, Chief Justice of the Supreme Court of Queensland, to pay income tax on his judicial salary under the Queensland *Income Tax Consolidated Acts*, 1902–4, and the *Income Tax Declaratory Act*, 1905.

The claim was based on the fact that the Chief Justice's salary was fixed by the *Salary Act*, 1901, at £2,500, and the view the provisions of the *Constitution Act*, 1867, s. 17, providing that the salaries of Judges of the Supreme Court shall be paid and payable to each of them during the term of their commissions, were an equivalent to an enactment that the salaries should be paid to the judges without reduction or diminution throughout their terms of office.

The Legislature of Queensland were empowered to alter the constitution by express enactment altering or repealing constitutional provisions. But such powers of alteration must be exercised in the proper way, and the mere enactment of provisions inconsistent with the constitution did not repeal or alter the constitution to the extent of the inconsistency. It was argued that therefore the payment of income tax, if required from judges, was to interpret the *Income Tax Declaratory Act* of 1905 in such a manner as to be repugnant to the *Constitution Act*, 1867, and that Act, by virtue of the *Colonial Laws Validity Act*, 1865, overrode the provisions of the later Act. On the other hand, it was contended that the Constitution Act of 1867, being merely an Act of the Queensland Legislature, was of no more effect than any other Act of the Legislature, and therefore its terms

[1] (1907) 4 C. L. R. 1304. It should be noted that this decision applies generally to *all* cases of change of constitution, and would cover such cases as e.g. formerly Cape and Natal and now the Canadian Provinces, where there are not special conditions laid down regarding constitutional changes. These it holds, and I think rightly, must still be enacted *as such*. Cf. also the view of the New Zealand Government in 1866, *Parl. Pap.*, February, 1866, p. 36; and see above, pp. 360, 361.

could be amended in any way by a subsequent Act, although that Act did not purport to be an amendment of the constitution, so that if the Legislature thought fit by statute to alter the term of office of existing judges or to reduce their salaries they could do so without first amending the constitution. The High Court decided against the claim of Sir Pope Cooper. They held that the Act of 1867 declared the constitution of Queensland, and that, though that Act could be amended by legislation as provided for in the Act itself, nevertheless the constitution must be amended before it was possible for the provisions as to the tenure of office of judges to be altered. But they held that as a matter of fact the levying of income tax on judicial salaries was not really inconsistent with the constitution. Barton J. expressly held that attempted legislation which was merely at variance with the Charter of Constitution could not be held to be an effective law, on the grounds that the authority conferred by that instrument excluded the power to alter or repeal any part of it, unless the legislation had been preceded by a valid exercise of the power of alteration of the constitution. An implied repeal was not within the power to alter or repeal, and was not valid, because it was not an exercise of legislative power.

He also agreed, however, that the levying of income tax was not contrary to the constitutional provisions as to the salary of judges, and he pointed out that under the Imperial Acts of 1700 and 1760, which were the basis of the provisions in ss. 15 to 17 in the Queensland Constitution Act of 1867, those provisions could not be held to be inconsistent with the levying of income tax on the salaries of judges.

The other justices all concurred in the views expressed by the Chief Justice and Barton J.

§ 2. The Restrictions on Alteration in Australia

In the case of the Australian Colonies, now States, the limitations on constitutional alteration were confusing, and nearly unintelligible. The following seems to have been

the practice, but it cannot be said to have been generally admitted.[1]

It was provided by s. 31 of the Imperial Act of 1842[2] that all Bills except Bills for temporary laws declared urgent should be reserved :—

(1) Altering or affecting the divisions or extent of the several districts and towns which should be represented in the Legislative Council, or establishing new and other divisions of the same ; or

(2) Altering the number of the members of the Council to be chosen by the said districts and towns respectively ; or

(3) Increasing the whole number of the Legislative Council ; or

(4) Altering the salaries of the Governor, Superintendent,[3] or Judges (this requirement so far as regards the Judges was repealed by 13 & 14 Vict. c. 59, s. 13).

This section as originally enacted applied only to Bills passed by the Legislative Council of New South Wales. It was subsequently applied to the Legislative Councils of Victoria, Van Diemen's Land, South Australia, and Western Australia, by the Act 13 & 14 Vict. c. 59, s. 12, and it was incorporated in the letters patent of June 6, 1859 (clauses xiv and xxii), and thereby applied to Queensland. Its provisions were applied to Bills passed by the Parliament of New South Wales by s. 3 of the New South Wales Constitution Act of 1855. Apparently the provisions applied after 1855 to both the Legislative Assembly and Legislative Council of that Colony, and of course from the first to both houses in Queensland. In the case of Victoria the provisions were similarly applied by s. 3 of the Victoria Constitution Act of 1855. They were also applied to Western Australia by s. 2 (e) of the Western Australia Constitution Act of 1890. Apparently also in virtue of s. 12 of the Act of 1850 they applied also to both houses of the Parliament of Tasmania, and in virtue of the

[1] Jenkyns, *British Rule and Jurisdiction beyond the Seas*, App. ii, takes a different view of the position from that here adopted. But the Act of 1907 renders discussion otiose.

[2] 5 & 6 Vict. c. 76.

[3] No longer existing.

same section to the Parliament of South Australia, both of these Parliaments being constituted by a local, not an Imperial Act. In all these cases, however, under s. 7 of 7 & 8 Vict. c. 74, reservation was unnecessary if the Governor either refused assent to the Bill or assented to it in accordance with instructions previously received from Her Majesty. This was approved only for the case of New South Wales by the section as originally passed, but it was extended by the Act of 1850 to the other Colonies then existing. On the other hand, it was not expressly adopted in the Queensland letters patent, and it is therefore doubtful whether it was in force there.

In addition to these comparatively simple requirements it was provided in s. 32 of the Act of 1850,[1] that there should be reserved and laid before the Imperial Parliament before assent all Bills

(1) Altering the laws concerning the election of the Elected Members of the Legislative Council :

(2) Altering the laws concerning the qualifications of electors and elected members :

(3) Establishing in the place of the Legislative Councils at that time existing other separate Legislative Houses :

(4) Vesting in such separate Legislative Houses the powers and functions of a Legislative Council.

It applied as originally enacted to all the Colonies except Queensland, and was incorporated in the letters patent of June 6, 1859. As regards classes 3 and 4 its effect may be regarded as spent, and the power of altering their constitutions by ordinary legislation is given to all the Colonies by s. 5 of the *Colonial Laws Validity Act*, 1865.

The result of these provisions seems to be as follows : by s. 2 of 25 & 26 Vict. c. 11, it was provided[2] that reservation and laying before Parliament required by s. 32 of the Act of 1850 applied only to Bills passed by the original Legislative Councils of New South Wales, Victoria, Van Diemen's Land, and South Australia, and the necessity for reservation and laying before Parliament arises only from the subsequent

[1] 13 & 14 Vict. c. 59.

[2] The section is obscure ; possibly it referred only to classes 3 and 4.

legislation which adopted the provisions in the constitution. The provisions were again adopted with regard to New South Wales by s. 3 of the Constitution Act, and also by the same section of the Constitution Act of Victoria. Bills, therefore, affecting the election of the elected members of the Legislative Council of Victoria,[1] or altering the laws concerning the qualification of electors or elected members of the Legislative Assembly of either Victoria or New South Wales required to be reserved and laid before Parliament. In the case of Tasmania there was no such provision, and reservation of such Bills was not required unless they also fell within the terms of s. 31 of the Act of 1842. In the case of South Australia s. 34 of the Constitution Act of 1855–6 required that any Bills altering the Constitution of the Legislative Council or House of Assembly should be reserved, but not that they should be laid before Parliament. In the case of Western Australia, as in the case of New South Wales and Victoria, the provisions of the Act of 1850 were repeated in the Constitution Act of 1890, and Bills of the classes mentioned were required to be reserved and laid before Parliament. The same result arose in the case of Bills of Queensland by the operation of the letters patent of June 6, 1859.

The result of these Acts was constant confusion and difficulty. It is sufficient to note that the *Electoral Act*, No. 10 of 1856, of South Australia was in error not reserved by the Governor, and thus the whole constitution of the Parliament elected under its terms was vitiated, so that an Imperial Act of 1862 [2] had hastily to be passed to cure the defects, and further doubts had to be removed by the *Colonial Laws Validity Act*, 1865. Moreover, under fresh difficulties later Acts were required, and Bills of New South Wales, Victoria, South Australia, Western Australia, and Tasmania were validated in 1893, and in 1901 a set of New South Wales, Queensland, and Western Australia laws were validated, having not been passed with proper formalities.

[1] The Upper House of New South Wales is nominee.

[2] 25 & 26 Vict. c. 11. See also 26 & 27 Vict. c. 84. See Blackmore, *Constitution of South Australia*, pp. 38 seq.

In 1907 the *Australian States Constitution Act*[1] validated without special mention all Bills which for any reason were informal, but which had received the royal assent. It also laid down the following rules regarding reservation of Bills:—

1.—(1) There shall be reserved, for the signification of His Majesty's pleasure thereon, every Bill passed by the Legislature of any State forming part of the Commonwealth of Australia which—

(*a*) alters the constitution of the Legislature of the State or of either House thereof; or

(*b*) affects the salary of the Governor of the State; or

(*c*) is, under any Act of the Legislature of the State passed after the passing of this Act, or under any provision contained in the Bill itself, required to be reserved;

but, save as aforesaid, it shall not be necessary to so reserve any Bill passed by any such Legislature:[2]

Provided that—

(*a*) nothing in this Act shall affect the reservation of Bills in accordance with any instructions given to the Governor of the State by His Majesty; and

(*b*) it shall not be necessary to reserve a Bill for a temporary law which the Governor expressly declares necessary to be assented to forthwith by reason of some public and pressing emergency; and

(*c*) it shall not be necessary to reserve any Bill if the Governor declares that he withholds His Majesty's assent, or if he has previously received instructions from His Majesty to assent and does assent accordingly to the Bill.

(2) For the purposes of this section a Bill shall not be treated as a Bill altering the constitution of the Legislature of a State or of either House thereof by reason only that the Bill—

(*a*) creates, alters, or affects any province, district, or town, or division of a province, district, or town, which returns one or more members to either House of the Legislature; or

(*b*) fixes or alters the number of members to be elected for any such province, district, or town, or division of a province, district, or town; or

[1] 7 Edw. VII. c. 7.

[2] This includes reservation in New South Wales under Act No. 32 of 1902, s. 7; in Victoria under 18 & 19 Vict. c. 55, sched. s. 60; in Queensland under Act 31 Vict. No. 38, s. 9; in South Australia under Act No. 2 of 1855–6, s. 34; and in Western Australia under 53 & 54 Vict. c. 26, sched. s. 73.

(*c*) increases or decreases the total number of elective members of either House of the Legislature; or

(*d*) concerns the election of the elective members of the Legislature, or either House thereof, or the qualifications of electors or elective members.

(3) Section thirty-three of the Australian Constitutions Act, 1842, shall apply to Bills reserved under this Act in like manner as it applies to Bills reserved under that Act with the substitution of references to a State forming part of the Commonwealth of Australia for references to the colony of New South Wales, and of references to both Houses of the Legislature of the State for references to the Legislative Council.

(4) So much of any Act of Parliament or Order in Council as requires any Bill passed by the Legislature of any such State to be reserved for the signification of His Majesty's pleasure thereon, or to be laid before the Houses of Parliament before His Majesty's pleasure is signified, and, in particular, the enactments mentioned in the Schedule to this Act,[1] to the extent specified in the third column of that Schedule, shall be repealed both as originally enacted and as incorporated in or applied by any other Act of Parliament or any Order in Council or letters patent.

As if these Imperial restrictions were not sufficient, the Colonial Parliaments in Australia in passing their Constitution Acts added to the variety of the restrictions upon their own powers. Thus in New South Wales alterations of the constitution of the Legislative Council required to be passed on the second and third readings by two-thirds majorities of both Houses in each case.[2] This provision was fortunately repealed in 1857 as regards both Houses; there was an attempt at the time to claim that the repeal was illegal, as the clause could not be altered except by the two-thirds majority required for the alteration of the Legislative Council itself. This view, however, was definitely rejected at the time, and is mainly interesting because it was revived later on in Queensland. In that constitution analogous provisions

[1] 5 & 6 Vict. c. 76, s. 31 (in part); 7 & 8 Vict. c. 74, ss. 7 and 8; 13 & 14 Vict. c. 59, ss. 12 (in part), 32 (in part), 33; 18 & 19 Vict. cc. 54 and 55, s. 3 (in part); 25 & 26 Vict. c. 11, s. 2; 53 & 54 Vict. c. 26, s. 2 (in part).

[2] 18 & 19 Vict. c. 54, s. 36. In addition reservation and laying before Parliament were required. Reservation is still necessary under 7 Edw. VII. c. 7, s. 1 (1), but not apparently laying before Parliament.

with regard to majorities had been adopted in accordance with its usual practice of following exactly the constitution of the Mother Colony. It was provided by s. 9[1] that any alteration of the Legislative Council required the passing of the second and third readings of the Bill with the concurrence of two-thirds of members for the time being of the Council and the Assembly respectively, and every such Bill was to be reserved and a copy to be laid before both Houses of Parliament for a period of thirty days at least before Her Majesty's assent thereon was signified. These provisions were applied as in New South Wales by s. 10 to the Lower House,[2] with the alteration that a majority of members only was necessary in the Legislative Council, and the assent of the Queen was not to be given until an address had been presented by the Legislative Assembly to the Governor, stating that the Bill had been so passed. This latter provision was repealed by a simple Act, 34 Vict. No 28, in 1871, after an attempt had failed in 1870, but the proviso with regard to the Legislative Council did not disappear until Act No. 2 of 1908, when it was repealed by a simple Act, despite the protests of those who held that it should have been passed by two-thirds majorities in both Houses, a step which would have been impossible in view of the relations of parties at the time.

In the case of South Australia[3] it was provided that alterations in the constitution of the Houses should only be made if passed by absolute majorities in both Houses on the second and third readings, and the inconvenience of this provision was seen in 1910, when the Lower House had a majority in favour of passing the Bill of that year to reduce the Council franchise to that of the Assembly, but by accident an absolute majority was not available on the occasion of the second reading of the Bill and the standing orders had to be

[1] Of the Act 31 Vict. No. 38, following clause xxii of the Order in Council of June 6, 1859.

[2] This is not in the Order in Council but is taken from 18 & 19 Vict. c. 54, sched. s. 15. The rule disappeared in 1857 in New South Wales.

[3] Act No. 2 of 1855–6, s. 34. This requirement as to majorities being disregarded led to the invalidity of the *Electoral Act*, 1861, and the *Registration* Act, 1862, validated by 26 & 27 Vict. c. 84.

suspended to secure its re-introduction and passing through the House, only to be rejected by the Legislative Council. Reservation of such Bills required by the Constitution was abolished by the *Australian States Constitution Act*, 1907.

In the case of Victoria [1] absolute majorities are also required on the second and third readings in each House of Bills for constitutional alterations in the Houses under the Act of 1855. Even in the case of Western Australia [2] provisions were inserted in the local Act which provided that no change in the constitution of the Legislative Council or the Legislative Assembly could be effected unless the second and third readings of the Bill were passed with the concurrence of an absolute majority of the whole number of the members for the time being of the Legislative Council and the Legislative Assembly respectively. Moreover, it was required that there should be reserved by the Governor for the signification of the royal pleasure every Bill which so provided for the election of the Legislative Council before the date fixed by Part III of the Act in question, and every Bill which interfered with the operation of s. 59 (dealing with the Civil List), s. 70 (dealing with the appropriation for aborigines), s. 71 (dealing with compensation to officers who lost office on political grounds), and s. 72 (dealing with charges on the consolidated funds which secured certain rights to ex-civil servants), and Schedules B, C, and D (comprising the Civil List, the grant for aborigines, and the political pensions), and the section itself. The rules as to reservation disappeared in 1907.[3]

These provisions as to majorities, and as to procedure on reservation are still valid, and the inconvenience caused in the latter case may be illustrated by the fact that an Act of 1897 (61 Vict. No. 7) passed in Western Australia, to alter the posi-

[1] 18 & 19 Vict. c. 55, sched. s. 60. The reservation also provided for in the Act disappeared under the Imperial Act of 1907.

[2] 53 & 54 Vict. c. 26, sched. s. 73.

[3] *The Redistribution of Seats Act* No. 6 of 1911 actually includes a clause providing that it cannot be changed save by absolute majorities in both Houses.

tion in regard to the aborigines, was found to have been invalid because of the non-observance of the exact procedure in regard to the proclamation of the royal assent, and required to be re-enacted in the proper form in 1905 by s. 65 of Act No. 14.

The inconvenience of the procedure in the case of majorities was also illustrated by a case in Victoria in 1903.[1] It was there questioned whether the Constitution Amendment Bill, No. 1854 of that year, was, strictly speaking, valid. Among various points which were raised by petition presented to the Governor was whether the validity of the Bill was affected by the fact that Parliament sat in a different place from that named in the Governor's Proclamation as the place for holding the Session of Parliament; also whether the Bill was substantially altered after the second and third readings in the Lower House and before it was finally agreed to, and whether in view of its being substantially altered it should properly have been presented for the assent of the Governor. It was provided by s. 60 of the constitution, that alterations of the constitution of the Houses were subject to the second and third readings being passed with the concurrence of an absolute majority of the whole numbers of the members of the Legislative Council and of the Legislative Assembly. It was suggested, therefore, by opponents of the validity of the measure that no amendments could be allowed between the second and third readings of the Bill in the Lower House and its readings in the Upper House. The Bill was largely amended by alterations being made after a free conference between the two Houses. It is clear that the alterations and the general procedure were not at all satisfactory, but it does not appear that the irregularities were sufficient to render the Bill null and void. At any rate the royal assent was not withheld from the Bill, and it must be presumed that it was not held by the Imperial Government to violate the provisions of s. 60 of the Schedule. Nevertheless the validity of the Act has since been questioned

[1] Cf. the discussion in 1909, Victoria *Parliamentary Debates*, 1909, pp. 3303 seq.; and see Melbourne *Herald*, May 14 and 15, 1903. The discussion ignores the validating effect of 7 Edw. VII. c. 7.

in Parliament in 1908, and it is obvious that the restrictions are hardly such as can usefully be retained.[1]

The question has also been discussed whether the Parliament of Tasmania has power to alter the constitution of the state by establishing one House instead of the two Houses of the Legislature—a proposal to that effect having been under consideration in 1902. The answer would not appear to be doubtful. The *Colonial Laws Validity Act*, 1865, would seem to be sufficient authority for any such change if it were considered desirable to make it, as its provisions are general and there is no ground on which their effect can be limited.

§ 3. The Alteration of the Constitution of New Zealand

In the case of New Zealand some doubt exists as to the exact extent of the power of constitutional alteration. The constitution of 1852[2] gave certain definite powers to the Parliament, but did not specially provide as to the alteration of the constitution. It was, however, provided by a later Act of 1857[3] that the General Assembly might by any Act or Acts from time to time alter, suspend, or repeal all or any of the provisions of the Act of 1852, except those specified in the Act of 1857, which included those as to the establishment of provincial councils, which became inoperative when the provinces were abolished in 1876,[4] and which have been since formally repealed; the provision in s. 32 as to the establishment of a General Assembly, the provision in s. 44 as to the time and place of holding the Assembly, and the prorogation and dissolution of the Assembly; the provision in s. 46 as to the taking of the oath of allegiance by members of the Legislative Council or House of Representa-

[1] It is doubtful how far a court can question the validity of an Act on the ground of its not having been passed by the requisite majorities; the difficulty of obtaining evidence would probably be insuperable; cf. 28 & 29 Vict. c. 63, s. 6; *Bickford, Smith & Co.* v. *Musgrove*, 17 V. L. R. 296; Harrison Moore, *Commonwealth of Australia*[2], pp. 244 seq.

[2] 15 & 16 Vict. c. 72.

[3] 20 & 21 Vict. c. 53.

[4] New Zealand *Parl. Pap.*, 1876, A. 2 A. The power to abolish was given by 31 & 32 Vict. c. 92.

tives; the provision in s. 47 as to affirmation in place of an oath; the provision in s. 53 as to the power of the General Assembly to make laws; the provisions in s. 54 as to the appropriation and issue of public money; the provisions in ss. 56, 57, 58, and 59, as to the assent, the reservation of and refusal of assent to Bills and disallowance by the Crown; the provision in s. 61 as to the levying of duties on supplies for the Imperial troops and the raising of duties inconsistent with treaties; the provision in s. 64 as to grants for civil and judicial services except so much of that section as charged the Civil List on the revenues arising from the disposal of waste lands by the Crown; the provisions of s. 65 as to the variation of sums provided under s. 64; the provision in s. 71 regarding the maintenance of the laws of the aborigines under which provision might still[1] be made by letters patent despite the grant of self-government to the Colony; the provisions of s. 73 as to the acquisition of lands of the aborigines, and the provisions of s. 80 with regard to the interpretation of the term 'Governor', and of 'New Zealand', the interpretation of the latter term including the boundaries of the Colony. The restriction as to the repeal of s. 73 was repealed by s. 4 of the *Native Lands Act*, 1873, in reliance on the power conferred by an Imperial Act of 1862 (25 & 26 Vict. c. 48), which expressly enabled the Legislature to repeal the Act, and it is formally repealed by the Imperial Act 55 & 56 Vict. c. 19. The boundaries of New Zealand were also altered by an Imperial Act of 1863.[2] Other alterations, the addition of the Kermadec and Cook Islands in 1887 and 1901, have been made by letters patent validated by the *Colonial Boundaries Act*, 1895.

An important question arises as to whether these restrictions are still part of the law of New Zealand[3] or whether they must be regarded as having been superseded by the general power of altering a constitution which is conferred upon all representative legislatures by the *Colonial Laws*

[1] The section has not been repealed by the *Statute Law Revision Act*, 1893, and cannot be held to be obsolete.

[2] 26 & 27 Vict. c. 23.

[3] So Jenkyns, *British Rule and Jurisdiction beyond the Seas*, pp. 75, 76.

Validity Act, 1865. It has been held in New Zealand, as, for example, during the discussions of the possibility of rendering the Upper Chamber elective[1] and of changing the title of 'General Assembly' to 'Parliament', that no alteration can be made in these sections as the law at present stands. It would seem doubtful whether this doctrine is strictly correct. The Act of 1865 is general in its terms, and it would appear to give a right of alteration of the constitution subject only to the observation of such forms as may be prescribed. It is true that the existence of the express provisions of the Act of 1857 may be held to mitigate against this restriction, but the argument is not decisive,[2] and it may seriously be doubted whether if the power were exercised the exercise would be held to be invalid by any Court. The question is obviously of more than theoretic interest, since alteration of the Upper House has been often discussed, though hitherto vainly, and it would seem perfectly possible that the question may in the future cease to be merely academic if Mr. Seddon's idea of a single chamber revives. Bills altering the Governor's salary or the appropriation for native affairs still require reservation under s. 65 of the Act of 1852.

§ 4. The Alteration of the South African Constitutions

In the case of the Cape there were no restrictions under the Constitution Ordinance of 1852 as to the alteration of the constitution; alterations could therefore be made by a simple Act, which would no doubt have been reserved in the case of important changes as in the case of Bill No. 1 of 1872 to establish responsible government, although reservation was not legally requisite.[3]

The case in Natal was precisely the same under the Act

[1] *Parliamentary Debates*, 1907, cxxxix. 276.

[2] Cf. Dicey, *Law of the Constitution*[7], p. 106, note.

[3] In the case of Cape and Natal alike the rule before responsible government was that alteration required reservation; this was law in Natal by s. 51 of the letters patent of July 15, 1856.

No. 14 of 1893; it was left for the Governor to reserve if any essential principle was involved.

In the case of the Transvaal and Orange River Colony the letters patent of December 6, 1906, and June 5, 1907, constituting responsible government required the reservation of Acts altering in any way the letters patent or providing for the introduction of indentured labour, or imposing[1] upon non-Europeans disabilities which were not so imposed upon Europeans, but the inconvenience of these provisions was much modified and greatly reduced by the rule that reservation was not required if the Governor has previously obtained instructions with regard to such law through the Secretary of State or the law contained a clause suspending its operation until the proclamation in the Colony of the royal assent.

§ 5. Newfoundland and the Provinces of Canada

Special considerations apply to the alteration of the federal constitutions, and the question will be more conveniently dealt with in Part IV. There remain Newfoundland and the Canadian Provinces. In the former there is full power to change the constitution by a simple Act, though on the principle laid down in the Queensland case, not by mere inconsistency. This is, however, subject to the same doubt as in New Zealand, for an Imperial Act[2] allows the Crown to provide regarding the qualification 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. This power has been exercised by instructions of May 4, 1855, confirming earlier instructions of 1842, and, as regards electoral matters, the rules so laid down appear in the *Consolidated Statutes* of 1892. It is probable that these rules can be altered by local Act simply under the general power in the *Colonial Laws Validity Act*, 1865, though it is clear that the Crown could amend such legislation by fresh exercise of

[1] It is probable but not certain that a consolidating Act does not impose. There is no legal decision on the point.

[2] 5 & 6 Vict. c. 120, confirmed and made permanent in part by 10 & 11 Vict. c. 44. See instructions of Sept. 1, 1842.

the power given in the Acts which are powers to lay down directions, not actual provisions.

In the Canadian Provinces alteration by simple Act is the rule, but the position of the Lieutenant-Governor cannot be affected, and in Quebec [1] the alteration of the electoral districts, specified in a schedule (being English-speaking districts), cannot be altered unless the majority of members for those districts concur in the second and third readings, while in Prince Edward Island the proportion of Councillors and the qualifications of their electors (being the relic of the old elective second chamber which existed from 1862 to 1893) cannot be changed except by a two-thirds majority of the Legislative Assembly.[2]

In the old Province of Canada there was very little power to alter the constitution under the Act of 1840 (3 & 4 Vict. c. 35). But by an Act of 1854 (17 & 18 Vict. c. 118), ample power was conferred to alter the tenure of office of the Legislative Council, which was at once made elective, and to alter by simple Act (instead, as before, by a two-thirds majority) the proportion of members in either House. A later Act (22 & 23 Vict. c. 10) permitted of the Parliament making the Speakership of the Legislative Council elective.

In the Maritime Provinces all the three, Nova Scotia, New Brunswick, and Prince Edward Island, had full power to amend the constitution by simple Act, which no doubt in an important matter would need under the instructions reservation. British Columbia only achieved a representative constitution before its loss of Colonial status in 1871, but on the grant by Order in Council under an Imperial Act (33 & 34 Vict. c. 66) of a representative legislature it at once altered the constitution by Act No. 147 of 1871.

[1] 30 Vict. c. 3, s. 80. An address must be presented from the Assembly to the Lieutenant-Governor ere he assents; this is referred to in his instructions from the Governor-General. For the general power, see s. 92 (1).

[2] See Act No. 1 of 1908, s. 158, which is binding under s. 5 of the *Colonial Laws Validity Act*, 1865. Contra, in *Provincial Legislation*, 1867–1895, p. 1228 (on the Act of 1893), Sir J. Thompson argues that s. 92 (1) of the *British North America Act*, 1867, gives an absolute power of change which cannot so be fettered, i. e. that in this regard the Act of 1867 is not subject to the Act of 1865, which is a possible view.

CHAPTER V

THE PRIVILEGES AND PROCEDURE

§ 1. The Control of Expenditure

In every Dominion the rule of course is that moneys can only be raised and expended with the consent of Parliament. It is illegal either to levy duties or to spend money without the consent of Parliament, and the first action has been tested in the Courts and declared to be illegal, when an attempt was made to levy customs duties in Victoria without an Act of Parliament.[1] As regards expenditure the matter is difficult to bring into court: there is no very obvious way to deal with expenditure which is not obviously merely theft, and as a matter of fact the spending of money in the expectation of parliamentary action is a regular part of parliamentary practice in some Colonies, and still prevails in the Australian States to a degree which is decidedly unsatisfactory. There are the recent and remarkable cases of the expenditure of over £700,000 by Mr. Philp's Government in Queensland in 1907–8, when the Lower House had refused supply as a protest against the grant of a dissolution, and the much more improper case in which, at the end of the same year and at the beginning of 1909, Sir T. Bent authorized himself the expenditure of very large sums without legal sanction of any kind, and without any warrant from the Governor.[2] In this connexion too should be noted the famous effort made by the suggestion of Mr. Higinbotham to solve the question of spending moneys without law, when there was a deadlock in Victoria, and when he allowed persons claiming moneys from the Government to bring actions to which judgement was confessed, and the sums awarded paid out. Unhappily this ingenious scheme was

[1] *Stevenson* v. *The Queen*, (1865) 2 W. W. & A'B. L. 143; but levy of customs on a resolution in the Lower House when an Act will be passed later to legalize the levy is allowed as in England; see *ex parte Wallace & Co.*, 13 N. S. W. L. R. 1; *Sargood Bros.* v. *The Commonwealth*, 11 C. L. R. 258.

[2] Cf. Victoria *Parliamentary Debates*, 1909, pp. 330 seq.

defeated by its opponents bringing indirectly the question before the Courts which pronounced payments in this way without legislative appropriation to be contrary to law, with the result that the practice could no longer rank as a convenient method of securing the appropriation of money without the concurrence of the Upper House.

The general rule, which has no exception in the Dominions, secures a control over all expenditure to the Government of the day by requiring that any proposed appropriation shall be recommended by the Governor to the Lower House.[1] The action of the Governor in this regard may be regarded as purely ministerial; he has indeed on one occasion—that of the grant to Lady Darling in 1868—been instructed not to bring the matter before the Lower House by making the formal recommendation required, but that is a special case, and related to a payment to be made to a wife of a servant of the Imperial Government, and the instruction was revoked a month later by a dispatch of February 1, 1868, and the action of the Governor may now be regarded as being not a matter for discretion at all. But, in addition to that, all moneys must be issued under a warrant signed by him, and his signing such a warrant is not a ministerial act at all, but a matter in which he must exercise his discretion and satisfy himself that the grounds for his signature are good.

The mode in which moneys are issued may be illustrated by the case of the Commonwealth procedure, which is in essentials the ordinary Australian plan of action.[2] The Treasurer draws up statements of money required to the Auditor-General, whose duty it is, after seeing that the sums mentioned are legally available, to sign the instrument. Then the instrument is taken by the Treasurer for the

[1] For Canada see 30 Vict. c. 3, ss. 54, 90, repeated in all the provincial Acts: Newfoundland, 5 & 6 Vict. c. 120, s. 1, and royal instructions, May 4, 1855, thereunder; Commonwealth, 63 & 64 Vict. c. 12, Const. s. 56; New South Wales, Act No. 32 of 1902, s. 46; Victoria, 18 & 19 Vict. c. 55, sched. s. 57; Queensland, Act 31 Vict. No. 38, s. 18; South Australia, Act No. 2 of 1855–6, s. 40; Western Australia, 53 & 54 Vict. c. 26, sched. s. 67; Tasmania, 18 Vict. No. 17, s. 33; New Zealand, 15 & 16 Vict. c. 72, s. 54; Union, 7 Edw. VII. c. 9, s. 64.

[2] Harrison Moore, *Commonwealth of Australia*[2], pp. 150 seq.

signature of the Governor-General, whereupon it serves as the warrant for the Treasurer to issue cheques or drafts on the Public Account in the banks for the services in question. If, on the other hand, the Auditor-General is not satisfied, he returns the instrument with a statement of the sums not found by him to be legally available, together with grounds for his decision. Thus the Governor-General has always the opportunity of deciding if any appropriation for which he is desired to issue a warrant is or is not legally available, and if not so available he can see whether the case is one in which he can anticipate the sanction of Parliament by issuing a special warrant.

Further, the arrangements as to expenditure are much as in England everywhere in the Dominions, with numerous differences in detail. In the Commonwealth the rule that all appropriations lapse at the end of the financial year has been qualified by the institution of trust funds, payments to which are treated as appropriations, and have been held to be so by the High Court.[1] Moreover the *Audit Act* allows the varying of the expenditure on items of subdivisions in the estimates, but not so as to augment or add to any salary or wages. Amounts in excess of appropriations, or on subjects not provided for, can be charged to heads as the Treasurer may decide, but the total expenditure after the charges have been finally apportioned to heads for which there is an appropriation and after deduction of repayments must not exceed the amount of the appropriations under the head 'Advance to Treasurer' in the estimates.

The revenue as it accrues in the Commonwealth is paid into a public account which is opened at such banks as the Treasurer may direct. There are also other accounts for specific purposes called Trust Accounts, and to them are paid moneys appropriated by Parliament for that purpose,

[1] *The Government of New South Wales* v. *The Government of the Commonwealth*, 7 C. L. R. 179. Cf. also Queensland *Parliamentary Debates*, 1910, pp. 1463 seq., where the same question arose as to the placing to a trust fund for the University of £50,000, voted in one year when the expenditure was found impossible, to avoid a lapse. The Auditor accepted the procedure, but it was bitterly attacked in the Assembly.

moneys received in respect of sales or work done in respect of the account, corresponding in the British system to repayments in aid—all money paid by any person for the purpose of the account, and pay due to a militiaman if not claimed in three months, a curious item but not unimportant. These accounts can be used for any payments out of them for the purposes thereof, and the moneys in the fund are to be deemed to be money standing to the credit of the Trust Fund, which is one of the three funds into which the original *Audit Act* of 1901 divided the public funds. The others were the Consolidated Revenue Fund and the Loan Fund, into which all moneys raised by loan fall to be paid, and from which no money is to be issued unless on a definite Act of Parliament specifying the amount to be paid and the purposes for which it is to be expended. From the Trust Fund nothing can be spent likewise without the authority of an Act for the purposes of the fund.

The audit of the accounts is secured in each case by the presence of an independent Auditor-General, who is appointed for life and who is not removable from office save on an address from both Houses of Parliament.[1] In the Commonwealth he must not be a member of any Parliament in Australia nor an Executive Councillor, and the Governor-General has a carefully guarded right of suspension with a decision as to removal by both the Houses of Parliament. His salary is fixed at £1,000 by the *Audit Act*, which is appropriated by the law. In the Commonwealth the plan is similar to that in England; there is in the first place a staff which is engaged in checking the expenditure and receipt of money in the great departments day by day, including in their purview the propriety of departmental contracts and the sufficiency of government stores. Secondly, there is an examination of the accounts in the office of the Auditor-General. For this purpose he receives monthly statements from all persons who receive or disburse money of their receipts and disbursements for the period, and the

[1] There are similar Audit Acts in Canada, Newfoundland, the Provinces, the Australian States, and New Zealand, and in all cases the independence of the Auditor is fully recognized. For South Africa see the *Exchequer and Audit Act*, No. 21 of 1911.

Treasurer sends him an account daily in the form of a cash sheet. The Auditor-General then can determine whether the sums paid have been duly and legally expended, and if he is satisfied he grants the Treasurer a discharge; else he must surcharge the Treasurer, who in turn surcharges the defaulting officer, and takes such steps as may be necessary to recover the missing money. The officer is given a right of appeal to the Governor-General, who may make such order directing the relief of the officer as may appear to be just and reasonable. Finally there is required the publication of periodical accounts for the information of the public and of Parliament. Every quarter the Treasurer must publish in the *Gazette* a statement in detail of the receipts and expenditure of the Consolidated Revenue, Loan, and Trust Funds, with a comparative statement of the corresponding figures for the last year. He must also annually prepare a statement of all receipts and expenditure from the several funds, the expenditure to be set out in the case of the Consolidated Revenue Fund according to the classification adopted in the appropriation. On this annual statement the Auditor-General bases his report, which is presented to both Houses of Parliament in recognition of the financial powers of the Senate. In this report is the opportunity for exposing improper expenditure, and similar reports are rendered by the auditors of all the Dominions. In the Commonwealth there is as yet no Public Accounts Committee as there is in Canada and in several of the states.

It will be seen that there is no sufficient method of punishing the expenditure of public money without due warrant. If an officer does so in intent to defraud there is of course the criminal law to punish him, and the civil law to recover the proceeds if they are still in his hands. But if the Treasurer himself breaks the law there is no exact method of punishment available; if any attempt were made to proceed criminally against him the Government would *ex hypothesi* issue a *nolle prosequi*, and it is not easy to see who could be able to prosecute. The real punishment in this case must be public opinion, and since impeachment is obsolete, dismissal from office if the country does not

approve his action. In the case of Sir T. Bent his actions[1] formed the subject of examination by a committee, but it discovered that irregularities had been the order of the day in Victoria, and of course it would be an error to confuse such irregularities with serious crime.

§ 2. The Privileges of the Parliaments

The question of the privileges of the Houses of Parliament in the Colonies has been the subject of some judicial decisions, but now is perfectly clear. There is no doubt that apart from statute a colonial legislature had no more real power than a debating society except in so far as measures to preserve order therein might be allowed to take more drastic forms than in a mere debating society. It was laid down by the Privy Council in the case of *Kielley* v. *Carson*[2] that the House of Assembly of Newfoundland had no power to order an arrest on a complaint of contempt committed out of doors, on the ground that no such privilege had been conferred upon it by the Crown even had the Crown had the power to do so, which the Court evidently did not believe, the power not being required for the purpose of enforcing the conduct of the proceedings of the House. In the case of *Doyle* v. *Falconer*[3] they decided that the Legislative Assembly of Dominica, which was at the time a representative body, could not punish for a contempt committed before it; it could remove an obstruction to business but not punish for any action taken. So the Supreme Court of Canada, in

[1] Cf. Victoria *Parliamentary Debates*, 1909, pp. 330 seq.; *Parl. Pap.*, Sess. 2, No. 1. The useful function of the Auditor is there clearly shown, and the South Australia Government has asserted its desire for his free action; see *House of Assembly Debates*, 1910, p. 777. The disadvantages of the want of proper control can be seen in the case of the illegal payments from the Transvaal Treasury to members of Parliament in April 1910; see above, pp. 265, 266. It was then held that a civil suit to restrain an illegal payment by the Treasurer would not lie. For Canada, cf. the resignation of the Auditor-General in 1905, *Canadian Annual Review*, 1905, pp. 147 seq.

[2] 4 Moo. P. C. 63, overruling *Beaumont* v. *Barrett*, 1 Moo. P. C. 59. Cf. Forsyth, *Cases and Opinions on Constitutional Law*, pp. 25, 26.

[3] 4 Moo. P. C. (N.S.) 203.

Landers v. *Woodworth*,[1] on appeal from Nova Scotia, held that the Assembly there could not remove a member for contempt unless he was actually obstructing the business of the House, and therefore was not justified in removing a member because he would not offer an apology in terms dictated by the House for having made an unjust accusation against the Provincial Secretary, though the Supreme Court admitted that the decision was contrary to many decisions in Quebec rendered before *Doyle* v. *Falconer*. Again, in *Barton* v. *Taylor*[2] it was held by the Privy Council as regards the case of New South Wales that the power of self-defence included some right to suspend but not a right to suspend indefinitely or for a definite time depending on the irresponsible decision of the House itself. It is true that these powers are exercised by the Imperial House of Commons, but it is settled law that the extraordinary privileges of the House are a part of the *lex et consuetudo Parliamenti* which is peculiar to the House in England, and cannot be claimed except by virtue of a statute by the Colonial legislatures. In the case of *Fenton* v. *Hampton*[3] it was held by the Privy Council that the Legislative Council of Tasmania could not commit the Comptroller-General of Convicts there for refusing to appear before them to be examined as to the alleged ill-treatment of certain convicts.

On the other hand, the powers under the mere powers of legislatures *ex natura rei* are not altogether insignificant. In *Toohey* v. *Melville*[4] it was held that the Speaker or Chairman of the Legislative Assembly had power without a resolution of the House to eject from the chamber a member guilty of disorderly conduct and wilful obstruction of the course of business under standing order 176 of the British House of Commons, which had been adopted by the Legislative Assembly. In the case of *Harnett* v. *Crick*,[5] which

[1] 2 S. C. R. 158. The Assembly of New Brunswick used to assert extraordinary claims until 1844; see Hannay, *New Brunswick*, i. 182, 183; ii. 96, 97.

[2] 11 App. Cas. 197; 6 N. S. W. L. R. 1.

[3] 11 Moo. P. C. 347. Cf. Blackmore, *Constitution of South Australia*, pp. 106–8.

[4] 13 N. S. W. L. R. 132.

[5] [1908] A. C. 470 overruling 7 S. R. (N. S. W.) 126.

came before the Privy Council in 1908, the question was the legality of a decision of the Legislative Assembly to suspend Mr. Crick from the House of Assembly while certain inquiries were proceeding in the Courts as to his conduct as Minister of Lands. It was argued against the validity of the action taken that the power to protect their proceedings could not require that a member should be removed from the House. But the circumstances turned out to be very peculiar: a committee had brought in a report and would have considered it, but were prevented from doing so by the legal proceedings which were impending, and the Privy Council held that under the circumstances the expulsion of Mr. Crick from the House was perfectly legitimate under the special standing order made for the occasion.

On the other hand, when legislation has taken place, there can be no doubt of the powers of the Parliament. This legislation is not only possible under the general legislative power of the Colonies, but is often expressly conferred in the Constitution Acts, where it is normally given as a power to confer by legislation on the two Houses of the Parliament, and on the members of those Houses, powers equal to or less than those of the Lower House of the Imperial Parliament: this is the case, for example, in the constitutions of Victoria,[1] of Western Australia,[2] of South Australia[3] and of Natal.[4] There may be added the fact that in all these cases the powers could be increased by an alteration of the constitution carried out in the form prescribed for such alterations, but as the constitution stands, in no case could simple legislation alter the powers conferred by the Acts which establish the constitutions. In the case of the Commonwealth of Australia[5]

[1] 18 & 19 Vict. c. 55, sched. s. 35; the law was laid down in Act 20 Vict. No. 1; see now Act No. 1075, s. 10.

[2] 53 & 54 Vict. c. 26, sched. s. 36, exercised by 54 Vict. No. 4. This applies to the powers of the Imperial Parliament from time to time, not merely as in the case of Victoria and South Australia to the powers of that Parliament when the constitution was granted.

[3] Act No. 2 of 1855–6, s. 35. See Acts No. 14 of 1872 and No. 430 (1888).

[4] Act No. 14 of 1893, s. 42 (exercised by Act No. 27 of 1895), which accords with the Western Australia model.

[5] 63 & 64 Vict. c. 12, Const. s. 49.

the privileges of Parliament are to be such as are appointed by Parliament by legislation : until then they are to be those which are enjoyed by the Imperial House of Commons from time to time. Thus the House of Commons privileges are to be the minimum which the Commonwealth has ; it may increase these privileges by ordinary legislation, though it has not yet done so. An Act, No. 16, was passed in 1908 to protect parliamentary prints from the danger of libel actions. In the Cape of Good Hope and Newfoundland the Constitution Acts contained no hint as to privileges at all, and the privileges of the Houses rest on ordinary legislation ; by s. 57 of the *South Africa Act*, 1909, the privileges of the Parliament of the Union are to be those of the Cape Lower House until Parliament decides otherwise. It has defined its code by Act No. 19 of 1911, and has imposed on future Acts the constitutional obligation that the privileges exercised must not exceed those of the House of Commons from time to time. In the case of New South Wales,[1] Tasmania,[2] and Queensland,[3] the Constitution Acts and the letters patent refer merely to the power of each House adopting standing orders, and in New South Wales there is still no Act conferring privileges on the House. In Tasmania, on the other hand, the defect was removed in 1858 by a local Act, and in Queensland by an Act, 25 Vict. No. 7, which was consolidated in the *Constitution Act* of 1867,[4] so that the matter is now part of the constitution of the Colony and subject to alteration only in the manner appropriate in such cases. In the Transvaal[5] and the Orange River Colony[6] the constitutions allowed each House to take by legislation the privileges of the House of Commons from time to time, or any less privileges, and this privilege was availed of by the Transvaal by the *Parliamentary Privileges Act*, 1907.

When legislation has been passed there is no doubt of its effect, provided of course it does not infringe the constitution :

[1] 18 & 19 Vict. c. 54, sched. s. 35. [2] Act 18 Vict. No. 17 s. 29.
[3] Letters Patent, June 6, 1859, s. 13. [4] 31 Vict. No. 38, ss. 41–56.
[5] Letters Patent, December 6, 1906, s. 33.
[6] Letters Patent, June 5, 1907, s. 35. See now South Africa Act No. 19 of 1911.

in Victoria two cases have been decided which show the very full nature of the power which the Parliaments are able to confer upon themselves; it was held in *Dill* v. *Murphy*[1] that the Parliament could commit the appellant in that case for a libel upon one of its members, and in the case of the *Speaker of the Legislative Assembly of Victoria* v. *Glass*[2] it was held that the Assembly could exercise the power of committing for contempt without specifying the nature of the contempt, which in England is the supreme example of the power of the House of Commons, as it makes it in theory able to commit any person whatever for an unspecified contempt, although, were the contempt alleged to be specified, it is clear that, if not really a contempt, the Courts would interfere and release the person committed on a *habeas corpus*.

In Canada the case has been of some interest because of the view firmly held for a long time by Canadian ministers of justice that provincial legislatures were very humble bodies and need not be allowed to arrogate to themselves high powers. The Parliament of Canada itself was given such privileges as might be appointed by law, but so as that such privileges should never exceed those enjoyed by the House of Commons in England at the date of the passing of the *British North America Act*. In 1868 an Act of the Federal Parliament conferred power upon committees of the Senate to examine witnesses on oath, and was not, by inadvertence, disallowed, for it was clearly *ultra vires* as giving a power not possessed by the House of Commons committees in 1867. In 1873 the matter came more prominently forward with regard to an Act of that year giving power to both Houses and their committees to examine witnesses on oath. The Governor-General assented to the Act, though aware that its validity was doubtful, but asked the Imperial Government to consider the matter carefully, with the result that, while the Act was disallowed, the Imperial Parliament in 1875 altered the provisions of s. 18 of the *British North America Act* by making the limitation on the power of the Dominion Parliament merely that of not passing any Act which gave privileges greater than those

[1] 1 Moo. P. C. (N.S.) 487; 1 W. & W. L. 342. [2] 3 P. C. 560.

enjoyed by the House of Commons in England, not in 1867 but at the date of the passing of the Act of the Dominion Parliament defining the privileges thus taken. Thus the Oaths Act was re-enacted in 1876 and was allowed to remain in operation, while the Imperial Act of 1875 itself confirmed the Act of 1868 which had been allowed to pass unobserved.[1]

In the case of the provinces the Legislatures of Ontario and Quebec passed in the session of 1868–9 Acts (31 & 32 Vict. c. 3 and 32 Vict. c. 4) conferring on these bodies the privileges enjoyed by the Canadian House of Commons, adding in the case of the Quebec Legislative Council those of the Canadian Senate. These Acts were promptly disallowed, being held not only by the Dominion Minister of Justice, but also by the Imperial law officers, to be *ultra vires*.[2] On the other hand, when an Act of Quebec of 1870 (33 Vict. c. 5) defined the privileges which it claimed, amounting to pretty much the same thing as had been claimed in the case of the previous Act, the Act was left in operation,[3] and the case *ex parte Dansereau* [4] decided that a provincial legislature had a right to summon witnesses before it and to punish persons who declined to appear, and that the provincial Act of 1870 was a proper exercise of the power which in itself was inherent in a legislature by reason of its being essential for the proper conduct of its legislative powers. This decision went further than was justified in holding that the power was inherent in a legislature, and was evidently one of those Quebec decisions held by Taschereau C. J. to have been overruled by the decision in *Landers* v. *Woodworth*,[5] which followed the case of *Falconer* v. *Doyle*,[6] decided by the Privy Council, and which should have been followed in this matter by the judges in *ex parte Dansereau*. But the decision in itself was correct, as was to be proved later. In 1871 a British Columbia Act (35 Vict. c. 4, repealed by 36 Vict. c. 35,

[1] *Parl. Pap.*, C. 911, pp. 3–9; Canada *Sess. Pap.*, 1876, No. 45; Imperial Act, 38 & 39 Vict. c. 38; Canada Act, 39 Vict. c. 7.

[2] Canada *Sess. Pap.*, 1877, No. 89, pp. 202–11, 221; *Provincial Legislation*, 1867–95, pp. 83, 146, 147, &c.

[3] Cf. Canada *Sess. Pap.*, 1877, No. 89, pp. 108–14, 325.

[4] 19 L. C. J. 210.

[5] 2 S. C. R. 158.

[6] 4 Moo. P. C. (N.S.) 203; see above, pp. 446, 447.

but in substance re-enacted by c. 42) was allowed to stand, but in 1874 there was again a disallowance, this time of a Manitoba Act (36 Vict. c. 2); and in 1876 there was fresh legislation, and this time not disallowed, in both Ontario (39 Vict. c. 9) and Manitoba (39 Vict. c. 12). In *Landers* v. *Woodworth*, while, as noted above, negativing the power of a legislature without express statutory authority to punish for a contempt which did not actually obstruct business, the Supreme Court of Canada in 1878 expressly said: 'The Legislatures of Ontario and Quebec seem to have conferred on the House of Assembly in these provinces extensive powers to enable them effectively to exercise their high functions and discharge the important duties cast upon them. It may be necessary still further to extend their powers. The legislatures of the other provinces will probably consider it desirable to take the same course, and in that way unmistakably place these tribunals in the position of dignity and power which it is desirable they should possess.' The decision had been anticipated by the Legislature of Nova Scotia by c. 22 of 1876, which gave both Houses the same privileges as the Houses of the Dominion Parliament, and both this Act and the Ontario and Manitoba Acts were left to their operation. The Minister of Justice of Canada evidently was strongly in favour of the view that they were invalid, but he did not go beyond recommending that the attention of the Government of Nova Scotia should be drawn to the provisions of the Act deemed undesirable, with a view to their amendment.[1] But Nova Scotia, having obtained the Act it desired, had no intention of altering it. The other provinces also passed Acts regarding the privileges of the legislatures, New Brunswick[2] and Prince Edward Island[3] in 1890, Alberta[4] and Saskatchewan[5] being of course the latest to do so. In British Columbia, by c. 47 of the *Revised Statutes* the privileges of the House are not to exceed those of the British House of Commons.

[1] Canada *Sess. Pap.*, 1877, No. 89, pp. 108–14, 201.
[2] 53 Vict. c. 6. Cf. 33 Vict. c. 33; *Revised Statutes*, 1903, c. 5.
[3] 53 Vict. c. 4, s. 110; 56 Vict. c. 1, ss. 8–11; 8 Edw. VII, c. 1, ss. 8–11.
[4] 1909, c. 2. [5] 1908, c. 4.

The validity of such legislation only received final settlement in 1896, when a case, *Fielding* v. *Thomas*,[1] was adjudicated upon by the Privy Council. The Act of Nova Scotia included a provision authorizing the Legislature to summon any person before it, offenders to be liable to imprisonment. The plaintiff deliberately disobeyed an order of the House of Assembly to attend, and was arrested by the serjeant-at-arms and imprisoned under order of the House. Being released under a writ of *habeas corpus*, he brought an action against certain members for assault and false imprisonment. Judgement went for the plaintiff, and on appeal to the Supreme Court of Nova Scotia the Court was equally divided and the judgement in the lower Court was therefore affirmed. But it was reversed in the Privy Council, which entertained no doubt of the power of the Legislature of Nova Scotia to enact the Act in question; the judgement pointed out that by the Act of 1867 the powers of the legislatures at confederation were continued, and they had before they became provinces of the federation full power to enact such laws as they pleased on the subject of their privileges, and this power was not gone; again, and this is of especial importance, as it refers generally and covers the case of a province which has never been a Colony with a representative legislature in the sense of the *Colonial Laws Validity Act*, 1865, they held that the power was competent to be exercised under s. 92 (1) of the *British North America Act*, 1867, as being an amendment of the constitution of the province. This will authorize the Legislatures of Manitoba, Alberta, and Saskatchewan, and any new provinces to exercise full powers over their privileges.[2] On the other hand, it is important to note that as the criminal law is reserved by s. 91 (27) of the *British North America Act*

[1] [1896] A. C. 600 overruling 26 N. S. 55. Contra, Sir J. Thompson, *Provincial Legislation*, 1867–95, p. 1228.

[2] This will also apply to British Columbia, which had not a representative constitution on its joining the federation, according to Lefroy, *Legislative Power in Canada*, p. 749, note 1, but this is an error; see Act No. 147 of 1871 of that province. All the provinces now have parliamentary privileges laid down by their local Acts. For Ontario, see 1908, c. 5, ss. 43–61; for Quebec, *Revised Statutes*, 1909, ss. 129–40.

exclusively to the Dominion, the Privy Council were at pains to point out that all they decided was the power of the legislatures to establish themselves as courts of record, as was done by the Nova Scotia Act, for the purpose of dealing with contempts as contempts, not as criminal offences, a distinction not of much practical importance, but obviously excellent in law. The case was followed by the Supreme Court of Canada, in *Payson* v. *Hubert*,[1] overruling the Supreme Court of Nova Scotia,[2] and deciding that a person who created a disturbance could legally be removed from the stairs of the House of Assembly.

The nature of the privileges conferred may be gathered from the Act, 1909, c. 2, of Alberta, defining the privileges claimed by that body. The Assembly may compel the attendance of any persons before it, and the production of papers, and the serjeant may issue a warrant or subpoena to enforce attendance. Any committee may examine a witness on oath, and in exercising the powers conferred all persons acting under instructions are indemnified, and all sheriffs, constables, and others are bound to help them. No member shall be liable to any civil action or prosecution for things done before the House by petition, motion, or otherwise. Except for a breach of the peace, no member shall be liable to arrest, detention, or molestation for any civil cause during the session, and for twenty days after and before the session, thus providing against the case of *Norton* v. *Crick*,[3] in which in New South Wales it was laid down that arrest on a *ca. sa.* was possible even while the Assembly was sitting. During the same periods all members and officers of the Assembly and witnesses summoned before it or a committee are exempted from serving on juries. The assembly is made a court and authorized to punish summarily (*a*) assaults, insults, and libels upon the members of the House while in session; (*b*) obstruction or intimidation of members; (*c*) offering or accepting of a bribe in connexion

[1] 34 S. C. R. 400. [2] 36 N. S. 211.

[3] 15 N. S. W. L. R. 172. In *Gipps* v. *Malone*, 2 N. S. W. L. R. 18, it was held that no action for defamation would lie for words spoken in the House in the course of a question.

with legislative business; (*d*) assaults upon or interference with officers of the Assembly in the discharge of their duties; (*e*) tampering with witnesses in respect of any evidence given before the Assembly or a committee; (*f*) presenting any forged document to the Assembly; (*g*) forging documents or records of the Assembly; (*h*) bringing an action against or causing the arrest of a member for anything done by him in the Assembly; (*i*) causing the arrest or molestation of a member for a civil suit. The punishment to be awarded is imprisonment during such portion of the session as the Legislative Assembly may award, and the determination of the Assembly is to be final and conclusive. If any action is brought against the printer of any record of proceedings of the Assembly it shall be stayed by production of the original with an affidavit of the correctness of the copy, and the publication of extracts is protected if *bona fide* and without malice. The arrest and detention of any person under the authority of the Act is to be effected by the serjeant-at-arms or the keeper of the common jail in Edmonton, or the officer commanding the Royal North-West Mounted Police of the Edmonton district.

It will be seen that the powers taken are pretty much the same as those of the Imperial House of Commons, though they do not expressly go so far as the powers of that House. In the case of one of the earliest Acts, that of Tasmania, in 1858, it is laid down expressly that to a writ of *habeas corpus* issued it will be a conclusive answer that the prisoner is in custody under the authority of a warrant under the hand of the President of the Legislative Council or Speaker of the Legislative Assembly, providing for his detention on the ground of a contempt, the contempt to be set out in words to show under which of the heads enumerated in s. 3 of the Act the contempt falls. This is not the wide power to commit without specifying a contempt claimed and allowed to the House of Commons. The power of punishment in the case of Tasmania also is limited to the period of the session, and this is a rule in all cases, as in England. Moreover the Colonial Parliaments do not usually confer any right to punish by fine, a right which, though

theoretically possessed by the House of Commons, may be regarded as obsolete by reason of disuse. The Union Act of 1911, however, like the Cape Act of 1883, recognizes the power. The Tasmania and Queensland Acts contain also a power to the Houses to direct a prosecution against any person who infringes the rights of the Houses or members by committing any offence cognizable by the Supreme Court, and such offences can be punished by fine and imprisonment not to exceed two years.

It may seem somewhat anomalous that the Parliaments which have no constitutional rule regarding the extent of their privileges should have power to confer such privileges as they deem desirable. But the fact is of little importance: it is fairly certain in the Provinces of Canada that any effort to arrogate great power would lead to the disallowance of the provincial Act by the Dominion Government, and in point of fact it does not seem that any provincial legislature has yet attempted to take too great powers, though no doubt ample powers have been taken from time to time. It may also be argued [1] that the limitation of the powers of the Dominion House applies to the provinces. In the other States and Dominions the practice has been, where powers are taken, to follow the House of Commons claims as actually exercised at the present day, and not to extend them. New South Wales indeed, for whatever cause, has taken no real privileges at all.[2]

It is possible indeed that New South Wales may hold the view that the privileges which it could take are restricted to making the rules for standing orders which are specified in the Constitution Act and which it has exercised. It may be that it is held that this grant implicitly excludes any

[1] See *Provincial Legislation*, 1867–95, p. 88. I do not think this argument sound.

[2] New Zealand, which has only power as to standing orders under 15 & 16 Vict. c. 72, s. 52, by the *Parliamentary Privileges Act*, 1865, gave both Houses the Commons privileges as at January 1, 1865, and this is still law; see the Statutes, 1908, No. 101, s. 242. The Cape legislated in 1854 by Act No. 1, and see Act No. 13 of 1883. For Newfoundland see *Consolidated Statutes*, c. 2, s. 10. Queensland has made its privileges a part of the constitution by 31 Vict. No. 38, ss. 41–56. For Canada see 31 Vict. c. 22, and now *Revised Statutes*, 1906, c. 10; for Tasmania, 22 Vict. No. 17; 49 Vict. No. 25.

other powers.[1] But this is clearly wrong : the power to alter the constitution would of course enable it to take larger powers, but even without this it may safely be said that every legislature which is not restricted in the sphere of its powers is able to lay down what privileges it desires to lay down. It may be objected to this view that in the cases of Canada the privileges are expressly placed within the power of the Parliament. But the case is not merely that the privileges are placed within the power, but they are also expressly limited in extent, and further, it may have been, as was suggested in the case of *Fielding* v. *Thomas* by counsel, that the right was conferred in express terms upon the Dominion and not upon the provinces, because the matter was one of civil rights, and therefore *prima facie* reserved to the provinces exclusively of the power of the Dominion Parliament. Another and probable view is that the provisions were included simply because they form part of a constitution, and should be placed in a Constitution Act, just as has been done in Queensland, which enacted the provisions independently in a local Act, and later incorporated them with the *Constitution Act* of 1867. In the case of the Union of South Africa the insertion of the clauses is again justified in a different way : in each case the privileges to be possessed were defined in the Acts, and thus rendered legislation merely optional instead of necessary, as in cases like Canada, Victoria, South Australia, and Western Australia, and Natal, where the privileges are merely taken generally to be laid down by Act of Parliament, but are not to exceed those of the House of Commons.[2]

[1] In New Zealand the *Parliamentary Privileges Act*, 1865, expressly repealed s. 52 of the Constitution Act, which gave power to make orders, but with limited effect.

[2] Victoria and South Australia are prevented from taking further privileges than those enjoyed by the Commons at the date of their constitutions, until they formally alter these instruments. Canada was relieved from this restriction and given power to take the Commons' privileges from time to time by the Act of 1875, and Western Australia and Natal took the latter power in their constitutions, and so has South Africa by Act No. 19 of 1911, s. 36. It should be noted, however, that Natal voluntarily restricted itself to the standard of 1893 by Act No. 27 of 1895, s. 21.

§ 3. The Form of Acts

The form of the enactment of laws is generally by the Crown with the advice and consent of the two Houses of the Parliament. But there are certain variations: in New Zealand the laws are enacted by the General Assembly, which includes the two Houses and the Governor. In the Commonwealth the 'advice and consent' disappear. In the case of the Provinces of Nova Scotia, New Brunswick, and Prince Edward Island, which owe their original constitutions to the Commissions of the Governors,[1] the power was given to the Governor to enact laws with the Houses and the form is maintained, though in two of the provinces there is now but one House, and in all the Lieutenant-Governor takes the place of the Governor. In the Cape the Constitution Ordinance of 1852 gives the power to legislate to the Governor with the two Houses, but in Natal and the Transvaal and the Orange River Colony it was given to the Crown. In the case of the Dominion of Canada and the other provinces the power is conferred upon the Crown with the House or Houses. In the case of South Australia and Tasmania the local Constitution Acts give the power to the Governor with the two Houses, but in all the other four colonies, now states, the power belongs to the Crown with the two Houses, and this is of course the case with the Commonwealth and the Union Parliaments. It is idle to suppose that there is any impropriety in the old form which is also followed in Newfoundland: the Governor legislates as representative of the Crown, and the assent he gives is in all cases in the name and on behalf of the King. The fact is rather amusingly illustrated by an Act of Newfoundland in 1910 dealing with Treasury notes, for the Act contained a clause suspending its operation until the royal pleasure had been signified, but ignoring the fact that it had been signified by the assent of the Governor. The correct form of suspending clause is that laid down by a dispatch of June 20, 1884, from the Secretary of State:[2]

[1] Cf. Clark, *Australian Constitutional Law*, pp. 309 seq.; Harrison Moore, *Commonwealth of Australia*, pp. 105, 106. There is certainly absolutely no legal difference between the cases.

[2] *Constitution and Government of New Zealand*, p. 193. A direction that

This Act shall not come into operation unless and until the officer administering the Government notifies by proclamation that it is Her Majesty's pleasure not to disallow the same and thereafter it shall come into operation on such day as the officer administering the Government shall notify by the same or any other proclamation.

The assent to the Acts passed by the Parliament is given in various forms in various Colonies: in some cases it is usually given by commission, in others the Governor personally attends the Parliament and gives assent, or he may assent to it at the Government offices.[1] The words of assent are borrowed from the English form, and the words of assent to an Appropriation Bill are still the same as in England, but they are pronounced in English, not in Norman French. In Canada and Quebec the words are said both in English and also in French, as the legislatures are bilingual in these matters under the *British North America Act*, and the same remark as to English and Dutch applies to the Union Parliament.

The use of language in parliamentary proceedings is of some interest and importance. In the Union Act of 1840 it was expressly provided that all instruments for summoning the Parliament, for dissolving it and proroguing it, and all returns to instruments, all journals, entries, and written proceedings of the two Houses, and all written or printed proceedings of reports of committees of the two Houses, should be in English only, and copies in French, though not prohibited, were not to be allowed to be recorded among the archives. No attempt was, very wisely, made to enforce the use of English in the Houses, and the French language was used from the first in debates, the first Speaker of the Assembly, Mr. Cuvillier, being a French member of Parliament. Various rules were made to secure the translation of all matter into French, and in 1841 an Act was passed to secure the translation into French of all statutes and similar

the bill be reserved is absurd, but harmless; see New Zealand *Parl. Pap.*, 1902, A. 1, pp. 9, 12, 13; A. 2, p. 20.

[1] Where a Bill is reserved, the due publication of assent is essential, or the Bill is not validly an Act; see Western Australia Act No. 14 of 1905, s. 65. In 1911 there was an amusing dispute in Canada with regard to the assent being given by a Deputy instead of the Governor-General.

documents. But in the session of 1844–5 the Speaker refused a motion written in French, on the ground that to receive it would be a violation of the Union Act, and on an appeal to the House his decision was upheld. In 1848 the provisions of the Union Act in this regard were repealed: the measure had been urged by three successive Governors-General, and when an address from the Legislative Assembly was sent in 1845 the Imperial Government by a dispatch from Mr. Gladstone of February 3, 1846, promised repeal, which was defended by Lord Grey in the House of Lords as being proper, on the principle of allowing all their local concerns to be regulated according to the wishes and feelings of the people of Canada. Lord Elgin had the pleasure of announcing the decision of the Imperial Parliament in his speech on opening the Legislature on January 18, 1849, for it was a measure which he had urged energetically upon the consideration of the Imperial Government.[1]

S. 133 of the *British North America Act* provides that either the English or the French language may be used by any person in the debates of the Houses of the Parliament of the Dominion of Canada and of the Houses of the Legislature of Quebec, and both those languages shall be used in the respective records and journals of the Houses, and either of those languages may be used by any person or in any pleading or process in or issuing from any Court of Canada established under the Act and in or from all or any of the Courts of Quebec. The Acts of the Parliament of Canada and of the Legislature of Quebec are to be printed in both these languages. Under this provision everything in the Canadian Parliament is duplicated and issued in French as well as in English: the statutes and the Bills alike are printed in both languages, and recently steps have been taken to accelerate the rapidity of the French version of the proceedings, but the sessions of 1910 and 1911 opened as usual with complaints of delay by Mr. Landry, and amendment was promised. The expense is large, and the utility of much of the printing *nil*.

[1] Houston, *Constitutional Documents of Canada*, pp. 162, 175, 183, 213; cf. Pope, *Sir John Macdonald*, ii. 249, 250; Imperial Act 11 & 12 Vict. c. 56. s. 1. For Lord Durham's policy, see *Report*, pp. 110 seq.

In establishing the Province of Manitoba in 1870, the same provision was inserted by the Dominion Parliament in the constitution (33 Vict. c. 3, s. 23), but the provision was repealed by the Legislature of Manitoba in 1890,[1] as it had under its constitution a right to do.[2]

In the case of South Africa the course has been towards the more full recognition of the position of Dutch as a language of the state. It was provided by s. 89 of the *Constitution Ordinance*, 1852, of the Cape that the debates and discussions should be conducted in English, and that all journals, minutes, and proceedings should be made and recorded in the same language. The only alteration to this was effected by Act No. 1 of 1882,[3] which allowed debates and discussions to be conducted either in English or Dutch, but which went no further, while the use of Dutch in legal proceedings was recognized by Act No. 22 of 1884. Under the practice the rule was for all the records to be kept in English; Dutch petitions were accompanied by English translations, and on the other hand, while parliamentary papers were issued in English in special cases, translations into Dutch were issued also, and usually a report was accompanied by a Dutch version, the evidence being left untranslated, and the first prints of Bills were translated into Dutch, while a daily record of votes and proceedings was rendered into Dutch; the estimates were also translated, but the whole matter was one of convenience, and especially of expense, and in later years much that was once translated merely out of principle was allowed to be left untranslated when it would do no good.

In the case of the Transvaal and the Orange River Colony the rule laid down in the letters patent of December 6, 1906,[4] and repeated in the letters patent of the Orange River Colony in June 5, 1907,[5] was that debates might be conducted in either

[1] 53 Vict. c. 14. Cf. *Provincial Legislation*, pp. 909 seq.

[2] In the North-West Legislative Council both languages were provided for by the Act 43 Vict. c. 25, but see *House of Commons Journals*, 1890, pp. 106–8, where it was decided to leave the matter in future to the Council itself; 54 & 55 Vict. c. 22, s. 18; Willison, *Sir Wilfrid Laurier*, ii. 57, n. 1; the new constitutions of Alberta and Saskatchewan have nothing about this, an amendment for it being defeated; *Canadian Annual Review*, 1905, p. 105.

[3] Cf. Wilmot, *South Africa*, ii. 148. [4] ss. 34 and 44. [5] ss. 36 and 46.

language, and that the votes and proceedings and proposed laws should be printed in both languages, but all journals, entries, minutes, and proceedings in the two Houses were recorded in English only, while laws were to be issued in both languages. Thus the Dutch language remained in an inferior position, though still recognized as an official language. In the case of the Union of South Africa the matter is different: s. 137 of the *South Africa Act*, 1909, provides that both the English and Dutch languages shall be the official languages of the Union, and shall be treated on a footing of equality, and possess and enjoy equal freedom, rights, and privileges. All records, journals, and proceedings of the Union Parliament shall be kept in both languages, and all Bills, Acts, or notices of general public importance or interest issued by the Government of the Union shall be in both languages. The clause was admittedly a victory for the Dutch party, and it seems that originally Dr. (now Sir S.) Jameson was unwilling to concede the point, but yielded when he found that the matter was being treated as a question of honour by the Dutch party, as showing their equality with the English. This is its justification, though otherwise it would be regrettable that artificial steps should be taken to encourage the development of bilingualism in the Cape, where in the long run it can merely add to the complications of education and life. It is very doubtful if bilingualism is in any way encouraging to mental growth;[1] at any rate, the history of South Africa has not tended as a rule to encourage the view that that country is exceptionally fortunate in possessing intellectual leaders.

There is a curious difficulty in all these cases, viz. which language shall decide where there are discrepant versions, a matter not at all rare; it cannot be said that even in Canada there is any rule generally laid down; apparently it is held that the sense and context will decide in favour of the most probable interpretation, or if the Act be a consolidation, the language of the Act to be consolidated may be referred to.[2]

[1] Cf. *Parl. Pap.*, Cd. 5666, pp. 244–66.

[2] The Act 8 Edw. VII. c. 7, s. 13, accepts the principle of consistency for the *Revised Statutes*, 1909. See also *Civil Code*, s. 2615.

In the case of the Transvaal and the Orange River Colony, all difficulty was avoided by the requirement that the copy of each law to be signed by the Governor and enrolled in the office of the Registrar of the Supreme Court was to be the English copy, and was to be final evidence of the terms of the Act. In the case of the Union there shall be two copies prepared and the Governor-General shall sign which he chooses, and that shall be the final copy in cases of disagreement, though both copies will be enrolled in the office of the Registrar of the Supreme Court, Appellate Division. He signs some in Dutch, some in English, and confusion seems probable.

The necessity of safeguarding existing interests is recognized by a provision in the Act which exempts existing officers from the necessity of acquiring both tongues, but the provision of two official languages may be expected to tell in favour of Dutch applicants for posts, as the learning of English will be more common among the Dutch than the reverse process, for in South Africa, while a knowledge of English is very valuable, a knowledge of Dutch can hardly be deemed anywhere absolutely essential to the ordinary Englishman.

§ 4. The Procedure of Parliament

The procedure of Parliament is based avowedly and minutely on the practices of the Imperial Parliament. It has been so from the beginning, the pomps of the Imperial chambers having been introduced into Canada at a time when the capital where the Legislature of Upper Canada met was merely a small village. There have been proposals from time to time to simplify the procedure, but they have not been very sympathetically received in any quarter; indeed, there is some advantage in inducing the Houses to realize that the action which they are engaged upon is of serious importance, and should be treated in a spirit of dignity and responsibility. All the forms are therefore observed, state openings, messages from the Governor, and, what is more important, the full procedure by three readings in either House, with committee stages and sometimes report stages, though the Canadian House of Commons has discarded

this. It is generally provided that in cases of doubt the English procedure shall be followed, but as yet none of the Houses have had occasion to adopt the drastic closure rules of the Imperial Parliament. On the other hand, they might, it seems, be invoked in case of necessity under the clauses in the rules which allow the adoption of the Imperial procedure for the time being in certain cases; and on March 24, 1904, after there had been a hopeless confusion in the Lower House of the Cape Parliament, the Speaker asserted and exercised the right of putting the question on his own authority, following the example of Mr. Speaker Brand on a famous occasion in English history.[1] Threats of action have, however, been made in the direction of closure resolutions in Canada, when, in 1896, the dying Ministry of Sir C. Tupper was endeavouring to obtain supply, in 1908, when the Opposition in the Lower House persistently and successfully blocked operations until the Government had to carry supply by the mere physical exhaustion of all parties to the struggle, and in 1911 in the struggle over reciprocity with the United States, which led to a dissolution.[2] In September 1910 the closure had to be used to get any work done by the Upper House of New Zealand.[3]

In certain cases a time limit has been adopted for speeches: the following are the rules in force as given in a parliamentary return[4] of 1908:—

There are no rules in force for limiting the length of speeches in the Parliament of the *Dominion* of *Canada* or in the Legislatures of *Quebec*, *New Brunswick*, *Manitoba*, *British Columbia*, *Prince Edward Island*, *Saskatchewan*, and *Alberta*.

Rule No. 30 of the Legislative Assembly of *Ontario* provides

[1] The closure was applied on the British analogy by the Speaker in the Assembly on November 15–16, 1909, but was not popular; see *The State of South Africa*, ii. 675. Cf. the action of the speaker in New Zealand on Sept. 2, 1881; Rusden, iii. 384 seq.

[2] *Canadian Annual Review*, 1908, pp. 47, 51, 53, 54.

[3] See Sir J. Ward's speech, September 27, 1910. An amusing case of objection to forms is seen in the elaborate protest in Western Australia *Parliamentary Debates*, 1910, p. 2054, against the first reading of Bills in dummy. As a protest against this and other irregularities, as they held, the Labour party deserted the House in a body during the passing of the Redistribution Bill (Act No. 6 of 1911) of 1911.

[4] H. C. 301 (revised).

that no Member shall speak to a motion to adjourn the House or the Debate for more than ten minutes.

Rule No. 14 of the House of Assembly of *Nova Scotia* provides that no Member shall address the House upon any subject before it for a longer period than an hour and a half at any one time, unless by special leave of the House.

There is no limitation on the time occupied by speeches delivered in the Parliament of *Newfoundland*.

There is no provision for a time limit to speeches in the Senate of the *Commonwealth* of *Australia*, except in the case of a motion for the adjournment to discuss a definite matter of urgency, in which case the mover and Minister first speaking to the question shall not speak for more than thirty minutes each, and other Senators and the mover in reply shall not exceed fifteen minutes each, while the whole of the discussion of the subject shall not exceed three hours (Standing Orders of the Senate, No. 60).

In the House of Representatives, the only limitation is that under Standing Orders 38 and 39 a Member moving the adjournment of the House to discuss a definite matter of urgent public importance cannot speak for more than thirty minutes, and no other Member for more than fifteen minutes.

Standing Order No. 13 of the Legislative Council of *New South Wales* provides that on any motion for the adjournment of the House for the purpose of discussing a definite matter of urgent public importance, the speeches of the mover and the Minister first speaking to the question shall not exceed thirty minutes each, and the speech of any other Member or of the mover in reply shall not exceed fifteen minutes each. Standing Order No. 264 provides that any standing rules or order of the House may be suspended on motion made in accordance with notice given and, in cases of necessity, may be suspended on motion made without notice. The question of necessity may be decided by the House upon motion without notice or debate, except a statement by the mover limited to ten minutes.

Standing Order No. 49 of the Legislative Assembly provides that on motions for the adjournment of the House to discuss definite matters of urgent public importance, the mover and the Minister first speaking are limited to thirty minutes each, and any other Member speaking to the question to fifteen minutes each. Standing Order No. 161 provides that on a motion of dissent from Mr. Speaker's ruling no Member shall, without concurrence, speak for more than ten minutes, and Mr. Speaker is entitled to put the question when the debate on such question shall have exceeded thirty minutes.

Standing Order No. 335 provides that no debate is allowed on the Order of the Day for the House to resolve itself into Committee of Supply or Ways and Means, and no Amendment or contingent motion shall be entertained without the leave of the House, no debate being allowed upon the motion for such leave, except a statement of the subject-matter of the intended motion, limited to ten minutes. Standing Order No. 395 imposes a similar limit of ten minutes on the Member moving that it is a matter of urgent necessity that the Standing Orders should be suspended without notice.

There were no rules of the Parliament of *Queensland* providing a limit for speeches, but the Standing Orders provided that on a motion for the adjournment to discuss a definite matter of urgent public importance, the mover might not speak for more than thirty minutes, and any other Member debating the motion, or the mover speaking in reply, might not speak for more than twenty minutes. A time limit was agreed upon after long discussion in 1910. It limits speeches as a rule to an hour and a half in the case of the mover, in other cases to thirty minutes (see *Debates*, 1910, p. 611).

There is no time limit to speeches of Members of the Parliament of *South Australia*.

There is no limit in the length of speeches in the Legislative Council of *Victoria*. Standing Order No. 8*b* of the Legislative Assembly provides that, on a motion for the adjournment of the House to discuss a definite matter of urgent public importance the mover shall not exceed thirty minutes, and any other Member shall not exceed fifteen minutes, and the whole discussion on the subject shall not exceed two hours. This Standing Order has been in force since 1889 and works admirably.

There is no time limit to the length of speeches in the House of Parliament of *Tasmania* or of *Western Australia*.

There is no time limit to the length of speeches of the Legislative Council of the *Dominion* of *New Zealand*. Standing Order No. 108 of the House of Representatives provides that no Member shall speak for more than half an hour at a time in any debate in the House, except in the debate on the address in reply or on the financial statement, or in a debate of a motion of 'No confidence' or in moving the second reading of a Bill or on the debate on the Appropriation Bill, when a Member shall be at liberty to speak for one hour. In Committee of the House no Member shall speak for more than ten minutes at any one time or more than four times on any one question before Committee; provided that this rule shall not apply in Committee to a Member

in charge of a Bill or to a Minister when delivering the financial statement in Committee of Supply or, in regard to the number of his speeches, to a Minister in charge of a Class of Estimates in Committee of Supply. Standing Order No. 111 provides that in speaking to motions for the adjournment of the House no Member shall exceed five minutes, with the exception of Ministers, who shall each be allowed to speak ten minutes, and the whole discussion on the subject shall not exceed two hours.

There was no time limit to speeches in the Parliaments of the *Cape of Good Hope*, *Natal*, the *Transvaal*, and the *Orange River Colony*, and none has yet been adopted in the case of the Union.

In the case of the Commonwealth there was adopted in 1905 the excellent rule of allowing a Bill to be taken up in a subsequent session at the stage at which it was abandoned, provided always that no general election or periodic election of the Senate has intervened. It is also further laid down that if the Bill has gone to the other House from either House, the consent of the House in which it originated is requisite for the other House taking it up.[1] A good example of this procedure is the passing in 1910 through the Senate of the Navigation Bill with the intention of resuming it in 1911.

In Western Australia again in 1910 the Legislative Council asked the Lower House to concur in a similar rule without result. But in New South Wales and in South Australia the same rule applies.

In all the constitutions there are provisions for the appointment by election of a Speaker and of a President of the Legislative Council. In the Cape the Chief Justice was *ex officio* President. In the case of New South Wales[2] and Queensland[3] the appointment of the President is made by the Governor by instrument under the public seal; in New Zealand, which also has a nominee Upper House, the post of Speaker of the Council is elective.[4] In the case of Victoria the post is elective, but the election can be disallowed by the Governor; in Tasmania and South Australia it is elective, and notification only is prescribed, and so in

[1] *Senate Journals*, 1905, p. 54; *Parliamentary Debates*, 1905, p. 7089.
[2] Act No. 32 of 1902, s. 11. [3] Act 31 Vict. No. 38, s. 25.
[4] *Consolidated Statutes*, 1908, No. 101, s. 7.

Western Australia. The Speaker in the Lower House is always elected, and in the case of Tasmania and South Australia only is notification of the appointment legally required, though in all cases the form of notification is followed. In New Zealand the confirmation of the Governor is still required.[1] In Canada, the Commonwealth,[2] and the Union, the Speaker of the Lower House is elective, but by practice the appointment is notified, and so with the Presidents in the two latter cases, while in Canada the appointment rests with the Governor-General, as usual in nominee Houses, and similarly in Quebec and Nova Scotia. In the Lower Houses of the Provinces the office is elective, and so also in the House of Assembly of Newfoundland, while there the President of the Legislative Council is appointed by the Governor. Until 1841 the usage was in Canada to present the Speaker for approval, but it was then dropped. In Canada and the Provinces, and in the Australian States, the Speaker asks the Governor for the usual privileges, which are graciously accorded.[3]

As regards voting the provisions are curiously varied. In Canada and the Commonwealth the law is that the President has a vote, and that if the votes are equal the negative prevails, as in the House of Lords. In the Union the rule is that the President shall only have a casting vote, and the Speaker in all three cases has only a casting vote. In all the States and in New Zealand President and Speaker alike have only the casting vote by law. In Newfoundland there is no legal rule and the President and the Speaker might apparently vote twice, but it is doubtful if this would ever be done : there is no evidence of it on record, and if possible would hardly be actual. In the Provinces the legal rule as to the Speaker is as in Canada, but in Quebec the President has an ordinary vote only, as in Canada.[4]

[1] *Consolidated Statutes*, 1908, No. 101, s. 15.

[2] In 1901 both President and Speaker were presented for approval, *Senate Journals*, pp. 3, 4 ; *House of Representatives Votes*, p. 9. In 1904 they were only presented, *Journals*, pp. 2, 3 ; *Votes*, pp. 2, 6 ; and in the latter year the request for privileges was dropped.

[3] Cf. Munro, *Constitution of Canada*, pp. 48, 114.

[4] Otherwise in Nova Scotia, where apparently the rule is as in Newfoundland, that the President has by usage a casting vote, but no ordinary vote.

The Presidents and Speakers are all paid salaries as are Chairmen of Committees, and so hold office until successors are appointed : in all cases they hold office until they resign or are removed by a vote of the House in which they preside, or by the Governor in those cases in which the appointment rests in his hands. The post of Speaker is not by convention a permanent one as in England : it is always open to elect a new Speaker for a new Parliament. Each House has its officers, who are not ordinary public servants, and who in some cases can only be removed by a special process. In Victoria in 1910 a dispute arose because the Governor in Council declined to accept the recommendation of the President of the Legislative Council for an appointment, and in revenge the Upper House adjourned for a week as a mode of protest.

The curious position of the Speaker or President is exemplified by the difference in procedure between the Parliaments of certain States and the procedure in the United Kingdom. The British practice is normally followed on the meeting of a new Parliament, but in Tasmania the practice of issuing a commission prior to the election of a President was abandoned in 1884, and the position laid down that the election should take place before any communication from the throne was made. This plan is generally followed in Canada also as regards the Speaker.[1]

One point regarding the Legislatures is of interest, namely the fact that owing to their small size the Speaker has had on several occasions to give a casting vote. The principles on which he should give such a vote cannot be said to be in any way fixed : in the case of a vote of non-confidence in ministers in 1877 the Speaker of the House of Assembly of South Australia gave his vote against the Ministry on the ground which he declared he always followed, not to support a Ministry which was not in a majority when a vote of non-confidence was moved against it.[2] On the other hand, in the same year Sir George Grey's Ministry was upheld in New Zealand by a vote of the Speaker in the case of a similar motion, a step

[1] Cf. Munro, *Constitution of Canada*, pp. 47, 112. See Tasmania *Parl. Pap.*, 1909, No. 14. The Assembly follows the older usage.

[2] *House of Assembly Votes*, 1877, p. 236 ; cf. ibid., 1871, p. 226.

which Lord Normanby said was probably due to the desire of a Speaker not to prevent further consideration, as is the rule in England, and which therefore could not be used to prove, as Sir George Grey tried to use it, that he had the confidence of the House.[1] It would seem, however, that the Speaker would do well in such cases to conform to the practice in the Imperial Parliament: any other course turns him into a partisan, and it is most desirable that no Speaker should occupy that position, while the Imperial rule would always ensure that the Speaker himself would not be credited with responsibility for any decision, and that the House would be able to consider freely what course of action it should adopt. This rule was recently claimed by the President of the Transvaal Legislative Council to have governed his action in all cases. In 1874 Mr. Carter's Ministry in Newfoundland was only kept in office by the vote of the Speaker,[2] and on what was a vote of censure in 1903 in British Columbia the Speaker supported the Government.[3] In 1907 the President in the Cape laid down the rule that he should try to have funds voted and the Government carried on.[4]

The Governor-General or Governor has in every case by law the power to prorogue or dissolve Parliament besides the power to summon it, though the latter power is subject to the rule of annual Parliaments and must be exercised in view of it.[5] The power is also given in the letters patent, though

[1] New Zealand *Parl. Pap.*, 1877, A. 7.

[2] Prowse, *History of Newfoundland*, p. 499.

[3] *Canadian Annual Review*, 1903, p. 213. For another case (Cape Speaker, in 1897) see Wilmot, *South Africa*, iii. 331.

[4] See *Legislative Council Debates*, 1907, pp. 357 seq.

[5] See Canada, 30 Vict. c. 3, ss. 20, 38, 50; Ontario and Quebec, ss. 82, 85, 86; in the *Rev. Stat.* of all the provinces except Prince Edward Island (Act 1893, c. 21; 1908, c. 1), Alberta (Act 1909, c. 2), Saskatchewan (Act 1908, c. 4); Newfoundland, *Consol. Stat.*, c. 2; Commonwealth, 63 & 64 Vict. c. 12, Const. ss. 5, 6; New South Wales, Act No. 32 of 1902, ss. 10, 11; Victoria, 18 & 19 Vict. c. 55, sched. ss. 28, 29; Queensland, Act 31 Vict. No. 38, ss. 3, 12; South Australia, Act No. 2 of 1855–6, ss. 2, 3; Western Australia, 53 & 54 Vict. c. 26, sched. ss. 3, 4; Tasmania, 18 Vict. No. 17, ss. 4, 5; New Zealand, *Consolidated Statutes*, 1908, No. 101, s. 14; Union of South Africa, 9 Edw. VII. c. 9, ss. 20, 22. As to prorogation, cf. *Constitution of New Zealand*, pp. 191, 192.

the delegation is hardly necessary and is not requisite.[1] In the Dominions the English practice in these matters is followed, but in some of the Provinces of Canada there is power to prorogue indefinitely without fixing a day, and this is done, avoiding frequent prorogations. In New Zealand in 1909 the question arose whether when Parliament stood prorogued to a definite date its meeting could be accelerated, but this was not done, and in the absence of statutory provision it would seem that it could not legally be done. There is legislative provision in Tasmania and Victoria under which the Governor can summon the Legislature for a date not nearer than six days.

The rule is now regular that the Legislatures of the Dominions are not affected in any way by the demise of the Crown,[2] there being statutory enactments to that effect in nearly all the Dominions, save the Commonwealth of Australia, and in that case, when the question arose in 1910 on the death of King Edward, it was held that the Parliament was not affected by the demise of the Crown. Mr. Justice Clark has argued that the demise of the Crown produced the result merely by common law, and that without local legislation every Parliament resting on a statutory basis *ipso facto* is exempt from the rule of common law.

It need hardly be said that in convoking, proroguing, and dissolving Parliament the Governor acts on the advice of ministers, just as in all other matters. It is, however, a matter which might cause difficulty if ministers desired to break the law as to the holding of annual sessions, but there is no probability of this giving rise to a dispute. In the Cape during the war the constitution was so violated, but with ministerial advice and inevitably in view of the rebellion raging, and the defect was cured by an Indemnity Act.

[1] There is no delegation in the instruments issued to provincial Lieutenant-Governors, and yet they exercise the powers of the Crown; cf. Canada *Sess. Pap.*, 1877, No. 13, p. 10 (Mr. Blake).

[2] *Devine* v. *Holloway*, 14 Moo. P. C. 290. Cf. as to offices 1 Will. IV, c. 4; 1 Edw. VII. c. 5. See also Anson, *Law of the Constitution*[3], II. i. 251–4; Quick and Garran, *Constitution of Commonwealth*, pp. 462–4. The older rule applied to the New Brunswick Legislature in 1820 and 1830; Hannay, i. 445.

In 1891 it was held by Mr. Angers' advisers in Quebec that he fulfilled the law when he dissolved at once the Lower House of the Legislature so that no business session was actually held, and there was a formal meeting only in 1910 in Saskatchewan. In several cases Governors have put pressure on ministers to meet Parliament early for some reason or other, as when in 1879 Lord Normanby insisted on Sir G. Grey summoning the new Parliament at as early a date as possible, as there had been a dissolution and a general election. Again, in 1908–9, the leader of the Opposition in Newfoundland demanded that the Legislature should meet early, but the Governor did not press for a meeting much before the normal date. In 1882 the Government of New Zealand declined to accelerate the meeting of Parliament at Sir A. Gordon's request. In 1909 the Governor of Western Australia was credited with being the cause of the brief session of Parliament held to vote funds for carrying on the Government, and the cry of Downing Street interference was once more raised. But this is a matter in which a Governor may fairly say that no Government should be reluctant to meet those by whom it has been entrusted with power.

In the Commonwealth, New Zealand, and some of the States the Governor-General or the Governor has the valuable power of sending back a Bill for consideration with amendments.[1] The power which in the case of New Zealand was in 1854 considered by the law officer of the Crown to indicate that the Governor was intended to have a discretion in legislation has, of course, been used mainly for the purpose of governmental correction of unsatisfactory legislation, usually technical errors, and for that purpose is quite commonly used in the Australian States. The same rule applied to the old Colonies in South Africa, but never in Canada or Newfoundland.

In one respect the Dominions make real use of what is now merely a form in England. The practice of conferences in case of disagreement between the Houses is now merely

[1] Cf. Quick and Garran, *Constitution of Commonwealth*, pp. 691, 692. It appears in 5 & 6 Vict. c. 76, s. 30, and in the constitution of Victoria (18 & 19 Vict. c. 55, s. 36), and of South Australia (Act No. 2 of 1855–6, s. 28). It is law in Tasmania under 5 & 6 Vict. c. 76 and 13 & 14 Vict. c. 59, s. 12. For New Zealand, see 15 & 16 Vict. c. 72, s. 56.

formal in England—the constitutional conference of 1910 was something altogether outside of the constitution—but in the Australian States it is real. Thus in Victoria in 1910 the Electoral Act (No. 2288) passed after a full discussion held in public between members delegated by either House, who agreed to a compromise. In the same year in South Australia there were conferences over the Crown Land Bill, the Closer Settlement Bill, the Payment of Members Bill, and the Public Works' Loans Bills: the proceedings were not reported, but they were real conferences, ending in each case in mutual concessions, and a satisfactory adjustment, not formal meetings as in England. Conferences also are used in New Zealand, the other States of Australia, and the Commonwealth, but Canada and Newfoundland have too weak Upper Houses to render conferences desirable or necessary.

In the Australian States, the Commonwealth, New Zealand, and the Dominion of Canada, there are published Hansard reports. In the Commonwealth and in New South Wales, Victoria, Queensland, and Western Australia the reports are extremely full, and so in the Union and in the Dominion, though Mr. Raoul Dandurand has sensibly suggested[1] that the Senate Debates should be curtailed. But South Australia issues a very condensed—and much more useful—record, and Tasmania has of late abandoned the printing of debates, which certainly curtails discussion, but is open to other objections; while the Canadian Provinces normally but not always dispense with the glories of a Hansard.

In every case the quorum is fixed by law; a third is about the average figure.

Though the forms of the Imperial House of Commons are adopted there is a good deal of difference in the spirit of the conduct of business. In Canada harmless amusement such as singing during divisions (a practice borrowed perhaps from the United States) is not rare, while in the Australian States and even in the Commonwealth personalities are too rife, scenes of disorder are not uncommon, and the President or Speaker must expect to be called a party hack and to be accused of doing low, dirty work.

[1] *Senate Debates*, 1911, p. 561.

CHAPTER VI

THE LOWER HOUSES

§ 1. The Franchise

In each Dominion and in the Australian States the Legislature is bicameral, and in seven of the Canadian Provinces only one chamber exists. The Lower House is always a popular body elected on a low franchise. The Lower House is styled House of Commons in Canada; House of Representatives in the Commonwealth and New Zealand, in which Dominion the members of the Lower House are by law called M.P.'s; House of Assembly in South Australia, Tasmania, Newfoundland, Nova Scotia, the Union of South Africa, and formerly in the Cape of Good Hope; elsewhere it is known as the Legislative Assembly. The Upper House is called the Senate in the two federations and the Union, otherwise the Legislative Council. The Dominion and State Legislatures are legally styled Parliaments, the Provincial Legislatures are styled Legislatures.

(*a*) *North America*

In the Dominion of Canada the franchise for the Parliament of the Dominion is regulated by the franchise in the Provinces, the general Dominions franchise which was created in 1885 having been repealed by the Liberal party in 1898,[1] on the ground that the franchise of 1885 was based on party considerations and was an unfair interference with provincial rights. Under the existing law, chapter 6 of the *Revised Statutes*, 1906, there are minor provisions allowing for the preparation of new voters' lists in certain cases, so as to provide that no voters' list shall be more than a year old. It is also provided by s. 11 as follows :—

No person possessed of the qualifications generally required by the provincial law to entitle him to vote at a provincial election shall be disqualified from voting at a Dominion

[1] 61 Vict. c. 14.

election merely by reason of any provision of the provincial law disqualifying from having his name on the list or from voting—

(*a*) the holder of any office ; or,

(*b*) any person employed in any capacity in the public service of Canada or of the province ; or,

(*c*) any person belonging to or engaged in any profession, calling, employment or occupation ; or,

(*d*) any one belonging to any other class of persons who, although possessed of the qualifications generally required by the provincial law, are, by such law, declared to be disqualified by reason of their belonging to such class.

There are disfranchised also by chapter 9 voters who have taken bribes. There are laid down by chapters 5, 6 and 7, Edw. VII. c. 41, electoral districts which do not coincide with the electoral districts in force in the various provinces. Each of these districts returns one member, except those of Ottawa, Halifax, and Queen's (Prince Edward Island), which each returns two members. There are thus 85 districts in Ontario, 65 in Quebec, 17 in Nova Scotia, 13 in New Brunswick, 10 in Manitoba, 7 in British Columbia, 3 in Prince Edward Island, and 10 for the Province of Saskatchewan, 7 in Alberta, and 1 for the Yukon Territory. The quorum is twenty.

In the Provinces of Canada the qualifications, which it is hardly necessary to give at length, run on the same lines. The franchise has always been fairly liberal from the beginning, both in Canada, where it depended on an Imperial Act, 31 Geo. III. c. 31, and in the Maritime Provinces under the Governor's Commissions,[1] when it was only possible to set up a freeholder or other liberal franchise by virtue of the prerogative. Sir J. Macdonald was a convinced adherent to a property franchise, and it was no doubt a legitimate arrangement at a time when the population was very scattered and in consequence often illiterate. But changed times have rendered things otherwise, and the normal franchise is now manhood suffrage, for women's suffrage is still unpopular

[1] See Houston, *Constitutional Documents of Canada*, pp. 11 seq. For the New Brunswick franchise, see Hannay, i. 154 ; ii. 344, 345. Originally it was given to all males, 21 years old and three months resident, but a property franchise was created in 1791 and reduced in 1889.

in Canada. Energetic propaganda in New Brunswick in 1909 met with an overwhelming defeat in the Legislature.

In the case of the Provinces there prevails on the whole manhood suffrage. In the case of Quebec the suffrage for the Lower House of seventy-four members elected each, as usual everywhere in Canada, for one district is regulated by ss. 179–83 of the *Revised Statutes*, 1909, under which the franchise is given to male persons, being British subjects by birth or naturalization, who hold one of various qualifications, viz. owners or occupants of immovable property of the value of $300 in any municipality which is entitled to return one or more members to the Assembly, and of $200 in other municipalities; tenants paying an annual rent for immovable property of $30 or $20 in such municipalities, provided the real value of the property according to the valuation rule is $300 or $200 respectively; teachers in an institution under the control of school commissioners or trustees; retired farmers or proprietors receiving a rent in money or kind valued at $100; farmers' sons working for at least a year on their father's farm, if the farm is of such value as to qualify them as electors if divided between them and their father as co-proprietors in equal shares; proprietors' sons residing with their father or mother on similar conditions; navigators and fishermen and owners of real property, boats, nets, fishing-gear and tackle, or of shares in a registered ship which together are of the actual value of at least $150; priests, rectors, vicaires, missionaries and ministers of any religious denomination; and persons who have salary or wages or revenues of $300 a year, and piece-workers who receive $300 a year. It is difficult to see why manhood suffrage is not adopted.

The franchise in Nova Scotia is regulated by chapter 4, ss. 3–6 of the *Revised Statutes*, 1900. The requirements are: twenty-one years of age, a British subject by birth or naturalization, and either assessment as owner of real property to the value of $150 or of personal property, or of real and personal property to the value of $300, or possession of such property with exemption from taxation, or a yearly tenancy of real property of the value of $150, or being the son of

a person qualified as above on certain conditions. Qualification is also given for assessment in respect of income to the amount of $250, or the earning of at least $250 from some profession or trade, or from some investment, or the ownership of real property, boats, nets, fishing-gear and tackle, or of boats, nets, fishing-gear and tackle, of the actual value of $150. The House consists of thirty-eight members returned by eighteen districts, of which two have three members, and the rest two each.

In the case of the Ontario House of 106 members, one for each seat, under Acts 1908, cc. 2 and 3, and the New Brunswick House of forty-six members elected for sixteen districts (five returning four members, four three, the rest two), under c. 3 of the *Revised Statutes*, 1903, manhood suffrage applies, and the same is the case with British Columbia (forty-two members), Manitoba (forty-one members), Alberta (at first twenty-five members—now forty-one members for thirty-nine divisions under Act 1909, c. 2), and Saskatchewan (at first twenty-five, now forty-one members). In British Columbia one district has five, one four, and one two members. Under the Act 1908, c. 1, in the case of Prince Edward Island the Assembly is divided into two groups, fifteen of whom are elected by electors with a property qualification of $325, while the others are elected on a low and complicated franchise approximating to manhood suffrage,[1] the property owner thus having two votes. Residence of a year in the province and three months in the electoral district is usually required.

There are certain disqualifications on North American Indians for the franchise.[2] They are entitled to vote freely in Nova Scotia, Prince Edward Island and Quebec ; they cannot vote in New Brunswick or in Alberta and Saskatchewan. In Manitoba Indians or persons of Indian blood receiving annuity or treaty money from the Crown, or who have

[1] See Act 1908, c. 1, sched. 3. Ownership or occupation of property worth 100 dollars or six dollars a year, payment in Charlottetown and Summerside of one dollar poll-tax, or payment of one dollar under the *Public Road Act*, 1907, are qualifications.

[2] *Parl. Pap.*, Cd. 427. For Alberta see the Act 1909, c. 3, s. 1 ; for Saskatchewan the Electoral Act of 1908, c. 2, s. 11. The franchise is of course dealt with in the *Revised Statutes* of each province.

received such money within three years before, are not entitled to be registered as voters. In British Columbia no Indian shall have his name placed on the list of voters. In Ontario an enfranchised Indian can vote, and on certain conditions the franchise is given to unenfranchised Indians, but they are normally excluded from the vote.

The other disqualifications are practically all on the same lines. The various Provincial Acts disqualify Judges of the Supreme Court and of the County Courts, persons disqualified on the ground of corrupt practices, lunatics, idiots, and persons who are confined in asylums or prisons, and paupers or persons in receipt of charitable relief.

In addition to these disqualifications there are minor disqualifications in various provinces. In Manitoba any person who is not a British subject by birth, and who has not resided in some portion of Canada for at least seven years preceding the date of registration of electors is only entitled to the franchise if he can read a selected portion or portions of the Manitoba Act in English, French, German, Icelandic, or any Scandinavian language, but there is a saving of rights for persons who had at an earlier date secured their entry on the registration rolls. Chinese are excluded from the franchise by Act 1908, c. 2, of Saskatchewan, and they are excluded along with the Japanese in British Columbia under the Act 1899, c. 25,[1] and ability to read is required by the Act 4 Edw. VII. c. 17.[2] Plural voting is not allowed save to a limited extent in Prince Edward Island.

In Newfoundland the franchise is provided for under chapter 3 of the *Revised Statutes*, 1892.[3] The provisions in question are as follows :—

Every male British subject of the full age of twenty-one years, who for two years preceding the day of election has been resident in this Colony, and is of sound understanding, shall be competent to vote for the election of members of

[1] Cf. *Cunningham* v. *Tomey Homma*, [1903] A. C. 151.

[2] Cf. *Provincial Legislation*, 1904–6, p. 29.

[3] The residential qualification is imposed by royal instructions of May 4, 1855, under 5 & 6 Vict. c. 120 (made perpetual as to this point by 10 & 11 Vict. c. 44).

the House of Assembly in and for the electoral district within which he has resided for at least one year immediately preceding the election: provided that absence from the district or division of a district, within the year aforesaid, shall not be held to disqualify an elector.

No person who shall have received relief, as a pauper, from or out of the public moneys, at any time during the year immediately preceding any election of a member to serve in the House of Assembly, shall be competent to vote at such election.

The judges of any Court now existing or hereafter created, whose appointment rests with the Governor, shall be disqualified and incompetent to vote at any election.

There are eighteen electoral districts returning thirty-six members; seven return three each, four two each, and the rest one. The franchise has always been extremely democratic, and was slightly restricted under the Imperial Act of 1842, when the two Houses were for the time being merged, but only by requiring two years' residence as a qualification.

(*b*) *Australia*

The present state of the franchise in the Commonwealth and the Australian States is as follows:—

Under the Commonwealth Act No. 8 of 1902:

Subject to the disqualifications hereafter set out, all persons not under twenty-one years of age whether male or female, married or unmarried—

(*a*) Who have lived in Australia for six months continuously, and

(*b*) Who are natural-born or naturalized subjects of the King, and

(*c*) Whose names are on the Electoral Roll for any Electoral Division,

shall be entitled to vote at the election of Members of the Senate and the House of Representatives.

No person who is of unsound mind and no person attainted of treason, or who has been convicted and is under sentence or subject to be sentenced for any offence punishable under the law of any part of the King's dominions by imprisonment for one year or longer shall be entitled to vote at any election of Members of the Senate or the House of Representatives.

No aboriginal native of Australia, Asia, Africa, or the Islands of the Pacific, except New Zealand, shall be entitled

to have his name placed on an Electoral Roll unless so entitled under s. 41 of the Constitution.[1]

No person shall be entitled to vote more than once at the same election.

There are seventy-five constituencies, divided among the States as follows: New South Wales, 27; Victoria, 22; Queensland, 9; South Australia, 7; and Western Australia and Tasmania, 5 apiece. The quorum is a third.

In the case of New South Wales[2] the qualifications of electors are as follows :—

All adults of the age of twenty-one years, natural-born or naturalized British subjects, not disqualified or incapacitated, can claim to have their names enrolled for any polling place for the electoral district in which they reside, and to vote therefor, provided they have had their principal place of abode in the State for a continuous period of one year or for a year in the Commonwealth and six months in the State (or if a naturalized subject for one year *after* naturalization) and have resided within the electoral district in which they claimed to be enrolled for a continuous period of three months immediately prior to the day of such claim, one month's residence being sufficient to obtain a transfer from one electorate to another.

Persons not entitled to vote include: (1) persons not natural-born or naturalized subjects; (2) persons of unsound mind; (3) persons in receipt of aid from any public charitable institution (except as a patient under treatment for accident or disease at a hospital); (4) persons in prison under any conviction, or (5) convicted of any crime or offence, wherever committed, for which, if it had been committed in New South Wales, they might have been lawfully sentenced to death or penal servitude, and have not received a free pardon therefor, or served the sentence passed on them; (6) persons who during six months preceding the holding of an election have been imprisoned without the option of a fine for an

[1] This section provides that any adult person who has or acquires a vote at elections for a Lower House in a State cannot be deprived of the Commonwealth franchise so long as he has the State vote. See below, p. 521, n. 1.

[2] See Acts No. 33 of 1902, No. 1 of 1903, No. 41 of 1906, No. 18 of 1910.

aggregate period of three months; (7) persons who within one year prior to the holding of an election have been convicted of bribery, intimidation, impersonation, or any similar offence at any election; (8) persons who, during one year prior to the holding of an election have been convicted of being habitual drunkards, idle and disorderly persons, or incorrigible rogues, or rogues and vagabonds; (9) any person against whom there is an unsatisfied order of any Court for the maintenance of his wife or children (whether legitimate or illegitimate); (10) any person who has been convicted of having committed an aggravated assault upon his wife within one year; (11) persons in the naval or military service on full pay.

There are now ninety electorates, each returning one member: the number has reached 141, was then in 1902 reduced to 125, and further reduction is possible. The *quorum is twenty.*

By a bill of 1910 the periods of residence were to be shortened,[1] and the poverty disqualification to be removed. Manhood suffrage dates from 1858, and in 1893 all plural voting and property qualification for non-resident electors disappeared. In 1903 female suffrage was introduced.

In the case of Victoria the qualifications of electors under Act No. 1075 and amending Acts were as follows:—

Every person of the full age of twenty-one years, and not subject to any legal incapacity, who was a natural-born subject of His Majesty, was qualified to vote at elections for the Legislative Assembly, if his name was on the roll of rate-paying electors, or if he was the holder of an elector's right and his name was on the general or supplementary roll, or if he was the holder of a voter's certificate obtained under the provisions of s. 23 of Act No. 1601. The Act No. 1606 (known as the *Plural Voting Abolition Act*), assented to on August 30, 1899, provided, however, that it should not be lawful for any person on any one day to vote in more than

[1] The bill will presumably become law in 1911. The periods will be six months in the Commonwealth, three in the State, and one in the division; disqualifications (3) and (11) disappear, and absentee voting is provided for; see *Parliamentary Debates*, 1910, Sess. 2, pp. 910–49, 1000–47, 1163–74.

one electoral district at any election or elections for the Legislative Assembly, nor to vote more than once at the same election.

(1) *Ratepaying Qualification.* Enrolment on the citizen or burgess roll of any city, town, or borough, or any ward thereof, or the voters' roll of any shire, or any riding, or subdivision thereof, in respect of ratable property in any division of an electoral district, qualified any person to have his name placed on the ratepayers' roll, and to vote for such electoral district in such division thereof.

(2) *Qualification by Electors' Rights.* (*a*) *Residential.* Residence in Victoria for twelve months, and in the same or some other division of the district for one month preceding his application for an elector's right, qualified such person to obtain a residential right and to have his name placed on the general or supplementary roll, and to vote *for the electoral district in which he resided.* (*b*) *Non-residential.* Being seised at law or in equity of lands or tenements for his own life or for the life of any other person, or for any larger estate of the clear value of £50, or of the clear yearly value of £5, qualified such person to obtain a non-residential right and to have his name placed on the general or supplementary roll, and to vote *for the electoral district in which such lands or tenements were situated.*

(3) An elector's right for any district could not be issued to any person who had a right already for the same district, nor (if the application were in respect of a residential qualification) to any person who had already received a right 'in respect of a residential qualification in any division of any district whatsoever', nor to any person who was on the roll of ratepaying electors for any division of the district for which he sought to obtain a right; nor to any person who was receiving relief as an inmate of any eleemosynary or charitable institution other than a hospital.

(4) *Voters' Certificates.* The holder of a residential right whose name was not on the rolls in force for the division in which he resided, could, if he had resided therein for one month, obtain a voter's certificate under the provisions of s. 23 of Act No. 1601 and s. 34 of Act No. 1864, authorizing

him to vote at any election for the district until the coming into force of the next general or supplementary roll in which his name could properly be included.

Persons not entitled to vote included foreigners who are not naturalized subjects of His Majesty, and those who do not possess the qualifications, or whose names have been removed from the rolls under the *Purification of Rolls Acts*, Nos. 1242 and 1601. Manhood suffrage has existed practically since 1858, female since 1909, and plural voting disappeared in 1899.

Under an Act of 1910 the electoral franchise has been simplified. It was proposed by the Government in the Bill which they introduced in the Legislative Assembly to remove altogether the possibility of one elector being registered in more than one division, but after a conference between the two Houses a compromise was arrived at under which, in addition to being registered in the district in which he is resident, an owner of property or a holder of a leasehold created for not less than one year shall be entitled to be registered in the division in which his property is situated. He can, of course, only vote once at an election, but he will be able to vote in another division at a by-election.

There are sixty-five divisions, each returning one member. The quorum is twenty.

Under this Act of 1910, No. 2288, ss. 11–13, the franchise is extended to every person of full age who has resided six months in Victoria and in any district for one month preceding the date of any electoral canvass or of his claim for enrolment. Change of residence within the same division or to another division of the same district does not alter the right to vote, and a change of district leaves a voter entitled to vote for the old district for three months after his change of residence, until his name is transferred to the roll of the new district. A person who is enrolled in respect of residence as an elector for the Assembly may also be enrolled on the general roll if he has a freehold estate and his name appears on the citizen or burgess roll, or a separate list for Melbourne or Geelong, or on the municipal roll, or a separate voters' list for any municipality, or if he is a lessee, under a

lease created for not less than one year, of lands or tenements, and his name is similarly on the roll. But he can vote only once at any election.

A person is disqualified from being enrolled or from voting if—

(*a*) He is receiving relief as an inmate of any charitable institution other than a hospital; or

(*b*) If during the three years immediately preceding he has served any terms of imprisonment for periods amounting in the aggregate to at least three months, and imposed without the option of a fine; or

(*c*) If during such three years he has been convicted of any offence against ss. 275–80 of the Act No. 1075, or against ss. 294–9 of the *Crimes Act*, 1890; or

(*d*) If during the year immediately preceding he has been convicted of having been an habitual drunkard, or an idle and disorderly person, or an incorrigible rogue, or a rogue and vagabond within the meaning of the Police Offences Acts, Nos. 1126, 1241, 2093; or

(*e*) If during the year he has been convicted of an aggravated assault on a woman or child; or

(*f*) If there is in existence against him an unsatisfied maintenance order for the maintenance of his wife or child, or children, legitimate or not.

Elaborate provision is made for the conduct of elections, and for an electoral canvass to secure full enrolment.

By Part 4 of the Act, voting by post at elections for the Assembly is fully regulated.

In Queensland the qualifications for electors are as follows[1]:—

Every person not under twenty-one years of age, whether male or female, married or unmarried, who has resided in Queensland for twelve months continuously, being a natural-born or naturalized subject of His Majesty, and not disqualified or incapacitated, is entitled to vote for the district in which he or she resides. Any person not disqualified or incapacitated, (*a*) having a freehold estate of the clear value of one hundred pounds above all charges affecting the same,

[1] See *The Electoral Acts*, 1885–1905, as amended by 8 Edw. VII. No. 5.

or (*b*) having a leasehold estate of the annual value of twenty pounds, having not less than eighteen months to run, may elect to have his or her name entered on the electoral roll of the district in which such estate is situate. By the Act of 1905 no person is to have more than one vote, and female suffrage is established.

Persons not entitled to vote include (1) any person who is of unsound mind; (2) any person attainted of treason, or who has been convicted and is under sentence or subject to be sentenced for any offence punishable under the law of any part of the King's dominions by imprisonment; or (3) who during six months immediately preceding the sitting of the Registration Court, or the holding of the election, has been imprisoned without the option of a fine for an aggregate period of one month; or (4) who during one year immediately prior to the sitting of the Registration Court, or the holding of the election, has been convicted of being an habitual drunkard, or has been convicted of drunkenness twelve times; or (5) who has been convicted of being an idle or disorderly person, or an incorrigible rogue, or a rogue and vagabond; or (6) who has against him an unsatisfied order of any Court for the maintenance of his wife or children (whether legitimate or illegitimate); or (7) who has been convicted of having committed an aggravated assault upon his wife within one year; (8) any aboriginal native of Australia, Asia, Africa, or the islands of the Pacific; and (9) any person who is an inmate of any public charitable institution for the reception, maintenance, and care of indigent persons, other than a hospital established under the statutes relating to hospitals.

Before Act 1 Geo. V. No. 3 there were fifty electorates with one member, and eleven with two; now all seventy-two have one member. The quorum is sixteen.

In South Australia the qualifications of electors are, under the *Electoral Code*, 1908, No. 971, being a natural-born or naturalized subject, male or female, married or unmarried, twenty-one years of age, enrolled before the issue of a writ, and not subject to any disqualification, and six months' continuous residence in the State. Electors can transfer

their names from the electoral roll of one district to another. Claims and transfer forms are obtainable from the returning officer, registrars, and all post offices.

Persons not entitled to vote include (1) any person who has been attainted of treason or has been convicted and is under sentence for an offence punishable in any part of His Majesty's dominions by one year's imprisonment or more (i.e. one who has not received a free pardon for such offence, or served the sentence for it); (2) any person brought into the Northern Territory of South Australia under the *Northern Territory Indian Immigration Act*, 1882, and any person residing in the Northern Territory, unless a natural-born or naturalized subject of His Majesty, of European nationality, or a citizen of the United States, naturalized as a subject of His Majesty; and (3) any insane person. The Northern Territory is now a part of the Commonwealth, and Act No. 1029 has reduced the number of members to forty and the quorum to fifteen; nine districts counting three members each, two four, and one five. By s. 21 there is no plural voting. Manhood suffrage dates from 1856, and womanhood from 1894.

In Western Australia the qualifications of electors were as follows under the *Constitution Acts Amendment Act*, 1899[1]:

Every person who had resided in Western Australia for six months was entitled to be registered as a voter, and after six months to vote, who was (1) twenty-one years of age and not subject to any legal incapacity; (2) a natural-born or naturalized subject (for six months) of the King; (3) had in possession within the electoral district for which he or she ought to be registered, either a freehold estate of the value of £50 above all charges and incumbrances; a leasehold estate of the clear annual value of £10; or held a pastoral, agricultural, occupation, or mining lease, or licence from the Crown, subject to the payment of at least £5 per annum; (4) was a householder occupying any house, warehouse, counting-house, office, shop, or other building of the clear annual value of £10 within the electoral district for

[1] 63 Vict. No. 19, s. 26, and now Act No. 27 of 1907, amended considerably by Act No. 44 of 1911. See *Parliamentary Debates*, 1910-1, pp. 3192 seq.

which he or she seeks to be registered; (5) had his or her name upon the electoral roll of a municipality or a roads board in respect to any property within the electorate; or (6) was resident in the electoral district at the time of claiming registration. Aboriginals, or half-castes, of Asia, Australasia, or Africa, were not entitled to vote, except in respect of freehold qualifications. Under the *Electoral Act*, No. 27 of 1907, ss. 17, 18, the option of a property qualification disappears, and with it incidentally the aboriginal and half-caste franchise altogether. Plural voting is not allowed. The suffrage was extended to women by the Act 63 Vict. No. 19, ss. 3, 21. The amending Act of 1907 requires six months' residence in Western Australia, and one in the electoral district.

There are fifty electoral districts, each returning one member. The quorum is seventeen.

The disqualifications are, under s. 18 of the Act of 1907, (1) unsoundness of mind; (2) sole dependence on state or charitable relief other than hospital relief; (3) attainder of treason, and conviction and sentence for a crime punishable by imprisonment for a year or more in any part of the King's dominions, and (4) being an aboriginal native of Australia, Asia, Africa, or the Islands of the Pacific, or a person of the half blood.[1]

In Tasmania the qualifications of electors are as follows, under the Act 64 Vict. No. 5, and amending Acts, 3 Edw. VII. No. 13, and 7 Edw. VII. No. 6.

Every person of the age of twenty-one years, not subject to any legal incapacity, who is a natural-born or naturalized subject of His Majesty, or who has received letters of denization or a certificate of naturalization, and has been resident in Tasmania for a period of twelve months, shall be entitled to be registered as an elector, and, as such, qualified to vote at the election of a member to serve in the House of Assembly for the district in which he resides.

Persons not entitled to vote include any person, although qualified, if he (1) is, at the time of the sitting of the Revision

[1] An attempt was made by Mr. Scaddan in 1911 to secure the alteration of the clause to allow Maoris a vote, but unsuccessfully. He also tried to secure the franchise for half-castes.

Court, of unsound mind, or in the receipt of aid from any public charitable institution, except as a patient under treatment for accident or disease at a hospital; (2) is in prison under any conviction, or has been convicted of any crime or offence in any part of His Majesty's dominions, and has not received a free pardon or served the sentence passed therefor. There is no plural voting.

The state is divided into five electorates, each returning six members, and voting is on the preferential system. The quorum is a third.

It will be observed that in all cases women are permitted to vote in Australia[1]—the last refuge of men, the Legislative Council of Victoria, having permitted the extension of the franchise to women by an Act (No. 2185) which, having been reserved, received the royal assent in 1909. It was first adopted in 1893 in New Zealand, but Canada and South Africa have steadily, so far, rejected the proposals for its adoption in those dominions.

(c) *New Zealand.*

In the case of New Zealand the qualification under the *Consolidated Statutes*, 1908, No. 101, s. 35, for the franchise for the Lower House of eighty members, including four Maoris each for one district, is as follows: (*a*) Every person lawfully on the existing roll of the district in respect of a property qualification, so long as he retains such qualification: (*b*) every adult person who has resided for one year in New Zealand, and who has resided in the electoral district for which he claims to vote during the three months immediately preceding his registration on the roll of the district, and who is a British subject either by birth or naturalization, or a half-caste, is entitled (subject to the provisions of the Act) to be registered as an elector and to vote at the election of

[1] Accorded in 1902 (Act No. 1 of 1903) in New South Wales, after being twice rejected in the Upper House; in South Australia by Act No. 613 in 1894, in Western Australia by the Act 63 Vict. No. 19, as a Conservative move. Cf. Pember Reeves, *State Experiments in Australia and New Zealand*, i. 143 seq. For Tasmania, see 3 Edw. VII. No. 13; Queensland, 5 Edw. VII. No. 1. For the Commonwealth, cf. *Parliamentary Debates*, 1910, pp. 6300, 6886.

members of Parliament for that district. Maoris (other than half-castes) are not entitled to be so registered.

For all the purposes of the Act a person is deemed to have resided within the district wherein he has his usual place of abode notwithstanding his occasional absence from such district, and notwithstanding his absence for any period while serving His Majesty as a member of any naval or military force, or in any capacity in connexion with such force while on active service. Manhood suffrage dates from 1879, female suffrage dates from 1893, and all property qualifications disappeared in 1896.

A person is not entitled to be registered on more than one electoral roll, and Maoris are only qualified to vote at elections of Maori members under conditions laid down in Part IV of the Act. A half-caste registered under the Act is not qualified to vote at any election of Maori members. Moreover, the following persons are disqualified by s. 38 (1) of the Act : An alien, or person of unsound mind, or a person convicted of an offence punishable by death or by imprisonment for one year or upwards within any part of His Majesty's dominions, or convicted 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 such offender has received a free pardon, or has undergone the sentence or punishment to which he was adjudged for such offence.

(*d*) *South Africa.*

The old franchises of the Colonies, which are still in force in the Union pending a uniform Union franchise, are briefly as follows :—

The franchise in the Cape is extended under the electoral laws to all persons, British subjects, natural-born or naturalized, able to sign their names and write their addresses and occupation.

(*a*) A voter must have been occupier of property worth £75 within the electoral division for which he seeks registration for twelve months ; or as an alternative, (*b*) he must have been in receipt of salary or wages at the rate of not less than £50 per annum for twelve months, provided that

the person claiming to vote shall have resided within the last three months within the electoral division for which he claims registration. The Registration Act, No. 14 of 1887, excludes persons whose only qualification by possession of property is a share in tribal occupancy. The old Cape Assembly consisted of 107 members for forty-six divisions.[1]

Lunatics, and persons convicted for murder, treason, and other offences, are disqualified.

In Natal the conditions are similar, but there is no disqualification on the ground of lunacy, and there is no educational qualification.

(*a*) A voter must own immovable property worth £50 within the constituency; or, as an alternative, (*b*) he must rent immovable property worth £10 per annum within the constituency; or as an alternative, (*c*) he must have resided three years in the Colony, and have income worth £8 per month.

Natives, including coloured people, are disqualified unless they have resided for twelve years in the Colony, have been exempted from the operation of native law for seven years, have been recommended by three duly qualified European electors, and have received a certificate at the discretion of the Governor, who would act in Council, entitling them to registration. Persons who are natives or descendants in the male line of natives of countries which have not possessed representative elective institutions founded on the parliamentary franchise are also prevented from voting under an Act of 1896, unless exempted by the Governor in Council. In the old Assembly there were forty-three members for seventeen divisions.

In the Transvaal and the Orange River Colony the only qualifications required are residence for six months before registration, or a total residence of six months in the three years preceding, and residence at the date of registration

[1] See *The Government of South Africa*, ii. 396, 397; *Parl. Pap.*, Cd. 2399, pp. 65 seq.; Cape Acts No. 9 of 1892; No. 19 of 1898; No. 48 of 1899; No. 5 of 1902; No. 6 of 1908; Natal Charter, July 15, 1856, ss. 11, 12; Law No. 11 of 1865; No. 2 of 1883; Act No. 8 of 1896; Transvaal Letters Patent, Dec. 6, 1906, ss. 9, 10; Orange River Colony Letters Patent, June 5, 1907, ss. 9, 10.

in the division in which he demands to be registered. Only white persons are given the franchise, and soldiers on full pay from the Imperial Parliament are disqualified, as also those who have received relief from public funds otherwise than by way of repatriation under the terms of peace of May 31, 1902, or in a public or semi-public hospital. There is no disqualification on the ground of lunacy, but there is one on the ground of conviction, without the option of a fine, for crime, save for treason previous to June 1, 1902.

In the old Legislative Assemblies there were sixty-nine and thirty-five (after 1908, thirty-nine) members respectively, each for one division.

In the Union of South Africa, unless and until Parliament makes other provision, the qualifications for the Lower House, which consists of fifty-one members for the Cape Province, seventeen for Natal, thirty-six for the Transvaal, and seventeen for the Orange Free State Province, each for one division, will under s. 35 of the Constitution be the same as those existing in the provinces at the time of the Union being constituted, provided always that no member of His Majesty's Regular Forces on full pay shall be entitled to be registered as a voter. The provisions of the laws in force in the Colonies at the establishment of Union with regard to electoral matters apply to such elections, but all polls must be taken on one and the same day, thus obviating to any large extent plural voting. No law which affects the franchise shall disqualify any person in the Province of the Cape of Good Hope, who under the laws existing in the Colony at the time of the establishment of the Union is or may become capable of being registered as a voter, from being so registered in the province by reason of his race or colour only, unless the Bill be passed by both Houses of Parliament sitting together, and at the third reading be agreed to by not less than two-thirds of the total numbers of members of both Houses. Even in such a case no person who at the passing of the law is registered as a voter in any province shall be removed from the register by reason only of any disqualification based on race or colour. For the Provincial Councils the franchise is the same as for the Union Assembly.

§ 2. The Members

The qualifications for members of the Lower Houses in the Dominions follow generally the qualifications for the electorate, but certain persons qualified to vote are excluded on public grounds from the right of membership.

The disqualifications of members of the Houses of Parliament, and the conditions on which they shall vacate their seats, are much the same for the Lower Houses as for the Upper Houses.

(*a*) *North America.*

In the Dominion of Canada, members of the provincial legislatures [1] cannot be members of the House of Commons, nor can members of the Senate be members of the House of Commons. Officers under the Crown, with certain exceptions specified in chapter 10 of the *Revised Statutes*, cannot be members, but ministers are qualified for election. Government contractors, except shareholders in companies (other than companies which contract for public works) and persons on whom contracts devolve by operation of law for a year after the devolution, lenders of money to Government, and militiamen, are also excluded from membership.

In the Provinces of Canada the rules are in the main similar. Office-holders, whether Dominion or provincial, are ineligible to sit, and persons interested in contracts under the Crown are excluded, with the exception of shareholders in companies other than companies which undertake public works. In Prince Edward Island clergymen are not eligible. No member of the Legislative Assembly or Legislative Council of other provinces or of the House of Commons or Senate of Canada is eligible, and seats are vacated on the occurrence of similar conditions. Moreover, in every case a member of Parliament may resign his seat, usually being given the option of declaring his wish in his place in the Assembly or by writing under his hand addressed to the Speaker, or if the House is not in session and there is no Speaker, or the member be the Speaker himself, by

[1] There is no prohibition for a Senator to be a Legislative Councillor of Quebec, and cases have occurred (Pope, *Sir John Macdonald*, ii. 7). But otherwise in Nova Scotia.

delivering his resignation in writing to any two members of the House. Conviction of corrupt practices is a disqualification.

In all cases ministers, if elected while holding office, need not be re-elected. On the other hand, if ministers accept office after election they must be re-elected, but that does not apply to a change of office nor to a resignation followed by taking up of office again within a month after such resignation, provided that there has not elapsed in the interim a change of government and a change of offices, the new administrators having occupied the offices, nor to the acceptance of an additional office.[1]

In Newfoundland,[2] persons holding offices of profit under the Government or any public board the members of which are appointed by the Government, or being contractors on account of public service, cannot be members, but certain specified appointments are excepted from this rule by chapter 4 of the *Consolidated Statutes*. Seats are also vacated on the occurrence of any of the disqualifications, and on bankruptcy or insolvency a member must resign. Ministers who accept office after election must be re-elected, but this does not apply to a minister who accepts an office within six months after resignation of another office, unless the administration has resigned and a new administration has been formed and has occupied the office in question. There is since 1842[3] a property qualification of 2,400 dollars, or an income of 480 dollars a year.

(*b*) *Australia.*

In the Commonwealth the qualifications and disqualifications of members under the Constitution[4] are as follows :

A member (1) must be of the full age of twenty-one years and an elector entitled to vote at the election of members

[1] See Ontario Act 1908, c. 5; Quebec *Rev. Stat.*, 1909, ss. 179 seq.; Nova Scotia *Rev. Stat.*, 1900, c. 2; New Brunswick *Rev. Stat.*, 1903, c. 3; Manitoba *Rev. Stat.*, 1902, c. 96; British Columbia *Rev. Stat.*, 1897, c. 47; Prince Edward Island, Act 1908, c. 1; Saskatchewan, Act 1906, c. 4; Alberta, Act 1909, c. 2.

[2] *Cons. Stat.*, 1892, c. 4, amended by 10 Edw. VII. c. 10.

[3] 5 & 6 Vict. c. 120, and royal instructions of May 4, 1855, re-enacted in statutes.

[4] Ss. 34, 37, 38, 43–5; *Electoral Acts*, 1902–9, ss. 96, 206 A.

of the House of Representatives, or a person qualified to become such elector, and must have been for three years at the least a resident within the limits of the Commonwealth as existing at the time when he is chosen; (2) must be a subject of the King, either natural-born or for at least five years naturalized under a law of the United Kingdom, or of a Colony which has become or becomes a state, or of the Commonwealth, or of a state.

There are disqualified as members: Any person being a Senator, and any person who (1) is under any acknowledgement of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen, or entitled to the rights or privileges of a subject or a citizen, of a foreign power; or (2) is attainted of treason, or has been convicted and is under sentence, or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of a state by imprisonment for one year or longer; or (3) is an undischarged bankrupt or insolvent; or (4) holds any office of profit under the Crown, or any pension payable during the pleasure of the Crown out of any of the revenues of the Commonwealth; or (5) has any direct or indirect pecuniary interest in any agreement with the public service of the Commonwealth, otherwise than as a member and in common with the other members of an incorporated company consisting of more than twenty-five persons. By the Commonwealth *Electoral Act*, 1902, no person is entitled to be nominated as a member who is at the date of nomination, or was within fourteen days previously, a member of a State Parliament. Conviction for certain electoral offences disqualifies. A seat may be resigned, and is vacated by two months' absence without leave, on the occurrence of any disqualification, bankruptcy or insolvency, and the acceptance of a fee for services to the Commonwealth or in Parliament to a state or private person.

In New South Wales the qualification and disqualifications are as follows, under Act No. 32 of 1902, and No. 41 of 1906:—

The qualification for membership is being a man of or above twenty-one years of age, and a natural-born or naturalized British subject, unless disqualified.

The disqualifications include (1) being a member of the Legislative Council; (2) holding, under the Crown, any office of profit (not being a political office [1]), or pension during pleasure or for a term; (3) being disqualified as an elector; or (4) under the *Federal Elections Act*, 1900, being a member of the Commonwealth Parliament. An uncertificated bankrupt is not disqualified.

A seat is vacated by resignation; or (1) absence for one whole session except with sanction of the Assembly; (2) taking an oath of allegiance to, or becoming the subject of any foreign power; (3) becoming bankrupt; (4) being attainted of treason, or being convicted of felony or any infamous crime; (5) becoming pecuniarily interested in any contract for the public service, excepting as a member of a company exceeding twenty in number; (6) acceptance of an office of profit under the Crown; (7) becoming a member of either House of Parliament of the Australian Commonwealth.

In Victoria the conditions are as follows, under Act 18 & 19 Vict. c. 55, Act No. 1075, and amending Acts:

The qualification for membership is being a man twenty-one years of age, a natural-born subject of the King or an alien naturalized by law for the space of five years, resident in the State of Victoria for the space of two years.

The disqualifications include being (1) a member of either House of the Parliament of the Commonwealth (Act No. 1723); (2) a member of the Legislative Council; (3) a Judge of any Court of the state; (4) a minister of any religious denomination, whatever may be his title, rank, or designation; (5) directly or indirectly concerned or interested in any bargain or contract entered into by or on behalf of His Majesty, except as member of a company of more than twenty persons; (6) the holder of any office or place of profit under the Crown, or employed in the public service of Victoria for salary, wages, fees, or emolument (except responsible Ministers of the Crown, who are eligible for re-election, but vacate office by appointment—not exceeding six in number—the Speaker and the Chairman of Committees of the Legislative Assembly, members of the Parliamentary

[1] Re-election is abolished by Act No. 41 of 1906, s. 60.

Standing Committee on Railways); (7) attainted of any treason or convicted of any felony or infamous crime in any part of His Majesty's dominions; (8) an uncertificated bankrupt or insolvent; and (9) insanity.

A seat is vacated by resignation, or by (1) the acceptance of any office or place of profit under the Crown; (2) failure to attend for one entire session without leave of absence granted by the House; (3) taking any oath of allegiance to any foreign prince or power, &c.; (4) becoming insolvent or becoming a public defaulter, or (5) being attainted of treason, or being convicted of felony or infamous crime; (6) becoming insane; (7) becoming a contractor; (8) also, by report from the Committee of Elections and Qualifications, that the member is unqualified or disqualified, or has been 'guilty of an illegal practice'; (9) becoming a member of the Commonwealth Parliament.

In Queensland the conditions are as follows, under the Acts 31 Vict. No. 21 and 60 Vict. No. 3:

The qualification for membership: Being qualified and registered as a voter.

The disqualifications include (1) being a member of the Legislative Council or of the Commonwealth Parliament; (2) holding under the Crown any office of profit (not being a political office[1]), or a pension during pleasure or for a term of years; (3) and being a minister of religion.

A seat is vacated by resignation or (1) being absent for one whole session without the permission of the Assembly; (2) taking an oath of allegiance or becoming the subject of any foreign power; (3) becoming bankrupt; (4) being attainted of treason or being convicted of felony or other infamous crime; (5) becoming interested in any Government contract, excepting as a member of an incorporated company consisting of more than twenty persons—a rule borrowed, like so much else, from the Mother Colony; (6) accepting an office under the Crown other than a ministerial office.

In South Australia, under Act No. 2 of 1855–6 and Acts No. 731, 790, and 959, the conditions are as follows:

The qualification for membership is being qualified as an elector, but a naturalized person must have resided for five years in the State.

[1] Re-election is not required under Acts of 1884 and 1896.

The disqualifications are the same as apply to electors, and the holding of an office under the Crown or a pension.

A seat is vacated by (1) resignation or absence without leave for one month; (2) acceptance of office of profit (except ministerial offices [1]) or pension from Government or taking a Government contract; (3) contracting allegiance to foreign powers; (4) bankruptcy or public default; (5) attainder of treason, conviction of felony or infamous crime; (6) insanity, and (7) membership of the Commonwealth Parliament.

In Western Australia, under 63 Vict. No. 19, s. 20, and 64 Vict. No. 5, the conditions are as follows:—

The qualification for membership is being (1) a man of twenty-one years of age and free from legal incapacity; (2) a natural-born subject of the King, or naturalized for five years and resident in Western Australia for two years; and (3) resident in Western Australia for at least twelve months.

The disqualifications under s. 31 include being (1) a member of the Legislative Council; (2) a Judge of the Supreme Court; (3) the Sheriff of Western Australia; (4) a clergyman or minister of religion; (5) an undischarged bankrupt or debtor whose affairs are in course of liquidation or arrangement; (6) under attainder of treason or conviction of felony in any part of the King's dominions; and (7) directly or indirectly concerned in any contracts for the public service, except as member of an incorporated trading society of more than twenty persons. The holder of any office or place of profit under the Crown, other than that of an officer of His Majesty's land or sea forces on full, half, or retired pay, or than that of a political officer,[2] shall, if elected, be held to have resigned such office. Membership of the Commonwealth Parliament also disqualifies.

A seat is vacated by resignation or (1) becoming of unsound mind; (2) taking any oath of allegiance, &c., to any foreign prince or power, or becoming a subject of any foreign state or power; (3) failing to attend for two consecutive months

[1] Re-election is not required under the Act of 1896.

[2] Re-election is still necessary on appointment when a member to a political office. It is proposed to abolish this ultimately.

the meetings of the Legislative Assembly without obtaining leave of absence from the House ; (4) accepting any pension or place of profit under the Crown, with the exceptions above mentioned, this disqualification not extending to naval or military officers on full, half, or retired pay ; (5) bankruptcy.

In Tasmania, under 18 Vict. No. 17 and 64 Vict. No. 5, the conditions are as follows :—

The qualification for membership is being a man twenty-one years of age, a natural-born or naturalized subject of His Majesty, or having obtained letters of denization or certificate of naturalization, and having resided for twelve months.

The disqualifications include (1) the holding from the Government of any office of profit (ministerial offices excepted, or any pension) ; (2) being a Government contractor, except as a member of an incorporated company of more than six persons ; (3) allegiance to any foreign power ; (4) holding the office of a Supreme Court Judge ; (5) being insane ; (6) attainted of treason, or (7) convicted of any infamous offence ; (8) membership of the Commonwealth Parliament.

A seat is vacated by resignation or (1) absence without leave for one whole session ; (2) allegiance to foreign power ; (3) becoming bankrupt or insolvent ; (4) becoming a public defaulter, or (5) attainted of treason, or (6) convicted of felony or any infamous crime ; or (7) becoming of unsound mind ; (8) acceptance of office, and (9) contracting for the public service.

(*c*) *New Zealand.*

The qualification for membership in New Zealand is as follows, by s. 24 of the *Consolidated Statutes*, 1908, No. 101.

(1) Subject to the provisions of this Act, every male person registered as an elector, but no other person, is qualified to be a candidate and to be elected a member of Parliament for any electoral district :

Provided that a person shall not be so elected—

(*a*) Who is disqualified as an elector under any of the provisions of this Act ; or

(*b*) Who, being a bankrupt within the meaning of the Bankruptcy Act, 1908, has not obtained an order of discharge under that Act ; or

(*c*) Who is a member of the Legislative Council ; or

(*d*) Who is a civil servant or a contractor.

(2) For the purposes of this section—

'Civil servant' means any person in the Civil Service of New Zealand, or any person holding any office, permanent or temporary, under or from or at the appointment or nomination of the Crown, or Governor of New Zealand by virtue of his office, or at or by the nomination or appointment of any officer of the Government of New Zealand by virtue of his office, to which any salary is attached and paid out of money appropriated by Parliament. It does not include—

(*a*) The persons who are members of the Executive Council; nor

(*b*) The Speaker or Chairman of Committees of the House of Representatives; nor

(*c*) Officers in His Majesty's army or navy, or of militia or volunteers (except officers of the said militia and volunteers receiving annual or permanent salaries); nor

(*d*) Any persons as members only of any Senate or Council of any university; nor

(*e*) Members of a Commission issued by the Governor or Governor in Council; provided that, in the case of a member of Parliament appointed as Commissioner, there shall be paid an allowance for travelling expenses not exceeding one pound a day, in addition to money paid for coach, railway, steamship, or other passenger fare.

'Contractor' means a person who, either by himself, or directly or indirectly by or with others, but not as a member of a registered or incorporated company or any incorporated body, is interested in the execution or enjoyment of any contract or agreement entered into with His Majesty, or with any officer or department of the Government of New Zealand, or with any person for or on account of the public service of New Zealand, under which any public money above the sum of fifty pounds is payable directly or indirectly to such person in any one financial year; but it does not include or extend to any of the persons or contracts hereinafter mentioned:—

(*a*) Any person to whom the completion of any contract or agreement devolves by marriage, or as devisee, legatee, executor, or administrator, until twelve months after he has been in possession of the same:

(*b*) Any sale, purchase, or agreement for taking of land, or of or for any estate, interest, or easement therein, under any law or statute empowering the King or the Governor, or any person on his behalf, to take, purchase, or acquire any lands or any estate, interest, or easement therein for any public works, or for any other public purpose whatsoever:

(*c*) Contracts for the loan of money, or securities given for the payment of moneying only.

(*d*) Contracts for advertising by which a sum exceeding fifty pounds is payable, if the contract is entered into after public tender.

The seat of any member of Parliament shall become vacant—

(*a*) If for one whole session of the General Assembly he fails, without permission of the House, to give his attendance in the House ; or

(*b*) If he takes any oath or makes any declaration or acknowledgement of allegiance, obedience, or adherence, to any foreign prince or power ; or

(*c*) If he does or concurs in or adopts any act whereby he may become a subject or citizen of any foreign state or power, or entitled to the rights, privileges, or immunities of a subject of any foreign state or power ; or

(*d*) If he becomes a bankrupt within the meaning of the laws relating to bankruptcy ; or

(*e*) If he is a public defaulter or is convicted of any crime punishable by death or by imprisonment with hard labour for a term of two years or upwards, or is convicted of a corrupt practice ; or

(*f*) If he becomes a contractor or a civil servant as defined in s. 24 hereof ; or

(*g*) If he resigns his seat by writing under his hand addressed and delivered to the Speaker of the House, or to the Governor if there is no Speaker or the Speaker is absent from New Zealand, or if the resigning member is the Speaker ; or

(*h*) If on an election petition the Election Court declares his election void ; or

(*i*) If he dies ; or

(*j*) If he becomes a lunatic, as provided by the next succeeding section.

(*d*) *South Africa*

The old Colonial rules no longer retain validity for the Union Parliament, and may be given very briefly as they stood in 1910 before union.

In the Cape a member was qualified if he was entitled to be registered as a voter. Insolvency, change of nationality, acceptance of an office of profit other than a ministerial office, failure to attend for a whole session, and loss of qualification, vacated a seat, and a member might also resign.

In Natal a member must be qualified as a registered elector and hold no office under the Crown other than a political office or an office in the army or navy on retired or half-pay. A member could resign and vacated his seat if he failed to attend for a whole session, ceased to hold his qualifications or to be a British subject, became insolvent, was attainted of treason, or was sentenced to imprisonment for any infamous crime, became insane, or accepted any office under the Crown, or remained a party to a Government contract for one month, but this did not apply to a purchaser of Government land or a lessee of Government land.

In the Transvaal and the Orange River Colony a member must be qualified to be registered as a voter, must not hold an office of profit under the Crown other than a ministerial office or certain other specified offices, must not be an unrehabilitated insolvent, not be insane, or have acted as a registering or revising officer of a voters' list for the division for which he stood. He could resign and he vacated his seat if he failed to attend for a whole ordinary session, ceased to be a British subject, became insolvent, was a public defaulter, or was attainted of treason or was sentenced to imprisonment for an infamous offence, became of unsound mind, or accepted any office of profit under the Crown except such offices as did not disqualify for election to membership.

The qualifications for members of the House of Assembly in South Africa are as follows :—

He must (*a*) be qualified to be registered as a voter for the election of members of the House of Assembly in one of the provinces ; (*b*) have resided for five years within the limits of the Union as existing at the time when he is elected ; (*c*) be a British subject of European descent.

The disqualification of persons otherwise qualified, and the conditions on which the seats of members become vacated, correspond generally with the conditions on which seats in the Upper House are vacated, and it is hardly necessary to give them in detail.[1]

[1] 9 Edw. VII. c. 9, ss. 53, 54. See below, pp. 553, 554.

§ 3. The Duration of Parliament

The duration of the Parliaments of the Commonwealth,[1] and of all the six Australian States and of the Dominion of New Zealand, is now reduced to three years. In Canada, under the *British North America Act*, 1867, the Federal Parliament lasts for five years; the Parliament of Ontario lasts for four years, extended only temporarily by two months in 1901; that of Quebec, which was given a duration of four years by the *British North America Act*, has under a Quebec statute of 1881 (*Revised Statutes*, 1909, s. 115) been extended to five years. The House of Assembly of Nova Scotia has a duration since 1897 of five years; the House of Assembly of New Brunswick, which in 1795 was given a duration of seven years and in 1842 a duration of four years, had, under an Act of 1896 (c. 5), a duration of four years and two months, and since 1900 of five years and two months. The Legislative Assemblies of Manitoba, British Columbia, and Prince Edward Island last for four years; and the Legislative Assemblies of Saskatchewan [2] and Alberta for five years. The House of Assembly of Newfoundland has a duration of four years; that of the Parliament of the Union of South Africa is five years, as formerly in the Cape, Transvaal, and Orange River Colony, against four in Natal. In all cases a Parliament must by law annually be held so that twelve months shall not intervene between the last session of one and the first session of the new Parliament.

Difficulties have been caused with regard to this provision in Canada by questions as to return of members for out-

[1] Fixed at three years by the constitution, s. 28. In New South Wales the original five years' period disappeared in 1874; in Victoria (Act No. 89, s. 2) and Queensland (in 1890) also it has gone, and in Tasmania by Act 54 Vict. No. 58. In South Australia it has always been three years (*Constitution Act*, s. 3). In Western Australia it was four years (53 & 54 Vict. c. 26, sched. s. 14), but is reduced to three years by 63 Vict. No. 19, s. 21. To restore it to four years has been proposed; *Parliamentary Debates*, 1910–1, p. 828. For New Zealand, see the Act of 1879.

[2] Originally four years by Act 1906, c. 4, increased by 1908, c. 4. For Alberta, originally four years, see now Act 1909, c. 2; for Manitoba, Canada Act, 33 Vict. c. 3; for Prince Edward Island, 1908, c. 1; for Ontario, 1908, c. 5; and for the rest, the *Revised Statutes*.

of-the-way constituencies, but in 1896 in the Dominion House it was decided to adopt the date fixed for the return of the writs, not of the actual return, and the rule has applied generally since.[1]

§ 4. Payment of Members[2]

In all the Parliaments some payment is made to members. In the case of Australia, in the Parliament of the Commonwealth members of both Houses received first £400 and by Act No. 5 of 1907 £600 a year; in the case of New South Wales the Legislative Councillors[3] are not paid, but under Acts No. 32 of 1902 and No. 41 of 1906 the members of the Legislative Assembly receive £300 a year and postages, and in Victoria (where there is a property franchise and qualification for the Upper House), under Act No. 1075, and Queensland, under Acts of 1896, No. 15, and of 1909, No. 18, the same rule applies. In South Australia, under Act No. 399, and Western Australia,[4] under Act No. 34 of 1900, members of both Houses receive £200 per annum; and in Tasmania £100 per annum by Act No. 51 of 1900, increased to £150 by Act No. 53 of 1910. In all cases the members receive free railway passes on the state railways.

In the case of New Zealand the members of the Legislative Council receive £200 a year payable monthly, and members of the House of Representatives £25 a month or £300 a year, with deductions for non-attendance, and with travelling expenses, under the *Consolidated Statutes*, 1908, No. 101.

[1] Bourinot, *Constitution of Canada*, p. 61, note 4. For the case of Ontario, cf. the Act of 1879 (42 Vict. c. 4, s. 3); *Revised Statutes*, 1897, c. 12, and the Act of 1908, c. 5, s. 4.

[2] See *Parl. Pap.*, H. C. 80, 1911, a not very accurate return.

[3] In Queensland and New South Wales this is due to their being nominee.

[4] Increased to £300 for both Houses by Act No. 33 of 1911. In Canada and Queensland the leader of the Opposition gets an extra salary. But in Ontario the leader has declined such a proposal, and so in Western Australia in 1910; the Act, however, as in the case of Queensland, provides £200 extra for him. In Canada the salary is $7,000 extra. In South Australia, under Act No. 1025, the question of an increase to £300 was submitted to a referendum in April 1911, and negatived. There were for long disputes over the policy of payment; cf. *Attorney-General of New South Wales* v. *Rennie*, 16 N. S. W. L. R. 111; [1896] A. C. 376.

In the Dominion of Canada, under c. 10 of the *Revised Statutes*, 1906, the payment of the Dominion members is $2,500 for members of the Senate and $2,500 for members of the House of Commons, and travelling expenses, with certain deductions for days of non-attendance. In the case of Ontario, under Act of 1908, c. 5, members are paid mileage and $10 a day for thirty days, or a maximum of $1,000; in 1910 the sum paid by special vote was £280, and an Act of 1911 fixes the payment at $1,400 or $20 a day for under 31 days. In the case of Quebec under the *Revised Statutes*, 1909, ss. 154–60, members of the Legislature are paid $10 a day while the session lasts, if it lasts for thirty days, $1,500 if it lasts longer, and their travelling expenses. In Nova Scotia members are paid $700 a session and travelling expenses; in New Brunswick, under Act of 1904, c. 18, members receive $500 a session and their travelling expenses; in Manitoba, under the *Revised Statutes*, 1902, c. 96, and Act of 1904, c. 30, members receive $1,500 a session and their travelling expenses; in British Columbia, under Act of 1908, c. 12, members receive $1,200 a session, and their travelling expenses; while in Prince Edward Island members receive a payment of $200 a year and $12 for postage, besides travelling expenses. In Alberta and Saskatchewan the payment is $1,000 a year under Acts of 1909, c. 2, and of 1906, c. 4, with deductions for non-attendance and a mileage allowance, and in Saskatchewan the Act 1910–1, c. 4, increases the payment to $1,500.

In Newfoundland members of the Council receive $120 each, with an extra $120 for the President, a session. Members of the Assembly receive, if they live in St. John's, $200 a session; if in the out-ports, $300. The Speaker receives $750, and the pay of the Legislature is provided annually by local Act.

In South Africa, under the *South Africa Act*, 1909, the sum is £400 for either House, with deductions for non-attendance, and £120 is granted to the provincial councillors.[1]

[1] For the payment in the old Colonies, see *The Government of South Africa*, iii. 390, 391.

§ 5. Electoral Matters

It is not necessary to give details relating to electoral, registration, and similar matters. They are regulated in all cases by local legislation, and the provisions, while agreeing in substance, differ very widely in detail, and vary from time to time.[1] The issue of writs for a general election rests with the Governor, in other cases with the President or Speaker of the House concerned.

Voting by ballot is a general principle, but it is qualified to the extent that postal voting has been introduced and to some extent maintained in some of the Colonies. In the case of Queensland the postal vote caused a great deal of difficulty, and was one of the reasons for the political crisis of 1907. It was then held that the postal vote gave undue facilities for bringing pressure to bear upon voters, and that its abolition was desirable, and it was much modified in Act of 1908 No. 5, being replaced by an absent vote. It has also been proposed to abolish the postal vote in Victoria, but it is still retained for both Houses in Act No. 2288, s. 88, and it exists in the Commonwealth, Tasmania, and Western Australia, and as an absent vote in South Australia, and such a vote is proposed for New South Wales.

Elaborate provision exists in all the Dominions and States with regard to electoral corruption. In all cases in Canada and Newfoundland the Courts decide election petitions, not the Parliaments, and it has been held that in cases of jurisdiction in electoral matters[2] the Privy Council will

[1] The facts are set out as they stood in 1906 in *Parl. Pap.*, Cd. 3919. See since then the *Electoral Code*, 1908 (No. 971), of South Australia, the Victoria Act No. 2288, the *Electoral Act*, 1907 (No. 27), of Western Australia, the *Electoral Acts*, 1906 (No. 41) and 1910 (No. 18), of New South Wales, the Queensland Acts (5 Edw. VII. No. 1 and 8 Edw. VII. No. 5), Tasmania Act (7 Edw. VII. No. 6), the Ontario Act 1908, c. 3, the Alberta Act 1909, c. 3, the Saskatchewan Act 1908, c. 2, and the Western Australia Act No. 44 of 1911.

[2] *Théberge* v. *Laudry*, 2 App. Cas. 102, as explained in *Cushing* v. *Dupuy*, 5 App. Cas. 409, at p. 419. Followed by the Commonwealth High Court in *Holmes* v. *Angwin*, (1906) 4 C. L. R. 297; and cf. *Parkin* v. *James*, 2 C. L. R. 315, at p. 333. See also *Valin* v. *Langlois*, 5 App. Cas. 115; *Kennedy* v. *Purcell*, 14 S. C. R. 488; 59 L. T. 279.

not entertain appeals from Courts from which it would normally hear such appeals, and this principle has been formally adopted by the High Court of the Commonwealth of Australia. There are clearly paramount reasons of convenience for the adoption of this rule.

In the Commonwealth controverted elections are now referred to the High Court under the *Electoral Acts*, 1902–9, part xvi. In New South Wales and Victoria the Houses still exercise the right of themselves dealing with petitions; in Queensland in the House of Assembly the tribunal is the Supreme Court Judge and six members; in the case of the Council, as in New South Wales, it decides subject to appeal to the King in Council; in Tasmania and Western Australia the Court decides; and in South Australia, a judge aided by four members of the Council or the Assembly respectively. Under No. 101 of the *Consolidated Statutes* the Court in New Zealand is composed of two judges of the Supreme Court. The law courts also deal with such cases in South Africa.

There have been comparatively few experiments with regard to electoral matters in the Dominions. In the case of New Zealand the second ballot was adopted and was put into force first at the General Election in 1908. The Act was passed in October 1908. Under that Act a candidate must obtain more than half of the valid votes recorded. If no candidate receives an absolute majority of votes as the result of the first ballot, the second ballot becomes necessary, and is taken between the two candidates who have received the highest number of votes, all others being excluded. The date for taking the second ballot is fixed as the seventh day after the close of the poll on the first ballot, excepting in ten electorates, where the difficulties of communication necessitate an interval of fourteen days being allowed.

The candidate who at the second ballot receives the higher number of votes is declared to be elected. There are provisions for deciding procedure when an equal number of votes is polled by both candidates, the returning officer giving a casting vote; also as to recounts and election petitions.

The Act does not at present apply to the election of representatives of the Maori race, but the Governor is empowered by Order in Council to bring the second ballot into operation at any time as regards Maoris.

At the general election[1] held on November 17, 1908, in twenty-three electoral districts the candidate who polled the greatest number of votes failed to secure an absolute majority of all the votes polled. As the result of a second ballot fifteen of these candidates were elected and eight defeated, including the leader of the Opposition, Sir W. Russell. The total number of votes recorded in these districts at the first ballot, including 3,015 informal, was 133,752, or 78 per cent. of the number on the rolls, and at the second ballot 126,404 valid votes and 403 informal were recorded, being 74 per cent. of the total roll number. Thus there was a decrease of 6,945 votes, and if to these be added 6,601 votes of electors who voted upon the second occasion only it is found that 13,546 persons who recorded their votes at the first failed to do so at the second ballot.

A good deal of annoyance was caused to those candidates who were compelled to face a second election, and there was a movement at that time for the repeal of the Act before the next general election came on, but no steps have been taken to carry this movement into effect, though the point was raised during the discussion of the Electoral Act of 1910. One result of the Act was somewhat unexpected; in cases where two members of the same party stood against a third member of a different party, and one of the two was defeated, the supporters of that member were inclined to transfer their own votes from their own party to the opposition, in consequence of the personal feeling engendered on that occasion. Moreover, the strain on members of further electioneering was undoubtedly very severe, especially owing to the comparatively large size of the constituencies and the need of travelling from township to township.

The same principle of the second ballot was adopted by

[1] New Zealand *Official Year Book*, 1909, pp. 392, 393.

Act No. 18 of 1910 in the case of New South Wales.[1] Under it also a candidate would require to receive an absolute majority of votes; if no such absolute majority were recorded a second ballot was taken between the candidate who had received the highest number and the candidate who had received the next highest number; in most districts the second ballot was taken on the seventh day after the close of the first poll; in others not less than fourteen and more than twenty-one days after the close of the poll. No candidate could withdraw from the second ballot. The Act was put in force at the general election of 1910, but only in three cases was a second ballot necessary, and in those it appeared satisfactorily to perform its purpose of preventing split votes defeating the purposes of the majority of the electors.

In the case of Tasmania[2] there is in force a most elaborate scheme for proportional voting. This scheme, which was put in force in its full form at the last general election in 1909, has been considered locally to be quite satisfactory, as it secures the more accurate representation of the parties in the state. On the other hand, it must be admitted that Tasmania presents—whether as a result of the principle, or not—the spectacle of constant instability of government, but that would almost be inevitable in any case, because of the fact that the Lower House is so small, consisting only of thirty members, that it is impossible to have an effective party system. It formerly tried the system in 1896, but abandoned it again in 1901.

In the case of Queensland the principle of the contingent vote is in operation. The following provisions are laid down with regard to it in ss. 20–6 of the Act of 1892, No. 7.[3]

[1] It was adopted despite protests from the Labour party to avoid the weakening of the governmental party by split votes; see *Parliamentary Debates*, 1910, pp. 1790, 1875.

[2] See the *Electoral Act*, 1907; *Parl. Pap.*, Cd. 5163, pp. 54–63; Dr. McCall in Cd. 5352, pp. 188–91; cf. Commonwealth *Parl. Pap.*, 1901–2, No. 46; Reeves, *State Experiments in Australia and New Zealand*, i. 180–91; Western Australia *Parliamentary Debates*, 1910–1, p. 2477. It is based on the Hare system modified by Mr. Justice Clark's advice.

[3] Consolidated in 1905; see *Parl. Pap.*, Cd. 3919, pp. 202, 203. In 1910

In the succeeding sections of this Act the term 'absolute majority of votes' means a number of votes greater than one-half of the number of all the electors who vote at an election, exclusive of electors whose ballot-papers are rejected, but the casting vote of the returning officer, when given, shall be included in reckoning an absolute majority of votes.

21. When a poll is taken at an election a candidate shall not, except as hereinafter provided, be elected as a member unless he receives an absolute majority of votes.

22. Notwithstanding the provisions of the seventy-third section of the Principal Act, an elector may, if he thinks fit, indicate on his ballot-paper the name or names of any candidate or candidates for whom he does not vote in the first instance, but for whom he desires his vote or votes to be counted in the event of any candidate or candidates for whom he votes in the first instance not receiving an absolute majority of votes; and, if he indicates more than one such candidate, may indicate the order in which he desires that his vote or votes shall be counted for any such candidate or candidates.

Such indication shall be made by writing the figures 2, 3, or any subsequent number, opposite to the name or names of the candidate or candidates for whom he does not vote in the first instance, but for whom he desires his vote or votes to be so counted, and the order indicated by such numbers shall be taken to be the order in which he desires his vote or votes to be so counted.

Provided always that no mere irregularity or error in writing such figures shall invalidate the vote or votes given by an elector in favour of any candidate or candidates in the first instance, if the ballot-paper of such elector is otherwise in order.

23. When one member only is to be returned at the election, if there is no candidate who receives an absolute majority of votes, all the candidates except those two who receive the greatest number of votes shall be deemed defeated candidates.

The vote of every elector who has voted for a defeated candidate shall be counted for that one (if any) of the remaining two candidates for whom he has indicated in the manner aforesaid that he desires his vote to be counted.

the Premier of Victoria introduced a Bill into the Assembly for preferential voting, but the Upper House was not prepared to accept it and the Government allowed it to drop, but has reintroduced it in 1911.

The votes so counted for such remaining candidates shall be added to the votes originally given for them, and the candidate who receives the greatest number of votes, including the votes so counted (if any), shall be elected.

24. When two members are to be returned, and there are not more than four candidates, the two candidates who receive the greatest number of votes shall be elected.

25. When two members are to be returned, and there are more than four candidates, if there is no candidate who receives an absolute majority of votes, all the candidates except those four who receive the greatest number of votes shall be deemed defeated candidates.

The vote or votes of every elector who has voted for a defeated candidate or defeated candidates shall be counted for that one or those two of the remaining four candidates for whom the elector has not voted in the first instance, but for whom he has indicated in the manner aforesaid that he desires his vote or votes to be counted.

The votes so counted for such remaining candidates shall be added to the votes originally given for them, and the candidates who receive the greatest number of votes, including the votes so counted (if any), shall be elected.

If only one candidate receives an absolute majority of votes, he shall be elected.

In that case all the other candidates except those two who receive the next greatest number of votes shall be deemed defeated candidates.

The vote of every elector who has voted for a defeated candidate shall be counted for that one (if any) of the remaining two candidates for whom the elector has not voted in the first instance, but for whom he has indicated in the manner aforesaid that he desires his vote to be counted.

The votes so counted for such remaining candidates shall be added to the votes originally given for them, and the candidate who receives the greatest number of votes, including the votes so counted (if any) shall be elected.

26. When two or more candidates, neither of whom is elected, receive an equal number of votes, the returning officer shall decide by his casting vote which of them have or has the greatest number of votes.

The system is clearly not a success when more than one member is to be returned. It exists also under the *Electoral Act*, 1907, in Western Australia.[1]

[1] See *Parl. Pap.*, Cd. 5163, pp. 46–50. It has been proposed, and steps

In the Colony of the Cape of Good Hope, under the *Constitution Ordinance* of 1852, there was formerly provision for plumping at elections of members of the Upper House, the elector being entitled to give as many votes as members were to be elected, and to distribute them precisely as he willed. It was proposed when constituting the Union of South Africa to adopt generally the principle of proportional representation, but that principle was finally dropped, and is only applied to the Provincial Councils, which are not legislatures in the proper sense of the word, and to the elections for the Senate, where it has been pronounced a marked success.[1]

In the case of the Commonwealth of Australia,[2] New Zealand,[3] and the Union of South Africa[4] (as before in the case of the Transvaal and the Orange River Colony), very elaborate provisions are made for the automatic redistribution of electoral districts from time to time, so as to adjust them to the changes of population. Similarly in New South Wales under the *Parliamentary Electorates and Elections Act*, 1902, and also in Queensland under the Act 1 Geo. V. No. 3, which makes certain provisions for the representation of the people of Queensland in the Parliament. The provisions are fairly typical and may be given at length. The number of the members of the Assembly is fixed at seventy-two,

have been taken by an Act No. 44 of 1911, s. 26, to make preferential voting there compulsory, so badly does it work; see *Parliamentary Debates*, 1910–1, pp. 3215 seq.; Dr. (now Sir W.) Hackett, *Parl. Pap.*, Cd. 5352, pp. 155–8.

[1] *The State of South Africa*, ii. 610; iii. 698, 699.

[2] See the *Electoral Acts*, 1902–9; Harrison Moore, *Commonwealth of Australia*,[2] pp. 120 seq.

[3] See *Consolidated Statutes*, 1908, No. 101, ss. 16–22. There are two commissioners, one for the North and one for the South Island, and the deviation from the quota is fixed at 550 maximum in a rural, and 600 in an urban district.

[4] See 9 Edw. VII. c. 9, ss. 40–2. After each quinquennial census three judges are appointed by the Governor-General in Council, who redistribute by a majority—the Governor-General in Council having only power to refer back for consideration. They are bound to pay attention to community or diversity of interests, means of communication, physical features, existing electoral boundaries, and sparsity or density of population, and can allow 15 per cent. either way from the quota obtained by dividing the total number of votes by members.

and the state is to be divided into seventy-two electoral districts each returning one member. As soon as possible after the passing of the Act commissioners are to be appointed to divide the state into electoral districts. For the purposes of the division a quota of electors shall be ascertained by dividing by seventy-two the total number of electors whose names appear upon the several electoral rolls of the state on January 1, 1911. In making the division, consideration shall be given by the commissioners to—(*a*) community or diversity of interest; (*b*) means of communication; (*c*) physical features; (*d*) the area of proposed districts which do not comprise any part of a city or town; and subject thereto the quota of electors shall be the basis for the division of the state into electoral districts, and the commissioners may adopt a margin of allowance to be used whenever necessary, but in no case shall such quota be departed from to a greater extent than one-fifth more or one-fifth less. On or before March 31, 1911, in each proposed electoral district maps shall be distributed showing the boundaries of the proposed district and the several contiguous districts, and the number of electors in the proposed district and in the several contiguous districts. Objections may be raised and lodged with the commissioners up to April 30, and they must be considered by the commissioners before the final division is made. When they have taken into consideration any objections, the commissioners shall on or before June 30, 1911, forward to the Home Secretary reports of the division made, specifying the quota of electors, the names of each electoral district, its boundaries, and the number of electors therein, together with signed maps and rolls of electors entitled to vote. The Governor in Council is required forthwith to proclaim the names and boundaries which shall become the electoral districts of the State of Queensland.

Provision is also made in the Act for the registration of voters so as to secure the correctness of the provisional list drawn up by the commissioners.

It is also provided that whenever at any time the number of voters on the roll of any district is so much above or below

the prescribed quota of electors, after taking into consideration the margin of allowance of one-fifth, that, in the opinion of the Governor in Council, it has become necessary to reduce or increase, as the case may be, the number of such electors, so as to approximate the same to the said quota, the Governor in Council may appoint three electoral commissioners with power to alter the boundaries of the electoral district. Provision is made that the commissioners shall consider any objections made to the proposed alterations, and for the making by the principal electoral registrar of new rules to suit the altered circumstances.

It is important to note that no discretion is given to the Governor in Council to vary the report of the commissioners, and that therefore their award shall be final. But redistribution is not automatic.

In the other states there is no provision for automatic redistribution. Tasmania has adopted the proportional system of representation with large divisions returning six members, and in 1910 Western Australia redistributed the seats on a basis attacked by the Labour party as concerned solely in the interests of the Government.[1] In Victoria and South Australia also the electorates are fixed by Act. So also in Newfoundland and in the Provinces of Canada.

In Canada, in the Dominion, redistribution is compulsory, but not automatic, under the *British North America Act* and 4 & 5 Edw. VII. cc. 3 and 42, as the result of each quinquennial census. Accordingly the House was last redistributed in 1903 and 1907, when very considerable changes were made, the basis being the sixty-five members of Quebec.[2] The creation of the new provinces in 1905 in Saskatchewan and Alberta led to very bitter accusations of gerrymandering.[3] A new redistribution falls due as the result of the census of 1911.

[1] See *Parliamentary Debates*, 1910–1, pp. 1499 seq. and *passim*; Act No. 6 of 1911.

[2] Cf. *Canadian Annual Review*, 1903, pp. 46 seq., and see the cases, *in re Representation of Certain Provinces in the House of Commons*, 33 S. C. R. 475, and *in re Representation of Prince Edward Island in the House of Commons*, 33 S. C. R. 594, and [1905] A. C. 37. For 1907, see 6 & 7 Edw. VII. c. 41.

[3] See *Canadian Annual Review*, 1905, p. 104.

CHAPTER VII

THE UPPER HOUSES

I. COMPOSITION AND LEGAL POWERS

In this chapter may be given—

(1) The composition of the Second Chamber and the method of nomination or election in the case of each of the Dominions ;

(2) Its powers or disabilities with regard to :—

(*a*) Finance, and

(*b*) General Legislation.

(3) The provisions, if any, for the adjustment of the differences which may arise between the two Chambers with regard to :—

(*a*) Finance, and

(*b*) General Legislation.

§ 1. Canada

(*a*) *The Dominion*

Under the *British North America Act*, 1867,[1] and amending legislation, the Senate of the Dominion of Canada consists of 87 Members, of whom 24 represent Ontario, 24 represent Quebec, 10 represent Nova Scotia, 10 represent New Brunswick, 4 represent Prince Edward Island, 3 represent British Columbia, 4 represent Manitoba, 4 represent Saskatchewan, and 4 represent Alberta.

The Senators are summoned by the Governor-General in the King's name by instrument under the Great Seal of Canada[2] and hold their places for life.[3] The quorum is fifteen.

The qualifications of a Senator are as follows :—

(1) He shall be of the full age of 30 years ;

[1] This number was fixed at 72 by 30 Vict. c. 3, s. 21, but power was given to Canada to increase the number by 34 & 35 Vict. c. 28 ; 49 & 50 Vict. c. 35.

[2] 30 Vict. c. 3, s. 24. By s. 25 the first senators were chosen in accordance with a warrant under the sign-manual, and the names inserted in the proclamation of Union.

[3] 30 Vict. c. 3, s. 29.

(2) He shall be either a natural-born subject of the King or a subject of the King naturalized by an Act of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland, or of the Legislature of one of the Provinces of Upper Canada, Lower Canada, Canada, Nova Scotia, or New Brunswick, before the Union, or of the Parliament of Canada after the Union ;

(3) He shall be legally or equitably seised as of freehold for his own use and benefit of lands or tenements held in free and common socage, or seised or possessed for his own use and benefit of lands or tenements held in franc-alleu or in roture, within the province for which he is appointed, of the value of four thousand dollars over and above all rents, dues, debts, charges, mortgages, and encumbrances due or payable out of or charged on or affecting the same ;

(4) His real and personal property shall be together worth four thousand dollars over and above his debts and liabilities ;

(5) He shall be resident in the province for which he is appointed ;

(6) In the case of Quebec he shall have his real property qualification in the electoral division for which he is appointed or shall be resident in that division.

A Senator may, however, resign ;[1] and his place shall become vacant in any of the following cases :—[2]

(1) If for two consecutive sessions of the Parliament he fails to give his attendance in the Senate ;

(2) If he takes an oath or makes a declaration or acknowledgement of allegiance, obedience or adherence to a foreign Power or does an act whereby he becomes a subject or citizen, or entitled to the rights or privileges of a subject or citizen, of a foreign Power ;

(3) If he is adjudged bankrupt or insolvent, or applies for the benefit of any law relating to insolvent debtors, or becomes a public defaulter ;

(4) If he is attainted of treason or convicted of felony or of any infamous crime ;

(5) If he ceases to be qualified in respect of property or of residence ; provided, that a Senator shall not be deemed to have ceased to be qualified in respect of residence by reason only of his residing at the seat of the Government of Canada while holding an office under that Government requiring his presence there.

[1] 30 Vict. c. 3, s. 30.

[2] 30 Vict. c. 3, s. 31.

2. It is provided by s. 53 of the *British North America Act* that 'Bills for appropriating any part of the public revenue, or for imposing any tax or impost, shall originate in the House of Commons.' There is no other provision limiting the power of the Senate with regard either to finance or to general legislation.

3. The *British North America Act* does not contain any provision expressly stated to be intended to be for the adjustment of differences between the Senate and the House of Commons whether with regard to finance or to general legislation. But it is provided by s. 26 that 'if at any time, on the recommendation of the Governor-General, the King thinks fit to direct that three or six members be added to the Senate, the Governor-General may, by summons to three or six qualified persons, as the case may be, representing equally the three divisions of Canada, add to the Senate accordingly'. The three divisions referred to are Ontario; Quebec; the Maritime Provinces, viz. Nova Scotia, New Brunswick, and Prince Edward Island. S. 27 provides that 'in the case of such addition being at any time made, the Governor-General shall not summon any person to the Senate except on a further like direction by the King on the like recommendation, until each of the three divisions of Canada is represented by twenty-four senators and no more.'

(*b*) *Quebec*

Under the *British North America Act*, ss. 71 and 72, as amended by the *Revised Statutes*, 1909, ss. 84–6, the Legislative Council of Quebec consists of twenty-four members who hold their seats for life, and who are appointed by the Lieutenant-Governor by instrument under the Great Seal of the Province, one for each of the twenty-four divisions of the Province. The quorum is ten, *including* the Speaker.

No person can be a Legislative Councillor who holds an office of profit under the Crown in the Province, except a ministerial office, or who undertakes or executes or has directly or indirectly any contract with the Provincial Government under which money is to be paid. This does not

* No provision is made for deadlocks by express reference. Under the legislation of 1915 four and eight members—two from each of the four divisions of the Senate.

apply to a man who is merely a shareholder in an incorporated company, with the exception of a company having the execution of any public works. Legislative Councillors must also hold the same qualifications as members of the Canadian Senate (except that their property need only be in the district in which the division is situated), and their seats are vacated in the same circumstances.

2. The only provision affecting the powers of the Legislative Council is that contained in s. 53 of the *British North America Act*, which is applied by s. 90 to the provinces, and which provides that Bills for appropriating any part of the public revenue or for imposing any tax or impost shall originate in the Lower House.

3. No provision exists for the adjustment of differences between the two Chambers of the Legislature of Quebec.

(c) *Nova Scotia*

Under the *Revised Statutes*, 1900, the Legislative Council of Nova Scotia consists of twenty-one members [1] nominated by the Lieutenant-Governor in Council. No person can be appointed who is a member of the Federal Parliament, or holds certain specified offices under the Provincial Government, or is declared by the judgement of a court of competent jurisdiction to be disqualified from being elected to or sitting in the House of Commons of Canada by reason of any violation of the law of Canada relating to elections or to the trial of controverted elections, so long as such disqualification lasts. A seat is vacated by two sessions' consecutive absence from the Council without the consent of the Lieutenant-Governor in Council.

2. The only provision affecting the powers of the Legislative Council is that contained in s. 53 of the *British North America Act*, which is applied by s. 90 to the provinces, and which provides that Bills for appropriating any part of the public revenue or for imposing any tax or impost shall originate in the Lower House.

3. No provision exists for the adjustment of differences between the two Chambers of the Legislature of Nova Scotia.

[1] For the number and tenure, see below, chap. viii.

There are no second Chambers in the other Canadian Provinces at the present day. In Ontario and British Columbia none has ever existed; that of New Brunswick disappeared in 1891 (it had twenty-three members); that of Prince Edward Island, elective from 1862 onwards, was merged in the Assembly by an Act of 1893, c. 21, and that of Manitoba was abolished by a local Act (c. 28) in 1876. The new provinces of Saskatchewan and Alberta have a single chamber only.

§ 2. Newfoundland

Under the letters patent of March 28, 1876, the Legislative Council of Newfoundland consists of members nominated and appointed by the King under the sign-manual and signet, or provisionally appointed by the Governor and afterwards confirmed by His Majesty. The total number of the said Legislative Council for the time being resident within Newfoundland shall not at any time by such provisional appointments be raised to a greater number on the whole than fifteen. The number of members who can be appointed by His Majesty is not limited in any way, and at present the Council contains twenty-one members. Every member holds his place during the King's pleasure, and may be removed by any instruction or warrant issued by His Majesty under the sign-manual and signet, and with the advice of the Privy Council. The quorum is five.

2. By No. 249 of the Rules of the House of Assembly adopted at the first session of the 16th Assembly and amended in the fifth session of the said 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 House will not insist on its privileges in the following cases

of Bills brought to the House from the Legislative Council, or returned to the House by the Legislative Council with amendments, whereby any pecuniary penalty, forfeiture, or fee shall be authorized, imposed, appropriated, regulated, varied, or extinguished :—

(1) When the object of such pecuniary penalty or forfeiture is to secure the execution of the Act, or the punishment or prevention of offences ;

(2) Where such fees are imposed in respect of benefit taken or service rendered under the Act, and in order to the execution of the Act, and are not made payable into the Treasury or Exchequer, or in aid of the public revenue, and do not form a ground of public accounting by the parties receiving the same, either in respect of deficit or surplus ; or

(3) When such a Bill shall be a private Bill. Nor will the House insist on its privileges with regard to any clauses in Private Bills sent down from the Legislative Council which relate to tolls or charges for services performed and are not in the nature of a tax.

3. There is no legislative provision for the settlement of disagreements between the two Houses, whether with regard to matters of finance or other questions. But there is no limitation on the power of the Crown to add to the numbers of the Upper House.

§ 3. AUSTRALIA

(*a*) *The Commonwealth* [1]

Under the constitution of the Commonwealth the Senate of the Commonwealth of Australia is composed of senators for each state directly chosen by the people of the state voting as one electorate.

Until the Parliament otherwise provides, there shall be six senators for each original state. The Parliament may make laws increasing or diminishing the number of senators for each state, but so that equal representation of the several original states shall be maintained, and that no original state shall have less than six senators. The Senators are chosen

[1] 63 & 64 Vict. c. 12, Const. s. 7.

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 New Zealand.

for a term of six years, half retiring every three years, from June 30, the date having been changed from December 31 to June 30 by Act No. 1 of 1907. The quorum is a third.

The senator must be of the full age of twenty-one years, and must be an elector entitled to vote at the election of members of the House of Representatives, or a person qualified to become such elector, and must have been for three years at least a resident within the limits of the Commonwealth as existing at the time that he is chosen. He must be a subject of the King, either natural-born or for at least five years naturalized under a law of the United Kingdom, or of a Colony which has become or becomes a state, or of the Commonwealth, or of a state.[1]

Any person who—

(i) Is under any acknowledgement of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power; or

(ii) Is attainted of treason, or has been convicted and is under sentence, or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of a state by imprisonment for one year or longer; or

(iii) Is an undischarged bankrupt or insolvent; or

(iv) Holds any office of profit under the Crown, or any pension payable during the pleasure of the Crown out of any of the revenues of the Commonwealth; or

(v) Has any direct or indirect pecuniary interest in any agreement with the public service of the Commonwealth otherwise than as a member and in common with the other members of an incorporated company consisting of more than twenty-five persons—shall be incapable of being chosen or of sitting as a Senator.[2]

But subsection iv does not apply to the office of any of the King's Ministers of State for the Commonwealth, or of any of the King's Ministers for a state, or to the receipt of pay, half-pay, or a pension by any person as an officer or member of the King's navy or army, or to the receipt of pay as an officer or member of the naval or military forces of

[1] s. 34.

[2] ss. 43–5. These provisions apply also to the House of Representatives. Women are apparently eligible; Harrison Moore, *Commonwealth of Australia*,[2] p. 130. They have stood, but none has yet been elected.

the Commonwealth by any person whose services are not wholly employed by the Commonwealth.

A seat is vacated on the happening of any of these events, or on bankruptcy, or insolvency, or the acceptance of a fee for services rendered to the Commonwealth or in Parliament to any person or state, and a seat may be resigned. Conviction for certain offences under the *Electoral Act* disqualifies for two years from election or sitting.

Members of the Lower House cannot of course be senators, and members of State Parliaments cannot be nominated.

The qualification of electors is extended, by Act No. 8 of 1902, to adult British subjects of either sex who have lived in Australia for six months continuously. Aboriginal natives of Australia, Asia, Africa, or the Islands of the Pacific except New Zealand, cannot vote at Federal elections unless they have acquired a right to vote at elections for the Lower House of a State Parliament.[1] Each elector has only one vote.

2. The powers of the Senate with regard to finance are restricted by s. 53 of the Constitution as follows :—

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 appropriation 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 law 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.

[1] That excludes them in Western Australia under the *Electoral Act* No. 27 of 1907, s. 18; and in Queensland under the Electoral Act of 1905, 5 Edw. VII. No. 1, s. 9. This limitation is provided in s. 41 of the constitution. See above, pp. 479, 480.

It is also provided by s. 54 that the law which appropriates revenue or moneys for the ordinary annual services of the Government shall deal only with such appropriation; by s. 55 that laws imposing taxation shall deal only with the imposition of taxation, and any provision therein dealing with any other matter shall be of no effect. Under s. 55 laws imposing taxation, except laws imposing duties of Customs or of Excise, shall deal with one subject of taxation only; but laws imposing duties of Customs shall deal with duties of Customs only, and laws imposing duties of Excise shall deal with duties of Excise only.

In all other matters except those mentioned in s. 53 of the Constitution, the Senate has equal power with the House of Representatives.

3. There are no special provisions for the adjustment of differences which may arise between the Senate and the House of Representatives with regard to Finance. In any case of difference, the procedure laid down in s. 57 of the Constitution applies.

If the House of Representatives passes any proposed law, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, and if after an interval of three months the House of Representatives, in the same or the next session, again passes the proposed law with or without any amendments which have been made, suggested, or agreed to by the Senate, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, the Governor-General may dissolve the Senate and the House of Representatives simultaneously. But such dissolution shall not take place within six months before the date of the expiry of the House of Representatives by effluxion of time.

If after such dissolution the House of Representatives again passes the proposed law, with or without any amendments which have been made, suggested, or agreed to by the Senate, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, the Governor-General may convene a joint

sitting of the members of the Senate and of the House of Representatives.[1]

The members present at the joint sitting may deliberate and shall vote together upon the proposed law as last proposed by the House of Representatives, and upon amendments, if any, which have been made therein by one House and not agreed to by the other, and any such amendments which are affirmed by an absolute majority of the total number of the members of the Senate and House of Representatives shall be taken to have been carried; and if the proposed law, with the amendments, if any, so carried is affirmed by an absolute majority of the total number of the members of the Senate and House of Representatives, it shall be taken to have been duly passed by both Houses of the Parliament, and shall be presented to the Governor-General for the King's assent.

Special provision is made for the case of differences between the two Houses, with regard to the amendment of the Constitution, by s. 128 of the Constitution, which is as follows :—

This Constitution shall not be altered except in the following manner :—

The proposed law for the alteration thereof must be passed by an absolute majority of each House of the Parliament, and, not less than two nor more than six months after its passage through both Houses, the proposed law shall be submitted in each State to the electors qualified to vote for the election of members of the House of Representatives.

But if either House passes any such proposed law by an absolute majority, and the other House rejects or fails to pass it, or passes it with any amendment to which the first-mentioned House will not agree, and if after an interval of three months the first-mentioned House in the same or the next session again passes the proposed law by an absolute majority with or without any amendment which has been made or agreed to by the other House, and such other House rejects or fails to pass it, or passes it with any amendment to which the first-mentioned House will not agree, the Governor-General may submit the proposed law as last

[1] Under the Constitution, the number of members of the House of Representatives must be as nearly as possible double that of the Senate. At present the Senate has 36, the House of Representatives 75, members.

proposed by the first-mentioned House, and, either with or without any amendments subsequently agreed to by both Houses, to the electors in each State qualified to vote for the election of the House of Representatives.[1]

When a proposed law is submitted to the electors the vote shall be taken in such manner as the Parliament prescribes. But until the qualification of electors of members of the House of Representatives becomes uniform throughout the Commonwealth,[2] only one half the electors voting for and against the proposed law shall be counted in any state in which adult suffrage prevails.

And if in a majority of the states a majority of the electors voting approve the proposed law, and if a majority of all the electors voting also approve the proposed law, it shall be presented to the Governor-General for the King's assent.

No alteration diminishing the proportionate representation of any state in either House of the Parliament, or the minimum number of representatives of a state in the House of Representatives, or increasing, diminishing, or otherwise altering the limits of the state, or in any manner affecting the provisions of the constitution in relation thereto, shall become law, unless the majority of the electors voting in that State approve the proposed law.

(*b*) *New South Wales*

Under the Constitution Act 18 & 19 Vict. c. 54, and Act No. 32 of 1902, the Legislative Council of New South Wales consists of persons unlimited in number[3]—at present 52—summoned by the Governor in virtue of clause xi of the Letters Patent by instrument under the Great Seal of the state. The quorum is one-fourth.

A Legislative Councillor must be of the full age of twenty-one, and a natural-born subject of His Majesty, or naturalized in Great Britain or in New South Wales, and must not be a public contractor except as member of a company exceeding twenty persons in number,[4] or a member of either House of

[1] At present, under Act No. 8 of 1902, the electorate for the Senate and the House of Representatives is the same; but if there is any difference, the electorate for the Lower House will be that to which the law is referred.

[2] This is now the case.

[3] The minimum of 21 included in the Act of 1855 (18 & 19 Vict. c. 54, sched. s. 3) does not appear in the Act No. 32 of 1902, s. 16.

[4] Cf. *Miles* v. *McIlwraith*, 8 App. Cas. 120, a decision on a similar provision in the case of the Queensland Lower House.

the Federal Parliament. No less than four-fifths of the members so summoned shall consist of persons not holding any office of emolument under the Crown; but officers of His Majesty's sea and land forces on full or half pay, and retired officers on pensions, shall not be deemed to be persons holding an office of emolument under the Crown within the meaning of this section.

Members of the Legislative Council hold their seats for the term of their natural lives, but they may resign their seats, and their seats become vacant on election to the Federal Parliament; and :—

If any Legislative Councillor—

(*a*) Fails for two successive sessions of the Legislature to give his attendance in the Legislative Council, unless excused in that behalf by the permission of His Majesty or of the Governor, signified by the Governor to the Legislative Council;[1] or

(*b*) Takes any oath or makes any declaration or acknowledgement of allegiance, obedience, or adherence to any foreign prince or power; or

(*c*) Does, concurs in, or adopts any act whereby he may become a subject or citizen of any foreign state or power, or whereby he may become entitled to the rights, privileges, or immunities of a subject or citizen of any foreign state or power; or

(*d*) Becomes bankrupt, or takes the benefit of any law relating to insolvent debtors; or

(*e*) Becomes a public contractor or defaulter; or

(*f*) Is attainted of treason, or convicted of felony or infamous crime.

The members of the Lower House are subject to similar disqualifications, absence for one session being a ground.

2. The only provision restricting the power of the Legislative Council with regard to legislation is the proviso contained in s. 5 of the New South Wales Act, No. 32 of 1902, under which 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. There are no legal provisions for the adjustment of

[1] Cf. *Attorney-General of Queensland* v. *Gibbon*, 12 App. Cas. 442, decided under a similar provision in the Queensland *Constitution Act*, 1867.

differences which may arise between the Legislative Council and the Legislative Assembly, whether with regard to matters of finance or to general legislation, but the number of the Upper House is not limited, and the Governor has power to add members to such extent as he thinks fit.

(c) *Victoria*

Under the Constitution Act 18 and 19 Vict. c. 55 and the Amending Acts, Nos. 1075, 1723, 1864, and 2075, the Legislative Council of Victoria consists of thirty-four members, who are elected for seventeen provinces, two for each province. Members hold office for six years, but one member for each province retires every third year, unless there is a dissolution of the Council, in which case one half of the members hold their seats for three years only, the one receiving the fewest votes retiring first. The quorum is twelve.

A member must be of the full age of thirty years and a natural-born subject of His Majesty, or who has been naturalized for ten years previous to election, and has resided during that period in Victoria. He must also for one year previous to the election have been legally or equitably seised of or entitled to an estate of freehold in possession for his own use and benefit of lands and tenements in Victoria of the annual value of £50 above all charges and encumbrances affecting the same, other than any public or parliamentary tax, or municipal or other rate or assessment. No person can become a member who is—(1) a judge of any court of Victoria; (2) a minister of religion; (3) attainted of any treason, or convicted of any felony or infamous offence within any part of His Majesty's dominions; (4) an uncertificated bankrupt or insolvent; (5) a public contractor, except in a partnership of more than twenty persons; (6) a member of the Legislative Assembly; or (7) of the Commonwealth Parliament; or (8) who is insane; or (9) a Government officer other than a Minister.[1]

A member may resign his seat, and his seat becomes vacant if he—(1) ceases to be possessed of the property qualification; or (2) is absent for one entire session without

[1] There are analogous disqualifications for the Assembly, but no property franchise there exists. See above, p. 495.

the leave of the Council; (3) takes an oath of allegiance to any foreign power; (4) becomes insolvent or a public defaulter; (5) is attainted of treason or commits a felony; (6) becomes insane; (7) becomes concerned in a public contract, except as a member of a partnership of more than twenty persons; or (8) accepts an office of profit under the Crown, except as Minister, in which case his seat is vacated, but he is eligible for re-election, or as President of the Council, or Chairman of Committees, or becomes a member of the Federal Parliament.[1]

Electors are qualified by—(1) owning the freehold or being mortgagor or mortgagee in possession, or in the receipt of the rents or profits, of property situate in one and the same province rated at not less than £10 a year; (2) being lessee or assignee for the unexpired residue of any term originally created for a period of not less than five years, or occupier of property, in one and the same province rated at not less than £15 a year; (3) being joint owner, lessee, assignee, or occupier of property sufficient to give each the foregoing qualification; (4) being resident in Victoria and a graduate of any university in the British dominions, a matriculated student of Melbourne University, a qualified legal or medical practitioner, a minister of religion, a certificated schoolmaster, or a naval or military officer.

All voters not being natural-born subjects of His Majesty must have resided in the state for twelve months previous to the 1st of January or the 1st of July in any year, and shall have been naturalized at least three years previously.

The suffrage is possessed by both men and women since 1909, but no person is entitled to more than one vote in the same province.[2]

2. It is provided by s. 56 of the Bill scheduled to the

[1] There are analogous disqualifications for the Assembly, but no property franchise there exists. See above, p. 496.

[2] The special representation of railway and other public servants in the Council by one member created in 1903 was repealed in 1906, the Council thus being reduced to 34 members. Similarly the three members, two for railway and one for other public servants, of the Assembly created in 1903, were abolished by the Act of 1906, No. 2075.

Imperial Act 18 & 19 Vict. c. 55, that all Bills for appropriating any part of the revenue of Victoria, and for 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. By s. 30 of the amending Victorian Act of 1903, No. 1864, it is provided as follows :—

(1) A Bill shall not be taken to be a Bill for appropriating any part of the revenue of Victoria, or for imposing any duty, rate, tax, rent, return, or impost, 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 appropriation of fees for licences, or fees for services under such Bill.

(2) The Council may once at each of the undermentioned stages of a Bill which the Council cannot alter return such Bill to the Assembly suggesting by message the omission or amendment of any items or provisions therein. And the Assembly may, if it thinks fit, make any of such omissions or amendments with or without modifications. Provided that the Council may not suggest any omission or amendment the effect of which will be to increase any proposed charge or burden on the people.

(3) The stages of a Bill at which the Council may return the Bill with a message as aforesaid shall be—

(*a*) The consideration of the Bill in Committee ;

(*b*) The consideration of the report of the Committee ; and

(*c*) The consideration of the question that the Bill be read a third time.

3. The following provision is made for disagreements between the two Houses with regard to matters of finance or general legislation by s. 31 of the Act of 1903, No. 1864 :—

(1) If the Assembly passes any Bill and the Council rejects or fails to pass it, or passes it with amendments to which the Assembly will not agree, and, if not later than six months before the date of the expiry of the Assembly by effluxion of time, the Assembly is dissolved by the Governor by a proclamation declaring such dissolution to be granted in consequence of the disagreement between the two Houses as to such Bill, and the Assembly again passes the Bill with or without any amendments which have been made, suggested, or agreed to by the Council, and the Council rejects or fails to pass it or passes it with amendments to which the Assembly will not agree, the Governor at any time, not being less than nine months nor more than twelve months

after the said dissolution, may, notwithstanding anything contained in the Constitution Act, dissolve the Council and the Assembly simultaneously.

(2) The Council shall be deemed to have failed to pass a Bill if the Bill is not returned to the Assembly within three months after its transmission to the Council and the session continue during such period.

(3) Any Bill by which an alteration may be made in the constitution of the Council or Assembly or in Schedule D to the Constitution Act (other than such alterations as are referred to in s. 61 of the said Act) shall not be within the operation of the foregoing provisions of this section.

(4) In s. 61 of the Constitution Act, after the words 'or increase' there shall be inserted the words 'or decrease'.

This provision refers to alterations in the number of members of the Houses chosen for electoral provinces.

(d) *Queensland*

Under Acts 31 Vict. Nos. 21 and 38 and 60 Vict. No. 3 the Legislative Council of Queensland consists of members unlimited in number—usually between forty and fifty—summoned by the Governor in His Majesty's name by an instrument under the Great Seal of the State.

No person can be summoned who is not of the full age of twenty-one years and a natural-born subject of His Majesty, or naturalized by an Act of the Imperial Parliament or by an Act of the Legislature of New South Wales before 1859,[1] or by an Act of Queensland. Not less than four-fifths of the members so summoned to the Legislative Council shall consist of persons not holding any office of emolument under the Crown, except officers of His Majesty's sea and land forces on full or half-pay or retired officers on pensions. No person who shall directly or indirectly himself, or by any

[1] The date of the constitution of Queensland as a separate Colony. It is curious that naturalization in other Australian Colonies is not accepted (cf. the case of New South Wales, where the Act of 1902 still keeps the restriction to naturalization in New South Wales). Now naturalization is one for the Commonwealth, and the terms will include any one henceforth so naturalized, but hardly persons naturalized in one state before the *Naturalization Act*, 1903. In the other states the term 'naturalized' is now defined so as to cover any person naturalized in any state.

The Legislative Council of Queensland was abolished in 1922. (Keith - Grand Edition, vol I p 434-35; 460-6 Marriott - Grand Chambers New Edition, 1929. p 108-109

person whatsoever in trust for him or for his use or benefit or on his account, undertake, execute, hold and enjoy in the whole or in part any contract or agreement for or on account of the public service, shall be capable of being summoned to the Legislative Council. This does not extend to any contract or agreement made by an incorporated company or trading company consisting of more than twenty members.

Members of the Council hold office for life, but a Legislative Councillor may resign his seat by letter to the Governor, and his seat is vacated if he (1) shall fail for ten successive sessions of the Council to give his attendance without the permission of His Majesty or the Governor; or (2) shall take any oath, or make any declaration or acknowledgement of allegiance, obedience, or adherence to any foreign prince or power, or shall do, concur in, or adopt any act whereby he may become a subject or citizen of any foreign state or power, or whereby he may become entitled to the rights, privileges, or immunities of a subject or citizen of any foreign state or power; or (3) shall become bankrupt or take the benefit of any law relating to insolvent debtors; or (4) become a public contractor or defaulter; or (5) be attainted of treason or convicted of felony or of any infamous crime; or (6) accept an office under the Crown other than a ministerial office or become a member of the Federal Parliament.[1]

2. It is provided by s. 2 of the *Constitution Act*, 1867, 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'. The exact force of this clause has formed the subject of a report of the Privy Council on reference from the two Houses in 1886, to which reference will be made in the next chapter.

3. By an Act, No. 16 of 1908, provision is made for the submission of certain Bills to the electors in the case of differences between the two Houses :—

3.—(1) For the purposes of this Act a Bill shall be deemed to have been rejected a first time whenever such Bill has,

[1] There are similar provisions with regard to members of the Legislative Assembly. See above, p. 496.

during a session of Parliament, not less than one month before the close of the session, been passed by the Legislative Assembly and transmitted to the Legislative Council for its concurrence therein, and the Legislative Council before the close of the session has either—

(*a*) Rejected or failed to pass such Bill; or

(*b*) Passed such Bill with any amendment or amendments in which the Legislative Assembly does not concur;—and by reason thereof the Bill has been lost.

(2) For the purposes of this Act such Bill shall be deemed to have been rejected a second time when the Legislative Assembly in the next session of Parliament has, after an interval of not less than three months from the first rejection of the Bill as defined by the last preceding subsection, again passed such Bill (or a Bill substantially the same) and transmitted it to the Legislative Council for its concurrence therein, not less than one week before the close of the session, and the Legislative Council before the close of the session has either—

(*c*) Rejected or failed to pass such Bill; or

(*d*) Passed such Bill with any amendment or amendments in which the Legislative Assembly does not concur;—and by reason thereof the Bill has again been lost.

4.—(1) Whenever a Bill has been twice rejected by the Legislative Council, the Governor in Council may, by proclamation published in the Gazette after the close of the session in which the Bill was rejected a second time, direct that the Bill so rejected shall be submitted by referendum to the electors; and a referendum poll shall accordingly be taken thereon under this Act at the time appointed in that behalf. The publication in the Gazette of such proclamation shall be conclusive evidence that the Bill as last rejected is the same Bill or substantially the same Bill as the Bill rejected in the session last but one preceding, and has been twice rejected by the Legislative Council.

(2) When a Bill is so directed to be submitted to a referendum, a copy of the Bill, in the form in which it was finally agreed to by the Legislative Assembly, certified as correct by the Speaker of the Legislative Assembly, shall, within twenty-one days after the issue of the said proclamation, be transmitted by the Clerk of the Legislative Assembly to the Home Secretary. Forthwith upon receipt of such copy the Home Secretary shall cause the same to be published in the Gazette, together with such amendments as have been made by the Legislative Council and which the Legislative Council may by resolution request to be annexed thereto.

5. The persons entitled to vote at the taking of the referendum poll shall be the electors and no other persons.

6.—(1) The Governor in Council may appoint, by commission under his hand and seal, a fit person to be the returning officer for taking the referendum poll under this Act.

In case of sickness or other cause preventing the returning officer from acting, the Governor in Council may in like manner appoint some other person to act as returning officer in his stead. Notification of the appointment of the returning officer shall be published in the Gazette.

(2) The returning officer, in addition to the powers and duties vested in and imposed upon him by this Act, shall have such of the powers and shall perform such of the duties of a returning officer appointed under the Elections Act as are necessary for carrying this Act into effect.

(3) Every returning officer appointed under the Elections Act shall be an assistant returning officer for the purposes of this Act, and, in addition to the powers and duties vested in and imposed upon him by this Act, shall have such of the powers and shall perform such of the duties vested in and imposed upon a returning officer under the Elections Act as are necessary for carrying this Act into effect.

(4) The writ for the referendum poll shall be directed by the Governor in Council to the returning officer.

A copy of the writ shall be published in the Gazette.

7.—(1) The mode of exercising the right to vote at a referendum poll and of ascertaining such right shall be the same as at elections of members of the Legislative Assembly.

And generally (except as may otherwise be provided in this Act, or any regulation made thereunder) every enactment contained in the Elections Act regulating and making provision for the holding and conduct of elections, the proceedings before and at and subsequent to such elections, and all incidental matters, shall, so far as applicable thereto, apply *mutatis mutandis* to the referendum poll to be taken under this Act: Provided that the provisions (if any) of the Elections Act for securing the absolute majority of votes shall not apply.

(2) Every act or omission which would be punishable by law, if the same had occurred in connexion with the holding of an election, shall be held to constitute the like offence, cognizable in the like manner, and punishable by the like punishment, if the same occurs in connexion with a referendum poll.

8. Every assistant returning officer shall, in manner pro-

vided by the Elections Act, ascertain the number of votes respectively recorded at the referendum poll in favour of and in opposition to the Bill at the various polling-places within the electoral district for which he is the returning officer, for which purpose the presiding officer at each such polling-place shall make a return (certified by him to be correct) to the assistant returning officer of the number of votes so given respectively at such polling-place ; and the assistant returning officer shall thereupon forthwith make out and furnish a return for such district (certified by him to be correct) to the returning officer appointed under this Act.

Every return to be made under this section may be transmitted by telegraphic message or messages under ' The Telegraphic Messages Act of 1872 '.

9. The total number of votes respectively recorded at the referendum poll in favour of and in opposition to the Bill shall be endorsed upon the writ by the returning officer, who shall forthwith return the writ so endorsed to the Governor.

The result of the referendum poll so endorsed shall be published by the Home Secretary in the Gazette within twenty-eight days from the return of the writ.

Such publication shall be conclusive evidence of the result of the referendum poll.

10. If the referendum poll is decided in favour of the Bill, the Bill shall be presented to the Governor for His Majesty's assent, and upon receiving such assent the Bill shall become an Act of Parliament in the same manner as if it had been passed by both Houses of Parliament, and notwithstanding any law to the contrary.

(*e*) *South Australia*

Under the Constitution Acts, No. 2 of 1855–6, Nos. 779 and 959, the Legislative Council of South Australia consists of eighteen elected members. The state is divided into four Council districts, of which one returns six members and the other three return four members each to the Legislative Council. The period of their service is regulated by ss. 10, 11, and 12 of the South Australia *Constitution Amendment Act*, 1908, No. 959, which are as follows :—

10. Subject to the provisions hereinafter contained as to the dissolution of the Legislative Council, every member of the said Council, except a member elected to fill a casual vacancy, shall occupy his seat for the term of six years at

least, calculated as from the first day of March of the year in which he was last elected, and for such further period as is provided for in the next succeeding section. Provided nevertheless, if the seat of any member of the Legislative Council becomes vacant by death, resignation, or otherwise before the expiration of his term of service, and a member is returned from the electoral district in which the vacancy occurred, he shall hold office only for the unexpired term of the member whose seat has been vacated as aforesaid, and shall, for the purpose of retirement, be deemed to have been elected at the time when such last-mentioned member was or was deemed to be elected : Provided also that where two or more members are so returned at the same time to fill vacated seats of unequal terms, such terms shall be deemed to be held by the said members according to their position on the poll at their election, and that he who receives the greatest number of votes shall hold the seat which has the longest term to run, and in the event of a tie the matter shall be determined by lot.

11. Whenever the House of Assembly is dissolved by the Governor, or expires by effluxion of time, so many members of the Legislative Council, not exceeding three for the Central District and two for each of the other districts, as have completed the minimum term of service provided by s. 10 shall retire and vacate their seats, and, subject to s. 21, an election to supply the vacancies so created shall take place on the day of the next general election of the House of Assembly.

12. The periodical retirement of members of the Legislative Council under the provisions of the last preceding section shall be determined as follows :—

(i) The members retiring in each Council district shall be those who have represented such district for the longest time, calculated from the date of their last election :

(ii) If two or more members have represented the same Council district for an equal time, calculated as aforesaid, the order of retirement as between them shall be determined by their position on the poll at their election, and he or they who had the least number of votes shall retire first. If their position is equal in this respect, or if no poll was taken, the order of retirement between them shall be determined by lot :

(iii) The Legislative Council shall keep a roll of its members containing all particulars necessary for the application of the foregoing rules as to their periodical retirement.

A Legislative Councillor must be a man of the full age of

thirty years, and a natural-born or a naturalized subject of His Majesty, who has resided within the state for the full period of three years. No person can be elected a member if he owes allegiance to a foreign power, is a Government contractor, is insane, or has been attainted of treason or convicted of felony or an infamous crime, is an uncertified bankrupt, or is a member of the Federal Parliament.[1]

A seat may be resigned, and the seat is vacated by membership of the Federal Parliament, absence without leave for one month, by acceptance of office of profit (except ministerial offices) or pension, by loss of nationality, by bankruptcy, or conviction for treason or felony, and by lunacy.[1]

The franchise for elections to the Legislative Council is possessed by adult British subjects of either sex who are—(*a*) Owners of freehold of the clear value of £50; (*b*) Owners of leasehold of the clear annual value of £20 with at least three years to run or containing a right to purchase; (*c*) Occupiers of a dwelling-house of a clear annual value of £17; (*d*) Registered proprietors of a Crown lease on which there are improvements to the value of at least £50. Postmasters and postmistresses, police officers in charge of a police station, railway stationmasters, head school teachers who reside in official premises, and officiating ministers of religion are also qualified.

Voters must have been residents for six months prior to being placed on the rolls of the Council.[2]

2. The only provision limiting the power of the Legislative Council with regard to legislation is that contained in the first section of the South Australia *Constitution Act*, No. 2 of 1855–6, which provides that all Bills for 'appropriating any part of the revenue of the said Province, or for imposing, altering, or repealing any rate, tax, duty, or impost, shall originate in the House of Assembly'.

[1] There are similar disqualifications for the House of Assembly; see pp. 496, 497. The question of a Government contract (which arises under an Act, No. 16 of 1868–9) has been considered in Sir J. Downer's case; see *Legislative Council Debates*, 1910, p. 600; *Parl. Pap.*, No. 115. The restriction to males seems correct, but has been doubted.

[2] See the *Electoral Code*, 1908.

3. The following provision is made by Act No. 959 passed in 1908 for the settlement of differences between the two Houses :—

(1) Whenever any Bill for an Act has been passed by the House of Assembly during any session of Parliament, and the same Bill, or a similar Bill with substantially the same objects and having the same title, has been passed by the House of Assembly during the next ensuing Parliament, a general election of the House of Assembly having taken place between such two Parliaments, and the second and third readings of such Bill having been passed in the second instance by an absolute majority of the whole number of members of the said House of Assembly, and both such Bills have been rejected by or fail to become law in consequence of any amendments made therein by the Legislative Council, it shall be lawful for but not obligatory upon the Governor of the said state, within six months after the last rejection or failure, by proclamation to be published in the Government Gazette, to dissolve the Legislative Council and House of Assembly, and thereupon all the members of both Houses of Parliament shall vacate their seats, and members shall be elected to supply the vacancies so created ; or for the Governor, within six months after such rejection or failure, to issue writs for the election of three additional members for the Central District and of two additional members for each of the other districts of the Legislative Council.

(2) After the issue of such writs no vacancy, whether arising before or after the issue thereof, shall be filled, except as may be necessary to bring the representation of the district in which such vacancy occurs to its proper number as set forth in First Schedule hereto. Whenever there are more seats vacated by members returned for the same district than are to be filled, and such members' seats were of unequal tenure, the seats of those members the unexpired portions of whose terms are the shorter shall be first filled.

(3) Upon every such dissolution of the Legislative Council the order of retirement, as between the members elected after such dissolution, shall be as provided in s. 12 of this Act ; and one half of such members shall retire after three years' service, calculated from the first day of March of the year of their election, or after such further period as is provided for in s. 11.

(*f*) *Western Australia*

The Legislative Council of Western Australia consists of 30 elected members, who are elected for six years.[1] They are returned for 10 electorates, each returning three members. At the expiration of two years from the date of election, and every two years thereafter, the senior member for the time being retires. Seniority is determined—(*a*) by date of election; (*b*) if two or more members are elected on the same day, then the senior is the one who polled the greatest number of votes; (*c*) if the election be uncontested, or in the case of an equality of votes, then the seniority is determined by the alphabetical precedence of surnames and, if necessary, of Christian names.

A Legislative Councillor must be a male natural-born or naturalized British subject of the age of 30 years or upwards, and—(*a*) in the case of a natural-born subject, resident in the state for two years; and (*b*) in the case of naturalized subjects, if naturalized for five years previous to the election and resident in the state during that period. He must not be a member of the Commonwealth Parliament, Judge of the Supreme Court, Sheriff of Western Australia, a clergyman, an undischarged bankrupt, under attainder of treason or conviction of felony in any part of His Majesty's dominions, or directly or indirectly concerned in any public contracts, save as a member of an incorporated trading society, or a member of the Legislative Assembly, and an officer (other than a minister) vacates office by election.

Seats in the Legislative Council may be resigned and are vacated by election to the Commonwealth Parliament and in the following instances :—

If any member of the Legislative Council after his election—

(1) Ceases to be qualified or becomes disqualified as aforesaid; or

(2) Takes the benefit, whether by assignment, composition,

[1] Originally the Council was a nominee body of fifteen members, but it was to become elective when the population (exclusive of aborigines) was 60,000, or six years had elapsed; 53 & 54 Vict. c. 26, sched. s. 42. For its present composition see 63 Vict. No. 19 and 64 Vict. No. 5, and for the franchise, Acts No. 27 of 1907, and No. 31 of 1911.

or otherwise, of any law relating to bankrupt or insolvent debtors ; or

(3) Becomes of unsound mind ; or

(4) Takes any oath or makes any declaration or acknowledgement of allegiance, obedience, or adherence to any foreign prince or power, or does, concurs in, or adopts any act whereby he may become a subject or citizen of any foreign state or power, or whereby he may become entitled to the rights, privileges, or immunities of a subject or citizen of any foreign state or power ; or

(5) Fails to give his attendance in the Legislative Council for two consecutive months of any session thereof without the permission of the Council entered upon its journals ; or

(6) Accepts any pension during pleasure or for term of years other than an allowance under s. 71 of 'The Constitution Act, 1889,' or any office of profit from the Crown, other than that of an officer of His Majesty's sea or land forces on full, half, or retired pay ;—his seat shall thereupon become vacant : Provided that members accepting offices liable to be vacated on political grounds shall be eligible for re-election.[1]

The franchise is held by adult British subjects of either sex who have resided in the state for six months, and who either—(*a*) Own a freehold estate to the value of £50 ; (*b*) occupy a house or own leasehold property rated at £17 ; (*c*) hold Crown leases or licences to the value of not less than £10 per annum ; or (*d*) are on the electoral list of any municipality or road board district in respect of property of the annual rateable value of £17. A determined effort was made in 1909, repeated successfully in 1910, to reduce the franchise for the Upper House.[2]

2. It is provided by the *Constitution Act* of 1890 that all Bills for appropriating any part of the consolidated revenue fund, or for imposing, altering, or repealing any rate, tax, duty, or impost, shall originate in the Legislative Assembly. In the amending Act of 1899 repeating the rule laid down in 1894 when the Council became elective the following provision is made by s. 46 :—

[1] There are similar provisions for the Lower House. See above, p. 497.

[2] See *Parliamentary Debates*, 1910–11, pp. 3468 seq. Plural voting still exists, ibid. pp. 3192 seq. Aborigines and half-castes of Asia, Africa or Australasia can only vote on the freehold 'qualification' (cf. p. 487).

In the case of a proposed Bill, which, according to law, must have originated in the Legislative Assembly, the Legislative Council may at any stage return it to the Legislative Assembly with a message requesting the omission or amendment of any items or provisions therein ; and the Legislative Assembly may, if it thinks fit, make such omissions or amendments, or any of them, with or without modifications.

3. There is no legal provision for the case of differences between the two Houses, whether in matters of finance or of general legislation.

(*g*) *Tasmania*

The Legislative Council of Tasmania consists of 18 members returned from 15 districts, Hobart returning 3, Launceston 2, and the remaining 13 districts sending 1 member each. Each member of the Council holds his seat for six years from the date of his election. Three members retire the first Monday in May every year, except in 1905, and every sixth year thereafter, when four retire.[1]

Members of Council must be male natural-born or five years naturalized British subjects of the age of 30 years or upwards, and must have resided continuously for five years in Tasmania or for at least two years immediately preceding the election. No person is qualified to be a member who has a pension payable during pleasure or holds any office of profit under the Government, except that of a minister, or who is a Government contractor, unless as a member of an incorporated company of more than six persons, or who owes allegiance to any foreign power, holds the office of Judge of the Supreme Court, is insane, attainted or convicted of treason, felony, or other infamous offence, or is a member of the Commonwealth Parliament. The following are not deemed offices of profit or emolument : Wardens of Marine Boards, Returning Officers under the Electoral Act, Officers of the Defence Forces of the Commonwealth whose services

[1] Originally the tenure of office was nine years, altered in 1885 (49 Vict. No. 8) to six. The arrangement for retirement of members has varied a good deal, and is readjusted by 8 Edw. VII. No. 12. See also 18 Vict. No. 17; 64 Vict. No. 5; and for the franchise, the *Electoral Act*, 1907.

are entirely employed by the Commonwealth Government, and Members of the Board of Land Purchase Commissioners.

A member may resign his seat, and his seat is vacated if he becomes a subject of a foreign power, is bankrupt or insolvent, becomes a public defaulter, is attainted of treason, or convicted of felony, or of any infamous crime, becomes insane, is absent without leave for an entire session, accepts any office of profit from the Government except a ministerial office or pension, or contracts for the public service unless as a member of an incorporated company of more than six persons, or becomes a member of the Commonwealth Parliament.[1]

The electors of the Legislative Council are qualified by being adult subjects, natural-born or naturalized of either sex of 21 years of age and upwards, having freehold estate in the electoral district of £10 a year or being the occupier of property of the value of £30 a year, or being a graduate of any University in the British Dominions, a qualified legal or medical practitioner, an officiating minister of religion, an officer or retired officer of His Majesty's Army or Navy on actual service, or a retired officer of the Volunteer Force of Tasmania.

2. It is provided by s. 33 of the *Constitution Act*, 1855, 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 is no legal provision for removing differences which may arise between the two Houses of Parliament in Tasmania, whether with regard to financial matters or to general legislation.

§ 4. New Zealand.

Under the *Legislature Act*, 1908, No. 101, the Legislative Council of New Zealand consists of members unlimited in number summoned for life in the case of persons summoned before 1891, or for seven years in other cases, by the Gover-

[1] There are similar provisions as to the House of Assembly. See above, p. 498.

nor from time to time in His Majesty's name by instrument under the Public Seal of New Zealand.

No person shall be summoned or shall hold a seat in the Council who is not a male—

(*a*) Of the full age of 21 years and either a natural-born subject of His Majesty or a subject of His Majesty naturalized by or under any Act of the Imperial Parliament, or by an Act of the General Assembly of New Zealand, or

(*b*) Who at any time theretofore has been bankrupt and has not received his discharge, or who has been attainted or convicted of any treason, any crime formerly known as felony, or any infamous offence within any part of His Majesty's Dominions, or as a public defaulter in New Zealand, unless he received a free pardon, or has undergone the sentence or punishment to which he was adjudged in respect thereof, or

(*c*) Is a member of Parliament, or

(*d*) Who is a contractor, or

(*e*) Who is, or within the next preceding six months was, a civil servant. This term does not include the persons who are members of the Executive Council, provided that such members do not exceed 10 in all (2 of which members must be Maories or half-castes), nor the Speaker or Chairman of Committees of the Council, nor officers of His Majesty's Army or Navy, or Militia or Volunteers, except officers of the Militia and Volunteers receiving annual or permanent salaries, nor any persons as members only of any Senate or Council or any University, nor members of a Commission issued by the Governor or Governor in Council.

'Contractor' is a person who either by himself or directly or indirectly by or with others, but not as a member of a registered or incorporated company or any incorporated body, is interested in the execution or enjoyment of any contract or agreement entered into with His Majesty or with any officer or department of the Government of New Zealand, or with any person for or on account of the Public Service of New Zealand under which any public money above the sum of £50 is payable directly or indirectly to such person in any one financial year, but does not extend to persons on whom the completion of any contract or agreement devolves by marriage, or as devisee, legatee, executor, or administrator until twelve months after he has been in possession of the same; any sale, purchase, or agreement for taking of land or of or for any interest, estate, or easement therein under any law or statute empowering the King

or the Governor or any person on his behalf to take, purchase, or acquire any lands, or any estate, interest, or easement therein for any public works or for any other public purposes whatsoever; contracts for the loan of money or securities given for the payment of money only; contracts for advertising by which a sum of over £50 is payable, if the contract is entered into after public tender.

A 'public defaulter' means a person convicted of wrongfully spending, taking, or using any moneys the property of the Crown or of any local authority or of any corporation represented by a local authority.

Members of the Council appointed since the passing of the Act of 1891 hold office for seven years only, to be reckoned from the date of the instrument of appointment, but they may be reappointed. In the case of any member of the Council, his seat shall *ipso facto* be vacated—

(*a*) If he takes any oath or makes any declaration or acknowledgement of allegiance, obedience, or adherence to any foreign prince or power; or

(*b*) If he does, or concurs in, or adopts any act whereby he may become a subject or citizen of any foreign state or power, or entitled to the rights, privileges, or immunities of a subject of any foreign state or power; or

(*c*) If he is bankrupt, or compounds with his creditors under any Act for the time being in force; or

(*d*) If he is a public defaulter, or is convicted of any crime punishable by death or by imprisonment with hard labour for a term of three years or upwards; or

(*e*) If he resigns his seat by writing under his hand addressed to and accepted by the Governor; or

(*f*) If for more than one whole session of the General Assembly he fails, without permission of the Governor notified to the Council, to give his attendance in the Council.

2. It is provided by s. 54 of the Imperial Act (15 & 16 Vict. 1852 c. 72) that it shall not be lawful for the House of Representatives or the Legislative Council to pass, or for the Governor to assent to, any Bill appropriating to the public service any sum of money from or out of His Majesty's revenue within New Zealand unless the Governor, on His Majesty's behalf, shall first have recommended the House of Representatives to make provision for the specific public purpose towards which such money is to be appropriated. The

provisions of this section render it necessary for any Appropriation Bill to be initiated in the Lower House.

3. There is no legal provision for a settlement of differences between the two Houses. (See Second Edition, vol I p 440-41)

§ 5. South Africa

(a) *Cape of Good Hope*[1]

Under the *Constitution Ordinance*, 1852, and amending Acts, No. 1 of 1872 and No. 14 of 1893, the Legislative Council of the Cape of Good Hope consisted in 1910 of 26 elected members, presided over *ex officio* by the Chief Justice. The members were elected, four for the Western, the South-eastern and the Eastern Provinces, three for the North-western, South-western, Midland and North-eastern Provinces, and one each for British Bechuanaland and Griqualand West. They kept their seats for seven years unless the Council was sooner dissolved.[2]

No person was qualified to be elected a member of the Council who was incapacitated to be registered as a voter, was under the age of 30 years, was not the owner for his own use and benefit of immovable property situate within the Colony of the value of £2,000 over and above all special conventional mortgages affecting the same, or who was not, being the owner of such property to such value but under mortgage, at the same time possessed of property movable and immovable in the Colony to the value of not less than £4,000 over and above his just debts. A married man for the purposes of this provision was deemed and taken to own or occupy the whole of the property belonging to his wife. But no person holding an office of profit under the Crown within the Colony, and no uncertificated insolvent, and no alien who had been registered as a voter by virtue merely of having obtained a deed of burghership, was eligible to be elected a member of the Council. From this proviso were excepted the offices of Colonial Secretary, Treasurer,

[1] See also *The Government of South Africa*, ii. 382 seq., 400.

[2] Formerly for ten years, with a rotation, one half retiring every five years. Originally there were only two provinces, but this was changed in 1874; see Molteno, *Sir J. Molteno*, i. 210 seq.

Attorney-General, Commissioner of Public Works, and Secretary for Agriculture, and of Prime Minister even if not holding one of these offices.[1]

A member of the Legislative Council could resign his seat by writing under his hand or by telegraph message addressed to the President of the Council, and his seat was vacated if for one whole session of the Parliament he failed to give his attendance in the Council without the permission of the Council, or took any oath or made any declaration or acknowledgement of allegiance, obedience, or adherence to any foreign prince or power, or did, concurred in, or adopted any act whereby he might become a subject or citizen of any foreign state or power, or if his estate were sequestrated as insolvent. A seat was also vacated if the member should accept or be the holder of any office of profit under the Crown save and except the office of Colonial Secretary and other offices specified above.[1]

The qualifications for electors were the age of 21 years or upwards, possession of property worth £75, or receipt of salary or wages of not less than £50 a year, but no person could be newly registered as a voter since the *Ballot and Franchise Act* of 1892 unless he could sign his name and write his address and occupation. Voters for the Legislative Council had as many votes as there were seats to be filled, and they might give all their votes to one candidate or divide them between two or more candidates.

2. The following provision was made by s. 88 of the *Constitution Ordinance* as approved by Order in Council of the 11th of March, 1853 :—

And be it enacted, that in regard to all Bills relative to the granting of supplies to Her Majesty, or the imposition of any impost, rate, or pecuniary burden upon the inhabitants, and which Bills shall be of such a nature that if Bills similar to them should be proposed to the Imperial Parliament of Great Britain and Ireland, such Bills would, by the law and custom of Parliament, be required to originate in the House of Commons, that all such Bills shall originate in, or be by the Governor of the Cape of Good Hope introduced into, the

[1] There were similar provisions regarding the Lower House, save as to age and property qualification. See above, p. 500.

House of Assembly of the said Colony: Provided that the Legislative Council of the said Colony and the Governor thereof shall, respectively, have full power and authority to make, in all such Bills, such amendments as the said Council and the said Governor shall, respectively, regard as needful or expedient; and the said Council and the said Governor may, respectively, return such Bills, so amended, to the House of Assembly or the Legislative Council.

This clause allowed the Council to increase the burden on the people, but the power was not, normally at least, used.

3. No special provision was made by law for the settlement of differences between the Legislative Council and the House of Assembly, but by s. 74 of the *Constitution Ordinance* it was provided that the Governor might, whenever he saw fit so to do, either by speech or proclamation dissolve the Legislative Council and the House of Assembly, or dissolve the House of Assembly without dissolving the Legislative Council.

(*b*) *Natal*

Under the *Constitution Act*, No. 14 of 1893, ss. 14–21, and amending Acts the Legislative Council of Natal consisted in 1910 of thirteen members summoned by the Governor in Council in the name of His Majesty by instrument under the Public Seal of the Colony.

Each person so summoned held his seat for ten years from the date of his summons, but five of the members of the Legislative Council first summoned vacated their seats at the end of five years, the particular members who were so to vacate their seats being decided by lot within the first week of the first session of the Legislative Council. The members were summoned from the following districts of the Colony:—Five from within the counties of Durban, Victoria, Alexandria, and Alfred; three from within the counties of Pietermaritzburg and Umvoti, and three from within the counties of Weenen and Klip River, one from the Province of Zululand, and one from the new territory (Utrecht); but not more than two members might be chosen within any one county. The quorum was five.

A Legislative Councillor had to be of the age of 30 years

or upwards, must not be subject to any disqualification which would vacate his seat if it occurred after his appointment, have resided in the Colony for ten years, and be the registered proprietor of immovable property within the Colony of the value of £500 in net value, after deduction of the amount of all registered mortgages.

A seat in the Legislative Council was vacated under ss. 32 and 33 of the Act if any member of the Council failed for a whole ordinary annual session to give his attendance in the House, or ceased to hold his qualification, or took any oath or made any declaration or acknowledgement of allegiance, obedience, or adherence to any foreign state or power, or did, concurred in, or adopted any act whereby he might become the subject or citizen of any such state or power, or became an insolvent, or took advantage of any Act for the relief of insolvent debtors, or became a public defaulter, or was attainted of treason, or sentenced to imprisonment for any infamous crime, or became of unsound mind, or accepted any office of profit under the Crown other than a political office, or that of an officer of His Majesty's sea or land forces on full, retired, or half pay. The disqualification did not apply in the case of persons in receipt of pensions from the Colonial Government, or of persons granted pensions under the *Constitution Act* of 1893 on their retirement on political grounds. A seat was also vacated if any member of the Legislative Council for the period of one month remained a party to any contract with the Government; but this did not apply to a purchaser of land at public auction from the Government, or to any lessee of Government land.[1] A member of the Council might also resign his seat by writing under his hand addressed to the Governor. A member was eligible for reappointment by the Governor.

2. It was provided by s. 48 of the *Constitution Act* of 1893 that all Bills for appropriating any part of the consolidated revenue fund, or for imposing, altering, or repealing any rate, tax, duty, or impost, should originate in the Legislative

[1] Similar provisions applied to members of the Lower House. See above, p. 501.

Assembly. By s. 49 it was provided that 'The Legislative Council may either accept or reject any Money Bill passed by the Legislative Assembly, but may not alter it'.

3. There was no express provision for the settlement of differences between the two Houses of Parliament, whether with regard to finance or to general legislation.

(c) *Transvaal*

By clauses ii–vii of the letters patent of the 6th of December, 1906, it was provided that the Legislative Council should consist of 15 members, to be summoned in the case of the first Council by the Governor, and if any vacancy occurred in the first or in any subsequent Council a member should be appointed to fill the said vacancy by the Governor in Council until the completion of the period for which the person in whose place he was appointed would have held office. Members of the Council were appointed in the name of His Majesty by instrument under the Public Seal of the Colony.

A member of the Council had to be of the age of 30 years or upwards, have resided in the Colony for three years, and be qualified to be registered as a voter for some electoral division of the Colony. Members of the first Council held office for five years, but at any time after four years of the date of the first meeting of the Council the Legislature might have passed a law providing for the election of members of the Legislative Council, whereupon, subject to the provisions of any such law, the then existing Legislative Council would have been dissolved and all members of the Legislative Council thereafter have been elected as prescribed in the law. The quorum was six.

Any member of the Legislative Council might resign his seat by writing under his hand addressed to the Governor, and under clause xxx a seat was vacated if any member of the Legislative Council should—

(1) Fail for a whole ordinary annual session to give his attendance in the Legislative Council; or

(2) Take any oath, or make any declaration or acknowledgement of allegiance, obedience, or adherence to any foreign state or power; or

(3) Do, concur in, or adopt any act whereby he might become the subject or citizen of any such state or power; or

(4) Become an insolvent or take advantage of any law for the relief of insolvent debtors; or

(5) Be a public defaulter, or be attainted of treason, or be sentenced to imprisonment for any infamous crime; or

(6) Become of unsound mind; or

(7) Accept any office of profit under the Crown other than that of a Minister, or that of an officer of Our naval and military forces on retired or half pay.

Provided that a person in receipt of pension from the Crown should not be deemed to hold an office of profit under the Crown within the meaning of this section.[1]

2. It was provided by clauses lv and lvi of the letters patent that all Bills for appropriating any part of the consolidated revenue fund or for imposing, altering, or repealing any rate, tax, duty, or impost, should originate in the Legislative Assembly, and that 'The Legislative Council may either accept or reject any Money Bill passed by the Legislative Assembly, but may not alter it.'

3. The following provision was made by clause xxxvii for the case of disagreement between the Legislative Council and the Legislative Assembly :—

(1) If the Legislative Assembly passes any proposed law and the Legislative Council rejects or fails to pass it, or passes it with amendments to which the Legislative Assembly will not agree, and if the Legislative Assembly, in the next session, again passes the proposed law with or without any amendments which have been made, suggested, or agreed to by the Legislative Council, and the Legislative Council rejects, or fails to pass it, or passes it with amendments to which the Legislative Assembly will not agree, the Governor may during that session convene a joint sitting of the members of the Legislative Council and Legislative Assembly in the manner hereinafter provided, or may dissolve the Legislative Assembly, and may simultaneously dissolve both the Legislative Council and Legislative Assembly if the Legislative Council shall then be an elected Council. But such dissolution shall not take place within six months before the date of the expiry of the Legislative Assembly by effluxion of time.

[1] Similar provisions applied to the Lower House. See above, p. 501.

(2) If after such dissolution the Legislative Assembly again passes the proposed law, with or without any amendments which have been made, suggested, or agreed to by the Legislative Council, and the Legislative Council rejects or fails to pass it, or passes it with amendments to which the Legislative Assembly will not agree, the Governor may convene a joint sitting of the members of the Legislative Council and of the Legislative Assembly, at which the Speaker of the Legislative Assembly shall preside.

(3) The members present at any joint sitting convened under either of the preceding subsections may deliberate and shall vote together upon the proposed law, as last proposed by the Legislative Assembly, and upon amendments, if any, which have been made therein by the one House of the Legislature and not agreed to by the other, and any such amendments which are affirmed by an absolute majority of the total number of the members of the Legislative Council and the Legislative Assembly shall be taken to have been carried, and if the proposed law, with the amendments, if any, so carried, is affirmed by an absolute majority of the total number of the members of the Legislative Council and Legislative Assembly, it shall be taken to have been duly passed by the Legislature.

(*d*) *Orange River Colony*

The Legislative Council of the Orange River Colony as constituted by clauses ii–vii of the letters patent of the 5th of June, 1907, consisted of eleven members, to be summoned by the Governor by an instrument under the Public Seal of the Colony in the name of His Majesty, casual vacancies to be filled by the Governor in Council.

It was provided by the letters patent that three of the members of the Legislative Council, as first constituted, should vacate their seats at the expiration of the third year from the date of the issue of the first summons of any members thereto; four at the end of the fifth year and four at the end of the seventh year; the members who retired at the end of the third, fifth, and seventh years to be decided by lot, and fresh members to be appointed in their place by the Governor in Council; such members to hold office for five years from the date of their summons. But members could be reappointed by the Governor in Council. The quorum was four.

Power was given in the letters patent for the Legislature, at any time after four years from the date of the first meeting of the Council, to pass a law providing for the election of members of the Legislative Council, and thereupon, subject to the provisions of such law, the then existing Legislative Council would have been dissolved and the new Council would have been elected on such conditions as were laid down in the law.

No person could be summoned unless he was of the age of 30 years or upwards, had resided in the Colony for three years, and was qualified to be registered as a voter for some electoral division of the Colony.

Any member of the Legislative Council could resign his seat by writing under his hand addressed to the Governor. A member of the Legislative Council vacated his seat under clause xxxii if he should—

(1) Fail for a whole ordinary annual session to give his attendance in the Legislative Council; or

(2) Take any oath, or make any declaration or acknowledgement of allegiance, obedience, or adherence to any foreign state or power; or

(3) Do, concur in, or adopt any act whereby he might become the subject or citizen of any such state or power; or

(4) Become an insolvent or take advantage of any law for the relief of insolvent debtors; or

(5) Be a public defaulter, or be attainted of treason, or be sentenced to imprisonment for any infamous crime; or

(6) Become of unsound mind; or

(7) Accept any office of profit under the Crown other than that of a Minister, that of a member of the Inter-Colonial Council, of the Liquor Licensing Court, or of any Commission appointed by the Governor in Council, or under any law to make any public inquiry, or that of an officer of Our naval and military forces on retired or half-pay,

Provided that a person in receipt of pension from the Crown should not be deemed to hold an office of profit under the Crown within the meaning of this section.[1]

2. By clause lvi of the letters patent, all Bills for appropriating any part of the consolidated revenue fund, or for

[1] Similar provisions applied to the Lower House. See above, p. 501.

imposing, altering or repealing any rate, tax, duty or impost were to originate in the Legislative Assembly. And by lvii, 'The Legislative Council may either accept or reject any Money Bill passed by the Legislative Assembly, but may not alter it,

3. The following provision was made by clause xxxix for the case of disagreements between the Legislative Council and the Legislative Assembly :—

(1) If the Legislative Assembly passes any proposed law and the Legislative Council rejects or fails to pass it, or passes it with amendments to which the Legislative Assembly will not agree, and if the Legislative Assembly, in the next session, again passes the proposed law with or without any amendments which have been made, suggested, or agreed to by the Legislative Council, and the Legislative Council rejects, or fails to pass it, or passes it with amendments to which the Legislative Assembly will not agree, the Governor may during that session convene a joint sitting of the members of the Legislative Council and Legislative Assembly in the manner hereinafter provided, or may dissolve the Legislative Assembly, and may simultaneously dissolve both the Legislative Council and Legislative Assembly if the Legislative Council shall then be an elected Council. But such dissolution shall not take place within six months before the date of the expiry of the Legislative Assembly by effluxion of time.

(2) If after such dissolution the Legislative Assembly again passes the proposed law, with or without any amendments, which have been made, suggested, or agreed to by the Legislative Council, and the Legislative Council rejects or fails to pass it, or passes it with amendments to which the Legislative Assembly will not agree, the Governor may convene a joint sitting of the members of the Legislative Council and of the Legislative Assembly, at which the Speaker of the Legislative Assembly shall preside.

(3) The members present at any joint sitting convened under either of the preceding subsections may deliberate and shall vote together upon the proposed law, as last proposed by the Legislative Assembly, and upon amendments, if any, which have been made therein by the one House of the Legislature and not agreed to by the other, and any such amendments which are affirmed by an absolute majority of the total number of the members of the Legislative Council

and Legislative Assembly shall be taken to have been carried, and if the proposed law, with the amendments, if any, so carried, is affirmed by an absolute majority of the total number of the members of the Legislative Council and Legislative Assembly, it shall be taken to have been duly passed by the Legislature.

(e) *Union of South Africa*

The Senate of South Africa under the *South African Act* 1909,[1] which took effect from the 31st of May 1910, is constituted as follows :—

24. For ten years after the establishment of the Union, the constitution of the Senate shall, in respect of the original provinces, be as follows :—

(1) Eight senators shall be nominated by the Governor-General in Council, and for each original province eight senators shall be elected in the manner hereinafter provided :

(2) The senators to be nominated by the Governor-General in Council shall hold their seats for ten years. One-half of their number shall be selected on the ground mainly of their thorough acquaintance, by reason of their official experience or otherwise, with the reasonable wants and wishes of the coloured races in South Africa. If the seat of a senator so nominated shall become vacant, the Governor-General in Council shall nominate another person to be a senator, who shall hold his seat for ten years.

(3) After the passing of this Act, and before the day appointed for the establishment of the Union, the Governor of each of the Colonies shall summon a special sitting of both Houses of the Legislature, and the two Houses sitting together as one body, and presided over by the Speaker of the Legislative Assembly, shall elect eight persons to be senators for the province. Such senators shall hold their seats for ten years. If the seat of a senator so elected shall become vacant, the provincial council of the province for which such senator has been selected shall choose a person to hold the seat until the completion of the period for which the person in whose stead he is elected would have held his seat.

25. Parliament may provide for the manner in which the Senate shall be constituted after the expiration of ten years, and unless and until such provision shall have been made :—

[1] 9 Edw. VII. c. 9.

(1) The provisions of the last preceding section with regard to nominated senators shall continue to have effect.

(2) Eight senators for each province shall be elected by the members of the provincial council of such province together with the members of the House of Assembly elected for such province. Such senators shall hold their seats for ten years unless the Senate be sooner dissolved. If the seat of an elected senator shall become vacant, the members of the provincial council of the province, together with the members of the House of Assembly elected for such province, shall choose a person to hold the seat until the completion of the period for which the person in whose stead he is elected would have held his seat. The Governor-General in Council shall make regulations for the joint election of senators prescribed in this section.

26. The qualifications of a senator shall be as follows :— He must—(*a*) be not less than 30 years of age ; (*b*) be qualified to be registered as a voter for the election of members of the House of Assembly in one of the provinces ; (*c*) have resided for five years within the limits of the Union as existing at the time when he is elected or nominated, as the case may be ; (*d*) be a British subject of European descent ; (*e*) in the case of an elected senator, 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.

For the purposes of this section, residence in, and property situated within, a colony before its incorporation in the Union shall be treated as residence in and property situated within the Union.

Under s. 53 no person is capable of being chosen or of sitting as a senator who—

(*a*) has been at any time convicted of any crime or offence for which he shall have been sentenced to imprisonment without the option of a fine for a term of not less than twelve months, unless he shall have received a grant of amnesty or a free pardon, or unless such imprisonment shall have expired at least five years before the date of his election ; or (*b*) is an unrehabilitated insolvent ; or (*c*) is of unsound mind, and has been so declared by a competent court ; or (*d*) holds any office of profit under the Crown within the Union : Provided that the following persons shall not be deemed to hold an office of profit under the Crown for the purposes of this subsection :—

(1) A Minister of State for the Union ;
(2) A person in receipt of a pension from the Crown ;
(3) An officer or member of His Majesty's naval or military forces on retired or half pay, or an officer or member of the naval or military forces of the Union whose services are not wholly employed by the Union.

Under s. 54 if a senator—(*a*) becomes subject to any of the disabilities mentioned in the last preceding section ; or (*b*) ceases to be qualified as required by law ; or (*c*) fails for a whole ordinary session to attend without the special leave of the Senate, his seat shall thereupon become vacant.[1]

2. The provisions of the *South Africa Act* as to the powers of the Senate are as follows :—

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 burden 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. The following provision is made in s. 63 of the *South Africa Act* for the cases of disagreement between the two Houses :—

63. If the House of Assembly passes any Bill and the Senate rejects or fails to pass it or passes it with amendments to which the House of Assembly will not agree, and if the House of Assembly in the next session again passes the Bill with or without any amendments which have been made or agreed to by the Senate and the Senate rejects or fails to pass it or passes it with amendments to which the House of Assembly will not agree, the Governor-General may during that session convene a joint sitting of the members of the Senate and House of Assembly. The members present at

[1] Similar provisions apply to the Lower House. See above, p. 501.

any such joint sitting may deliberate and shall vote together upon the Bill as last proposed by the House of Assembly and upon amendments, if any, which have been made therein by one House of Parliament and not agreed to by the other; and any such amendments which are affirmed by a majority of the total number of members of the Senate and House of Assembly present at such sitting shall be taken to have been carried, and if the Bill with the amendments, if any, is affirmed by a majority of the members of the Senate and House of Assembly present at such sitting, it shall be taken to have been duly passed by both Houses of Parliament: Provided that, if the Senate shall reject or fail to pass any Bill dealing with the appropriation of revenue or moneys for the public service, such joint sitting may be convened during the same session in which the Senate so rejects or fails to pass such Bill.

§ 6. The Nominee Houses and Money Bills

The question of the powers of the Lower and Upper Houses in legislatures with nominee Upper Houses has been finally settled by a decision of the Judicial Committee of the Privy Council, to whom the matter was referred in 1886 by the request of both Houses of the Parliament of Queensland. In 1854 the question was raised by the Legislative Council of New Zealand, which asserted that it had a right to deal freely with and amend Supply Bills. But in his reply of March 25, 1855, the Secretary of State declined to accept this view, and laid it down that as the Upper House was not elective it should follow the practice of the Lords in these matters, and not amend Money Bills.[1] The question was again raised in 1862–3 in the following circumstances.[2] In the case of a Bill affecting native lands and allowing them to be disposed of otherwise than through the action of the Crown, there was a provision for the issue of certificates on payment of a certain rate. The Council amended the Bill to provide that any certificate granted was not to give power to any tribe or person to sell the land included in the certificate, or to exchange it or lease it for more than

[1] *Parl. Pap.*, H. C. 160, 1855, pp. 38, 39; *Constitution and Government of New Zealand*, p. 194.

[2] Ibid., pp. 195 seq.

seven years unless the certificate was endorsed by the Governor and sealed with the public seal, the amounts due on such signing and sealing being paid. The question raised by the Lower House was whether, the House of Representatives having imposed upon a Crown grant, or an instrument in the nature of a Crown grant, a certain tax or duty, it was competent to the Legislative Council to introduce an enactment to the effect that no transaction should take place under another class of instruments affecting native lands until such instruments had been practically transmuted into or changed for Crown grants, so in effect rendering the latter class of instruments liable to such tax or duty. The law officers advised that the claim of the Lower House that a breach of privilege had taken place was ill founded. They said :—

We are of opinion that, if in a Bill introduced in the House of Representatives and passed through that House a certain tax or duty has been imposed upon a Crown grant, or an instrument in the nature of a Crown grant, it is competent to the Legislative Council without any breach of the privileges of the House of Representatives to make the efficacy for any given purpose of another class of instruments intended to affect native lands under the provisions of the same Bill dependent upon their assuming the form of Crown grants, on which the tax or duty has been so imposed by the House of Representatives. It is, we think, a fallacy, to represent this as a case in which the Legislative Council takes upon itself to impose any tax or duty. It merely provides that a particular kind of instrument shall be necessary to produce a particular effect. It has a right to decide for itself upon the form and character of the instrument which shall be sufficient for that purpose, and it cannot be deprived of that right merely because the form of instrument which it prefers is one on which a duty may have been already imposed by law or will be imposed if the Bill should pass—the imposition of the duty on that form of instrument being the act not of the Legislative Council but of the House of Representatives. We do not agree with the argument that the 2*s.* 6*d.* was not in its nature a tax or duty, but the other argument urged on the part of the Legislative Council that the House of Representatives cannot, by imposing a tax or duty on a particular kind of legal instru-

ment, exclude the Legislative Council from the power of originating or amending Bills relating to such instruments, seems to us to be well founded, and we see no answer to the suggestion that the privilege contended for by the House of Representatives would in effect be the same as, if a stamp duty being imposed on deeds in England, the House of Peers were thereby precluded from considering whether certain transactions should or should not be effected by deed. It has never been supposed in England that the privilege of the House of Commons as to originating taxation is attended with such consequences as these.

The question again arose in 1872[1] in an acute form: the claims of the Legislative Council may be seen from the following extract from the grounds stated for their action:—

The present Bill, so far at least as concerns the application of the immigration and public works loan authorized to be raised last year, is not, in their opinion, a Bill of aid or supply. It imposes no new burden on the people nor alters any existing burden, nor is it a grant of money by way of supply.

The colonial parliament last year authorized a very large loan to be raised on the credit of the Colony to be expended strictly and exclusively on immigration, railways, and other public works and undertakings specified in the Act.

It is proposed by the present Bill to divert part of the money so to be raised to other objects of a cognate character, and to that extent the Legislative Council is prepared to concur in the proposed measure. But it proposed further to authorize the Governor to pay over one-half of the amount so to be diverted to the provinces.

Such an application of the immigration and public works loan authorized to be raised last year is not, in the opinion of the Council, right or consistent with the engagements upon the faith of which Parliament last year consented to raise the loan.

The Legislative Council claims its right to exercise its own judgement upon that point. The concession of that right would so narrow as practically to destroy its proper functions as a legislative body in dealing with questions of similar character which come before them in a great variety of forms.

The Lower House would not accept the amendments, and the arrangement was made to refer home for the opinion

[1] *Constitution and Government of New Zealand*, pp. 199 seq.

of the law officers, the Bill being in the meantime expressed to continue only till the end of the financial year. A case was prepared in which attention was called to s. 54 of the *Constitution Act*, which merely provides for the Governor's recommendation to the Lower House of any appropriation, and to s. 4 of the *Parliamentary Privileges Act*, 1865, which provided that :—

The Legislative Council and the House of Representatives of New Zealand respectively shall hold, enjoy, and exercise the like privileges, immunities, and powers as on January 1, 1865, were held, enjoyed, and exercised by the Commons House of Parliament of Great Britain and Ireland, and by the committees and members thereof, so that the same are not inconsistent with or repugnant to such and so many of the provisions of the sections of the *Constitution Act* as at the coming into operation of this Act are unrepealed, whether such privileges, immunities, or powers were so held, possessed, or enjoyed by custom, statute, or otherwise : and such privileges, immunities, and power shall be deemed to be, and shall be part of the general and public law of the Colony, and it shall not be necessary to plead the same, and the same shall in all Courts and by and before all judges be judicially taken notice of.

The report of the law officers, dated June 18, 1872, was as follows :—

We are of opinion that independently of the *Parliamentary Privileges Act*, 1865, the Legislative Council was not constitutionally justified in amending the *Payment to Provinces Bill*, 1871, by striking out the disputed clause 28 (which authorized a new disposition of the loan moneys raised under the Act of 1870). We think the Bill was a Money Bill, and such a Bill in the House of Commons in this country would not have been allowed to be amended by the House of Lords, and that the limitation proposed to be placed by the Legislative Council on Bills of aid or supply is too narrow, and would not be recognized by the House of Commons in England.

2. We are of opinion that the *Parliamentary Privileges Act*, 1865, does not confer on the Legislative Council any larger powers in this respect than it would otherwise have possessed. We think that this Act was not intended to affect and did not affect the legislative powers of either House of the Legislature in New Zealand.

3. We think that the claims of the House of Representatives contained in their message to the Legislative Council (which ran simply as follows :—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 Act of one session to vary the appropriation or management of money prescribed by Act of a previous session) are well founded.[1]

Subject of course to the limitation that the Legislative Council have a perfect right to reject any Bill passed by the House of Representatives having for its object to vary the management or appropriation of money prescribed by an Act of the previous session.

The same principles were reasserted in the Queensland case, but with the added dignity of the authority of the Judicial Committee of the Privy Council. The following extracts show the question put and the reply[2] :—

MOST GRACIOUS SOVEREIGN—

We, Your Majesty's loyal and dutiful subjects, the members of the Legislative Council and Legislative Assembly of Queensland in Parliament assembled, humbly approach Your Majesty with a renewed assurance of our affection and loyalty towards Your Majesty's person and Government.

Questions have arisen between the Legislative Council and Legislative Assembly with respect to the relative rights and powers of the two Houses, which questions we are desirous of submitting for the opinion of Your Majesty's Most Honourable Privy Council.

[1] In 1898 the Speaker ruled that the Legislative Council of New Zealand could not amend the Old Age Pensions Bill, and his ruling was acquiesced in; see Pember Reeves, *State Experiments in Australia and New Zealand*, ii. 247. Rejection of an Income Tax Bill in 1893 and of a Land and Income Tax Assessment Bill in 1895 by the Legislative Council of New South Wales illustrate the proviso; see Walker, *Australasian Democracy*, pp. 36, 50, 51. In 1882 Mr. Whitaker's Ministry introduced payment of members in a separate Bill to avoid the appearance of a 'tack' by adding the clause to an ordinary Appropriation Bill; see Rusden, *New Zealand*, iii. 450. In 1856 the Legislative Council of Canada threw out a Supply Bill because it included an item of £200,000 for buildings as to which it had not been consulted, and a new Supply Bill minus the objectionable item had hastily to be passed; see Pope, *Sir John Macdonald*, i. 173.

[2] *Parl. Pap.*, C. 4794; H. L. 214, 1894.

We have caused a case to be prepared setting forth the questions which have so arisen, and which we desire to be so submitted in the words following :—

1. The Constitution Act of Queensland, 31 Vict. No. 38, contains the following provisions :—

Section 1. 'There shall be within the said Colony of Queensland a Legislative Council and a Legislative Assembly.'

Section 2. 'Within the said Colony of Queensland, Her Majesty shall have power, by and with the advice and consent of the said Council and Assembly, to make laws for the peace, welfare, and good government of the Colony in all cases whatsoever. Provided that all Bills for appropriating any part of the public revenue, for imposing any new rate, tax, or impost, subject always to the limitations hereinafter provided, shall originate in the Legislative Assembly of the said Colony.'

Section 18. 'It shall not be lawful for the Legislative Assembly to originate or pass any vote, resolution, or Bill, for the appropriation of any part of the said Consolidated Revenue Fund, or of any other tax or impost to any purpose which shall not first have been recommended by a message of the Governor to the said Legislative Assembly during the session in which such vote, resolution, or Bill shall be passed.'

2. Sections 1 and 2 are re-enactments of sections 1 and 2 of the Order in Council of 6th June 1859, providing for the constitution of the Colony of Queensland.

Section 18 is a re-enactment of section 55 of the Act of New South Wales, 17 Vict. No. 41, contained in the first schedule to the Imperial Act, 18 & 19 Vict. c. 54.

3. The members of the Legislative Council are nominated by the Governor for life, subject to certain contingencies. The members of the Legislative Assembly are elected by the several constituencies into which the Colony is divided.

4. During the sessions of 1884 and 1885, 'A Bill to provide for the payment of the expenses incurred by members of the Legislative Assembly in attending Parliament' was passed by the Legislative Assembly, and on each occasion rejected by the Legislative Council. No limit was proposed to the duration of this Bill.

5. In the estimates of expenditure for the year 1885–6, which were laid before the Legislative Assembly in the session of 1885, after the rejection of this Bill for the second time by the Legislative Council, there was included under the heading of 'The Legislative Assembly's Establishment', an

item of £7,000 for 'expenses of members', to be payable for the year 1885–6, under conditions precisely similar to those defined by the Bill which had been so rejected by the Legislative Council.

6. The estimates are not formally presented to the Legislative Council, but are accessible to members.

7. The Annual Appropriation Bill having been sent by the Legislative Assembly to the Legislative Council for their concurrence, containing an item of £10,585 for 'The Legislative Assembly's establishment', which sum, in fact, included the item of £7,000 for 'expenses of members', the Legislative Council on the 11th of November 1885 amended the Bill by reducing the sum proposed to be appropriated for 'the Legislative Assembly's establishment' from £10,585 to £3,585, and making the necessary consequential amendments in the words and figures denoting the total amount of appropriation, and returned the Bill so amended to the Legislative Assembly. There was nothing on the face of the Bill to indicate the special purpose for which any part of the sum of £10,585 was to be appropriated, except that it was for the Legislative Assembly's establishment.

8. On the 12th of November the Legislative Assembly returned the Bill to the Legislative Council with the following message:—

'The Legislative Assembly having had under their consideration the amendments of the Legislative Council in "The Appropriation Bill, No. 2,"

'*Disagree* to the said amendments for the following reasons, to which they invite the most careful consideration of the Legislative Council:—

'It has been generally admitted that in British Colonies in which there are two branches of the Legislature, the legislative functions of the Upper House correspond with those of the House of Lords, while the Lower House exercises the rights and powers of the House of Commons. This analogy is recognized in the Standing Orders of both Houses of the Parliament of Queensland, and in the form of preamble adopted in Bills of Supply, and has hitherto been invariably acted upon.

'For centuries the House of Lords has not attempted to exercise its power of amending a Bill for appropriating the public revenue, it being accepted as an axiom of constitutional government that the right of taxation and of controlling the expenditure of public money rests entirely with the Representative House, or, as it is some-

times expressed, that there can be no taxation without representation.

'The attention of the Legislative Council is invited to the opinion given in 1872 by the Attorney-General and Solicitor-General of England (Sir J. D. Coleridge and Sir G. Jessel) when the question of the right of the Legislative Council of New Zealand to amend a Money Bill was formally submitted to them by the Legislature of that Colony. The Constitution Act of New Zealand (15 & 16 Vict. c. 72) provides that Money Bills must be recommended by the Governor to the House of Representatives, but does not formally deny to the Legislative Council (which is nominated by the Crown) the right to amend such Bills. The Law Officers were nevertheless of opinion that the Council were not constitutionally justified in amending a Money Bill, and they stated that this conclusion did not depend upon, and was not affected by the circumstance that by an Act of Parliament the two Houses of the Legislature had conferred upon themselves the privileges of the House of Commons so far as they were consistent with the Constitution Act of the Colony.

'The Legislative Assembly believe that no instance can be found in the history of constitutional government in which a nominated Council have attempted to amend an Appropriation Bill. Questions have often arisen whether a particular Bill which it was proposed to amend properly fell within the category of Money Bills. But the very fact of such a question having arisen shows that the principle for which the Legislative Assembly are now contending has been taken as admitted.

'The Legislative Assembly maintain, and have always maintained, that (in the words of the resolution of the House of Commons of 3rd July 1678) 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.

'For these reasons it is manifestly impossible for the Legislative Assembly to agree to the amendments of the Legislative Council in this Bill. The ordinary course to adopt under these circumstances would be to lay the Bill aside. The Legislative Assembly have, however, refrained from taking this extreme course at present, in the belief

that the Legislative Council, not having exercised their undoubted power to reject the Bill altogether, do not desire to cause the serious injury to the public service and to the welfare of the Colony which would inevitably result from a refusal to sanction the necessary expenditure for carrying on the government of the Colony, and in the confident hope that under the circumstances the Legislative Council will not insist on their amendments.'

9. On the same day the Legislative Council again returned the Bill to the Legislative Assembly with the following message :—

'The Legislative Council having had under consideration the message of the Legislative Assembly of this day's date, relative to the amendments made by the Legislative Council in "the Appropriation Bill of 1885–6, No. 2," beg now to intimate that they *insist* on their amendments in the said Bill :—

'*Because* the Council neither arrogate to themselves the position of being a reflex of the House of Lords, nor recognize the Legislative Assembly as holding the same relative position to the House of Commons.

'The Joint Standing Orders only apply to matters of form connected with the internal management of the two Houses, and do not affect constitutional questions.

'*Because* it does not appear that occasion has arisen to require that the House of Lords should exercise its powers of amending a Bill for appropriating the public revenue, and, therefore, the present case is not analogous ; the right is admitted though it may not have been exercised.

'*Because* the case of the Legislature of New Zealand is dissimilar to that now under consideration, inasmuch as the Constitution Act of New Zealand differs materially from that of Queensland, and the question submitted did not arise under the Constitution Act, but on the interpretation of a Parliamentary Privileges Act. If no instance can be found in the history of constitutional government in which a nominated council has attempted to amend an Appropriation Bill, it is because no similar case has ever arisen.

'*Because* in the amendment of all Bills "The Constitution Act of 1867" confers on the Legislative Council powers co-ordinate with those of the Legislative Assembly, and the annexing of any clause to a Bill of Supply, the matter of which is foreign to and different from the matter of said Bill of Supply, is unparliamentary and tends to the destruc-

tion of constitutional government, and the item which includes the payment of members' expenses is of the nature of a "tack".

'For the foregoing reasons the Council *insist* on their amendments, leaving the matter in the hands of the Legislative Assembly.'

10. On the 13th of November the Legislative Assembly, by message, proposed the appointment of a Joint Select Committee of both Houses 'to consider the present condition of public business, in consequence of no supplies having been granted to Her Majesty for the service of the current financial year.' Such Committee was appointed on the same day, and on the 17th of November brought up their report, recommending, amongst other things—

'That for the purpose of obtaining an opinion as to the relative rights and powers of both Houses with respect to Money Bills, a case be prepared, and that a Joint Address of both Houses be presented to Her Majesty praying Her Majesty to be graciously pleased to refer such case for the opinion of Her Majesty's Most Honourable Privy Council.'

11. The following Acts and documents are to be deemed to form part of this case :—

(1) The Imperial Act, 18 & 19 Vict. c. 54 ;
(2) The Order in Council of 6th June 1859 ;
(3) 'The Constitution Act of 1867' (Queensland) ;
(4) The Standing Orders of both Houses ;
(5) A copy of 'The Members Expenses Bill of 1884' ;
(6) A copy of 'The Members Expenses Bill of 1885' ;
(7) The estimates of expenditure for 1885–6, 'Executive and Legislative Departments' ;
(8) 'The Appropriation Bill of 1885–6, No. 2' ;
(9) Extracts from the journals of the Legislative Council relating to 'The Appropriation Bill' ;
(10) Extracts from the votes and proceedings of the Legislative Assembly relating to the same matter.

The questions submitted for consideration are :—

1. Whether 'The Constitution Act of 1867' confers on the Legislative Council powers co-ordinate with those of the Legislative Assembly in the amendment of all Bills, including Money Bills.

2. Whether the claims of the Legislative Assembly, as set forth in their message of 12th November, are well founded.

We humbly pray that Your Majesty will be graciously

pleased to refer the said case for the opinion and report of Your Majesty's Most Honourable Privy Council.

A. H. PALMER,
President of the Legislative Council.

WILLIAM H. GROOM,
Speaker of the Legislative Assembly.

Legislative Chambers,
17th November 1885.

The Judicial Committee of the Privy Council reported on the 27th March 1886 as follows :—

'Your Majesty having been pleased, by Your Order in Council of the 8th March instant, to refer unto this Committee a humble Petition from the Legislative Council and the Legislative Assembly of the Colony of Queensland, concerning questions which have arisen between those two bodies with regard to their relative rights and powers, together with certain documents on the subject, and to direct that this Committee should consider the same and report their opinion thereupon to Your Majesty at the Board: The Lords of the Committee, in obedience to Your Majesty's said Order of Reference, have taken the said Petition into consideration, and, in answer to the two questions submitted to their Lordships by the said Petitioners, namely :—

'1. Whether the Constitution Act of 1867 confers on the Legislative Council powers co-ordinate with those of the Legislative Assembly in the amendment of all Bills, including Money Bills ?

'2. Whether the claims of the Legislative Assembly, as set forth in their Message of 12th November 1885, are well founded ?

'Their Lordships agree humbly to report to Your Majesty as their opinion that the first of these questions should be answered in the negative, and the second in the affirmative.'

Names of the Lords of the Committee making the said Report: The Lord President (Lord Cranbrook), the Lord Chancellor (Lord Herschell), the Duke of Richmond and Gordon, Lord Aberdare, Lord Blackburn, Lord Hobhouse, Sir Richard Couch.

No witnesses were examined, and Counsel were not heard before the Committee.

It would of course be premature to say that the difficulties between nominee and elective Houses have disappeared for

good. There remains in each case the fact that the nominee House might throw out a Bill for the general supply, and could easily be tempted in a crisis to reject a Bill for some particular supply, though the action of the Lords in 1909 in the United Kingdom, and its sequel, are a significant warning against unconstitutional conduct, and the rejection of a whole Appropriation Bill is unthinkable in Canada, New Zealand, New South Wales, and Queensland. In 1878 the Upper House in Quebec threw out the Supply Bill in order to embarrass the Government of M. Joly, but that was exceptional in two ways: in the first place, M. Joly held office on a most insecure tenure, and the province had been much moved by the proceedings in the case of M. Letellier; in the second place, it was the case of a nominee House, which could not be swamped as the numbers were limited. So too in Natal, the Upper House in 1905 declined to accept a native-tax Bill proposed by the Government as a means of raising revenue: the Bill was not exactly a desirable measure, and the gravamen of the charge against it was mainly that it was unfair to increase native taxation even with the usual requirement of the reservation of the Bill under the royal instructions and the consequent necessity of securing the assent of the Imperial authorities.

In the case of the Transvaal an interesting dispute arose in 1908 as to what constituted a Money Bill.[1] When the Public Service and Pensions Bill came before the Legislative Council the President of the Council ruled that as some of the clauses of the Bill dealt with appropriations the whole Bill was, within the meaning of the letters patent establishing the Legislature, a Money Bill, and while it could be rejected it could not be altered by the Upper House. Several of the members of the Council disputed his ruling, and eventually the Government referred home to the Secretary of State for an opinion on the matter. The Secretary of State replied in a dispatch, No. 104 of March 25, 1909, conveying the views of the law officers of the Crown on the question, and also sending a copy of a letter from the Clerk of the House of

[1] Transvaal *Legislative Assembly Debates*, 1909, pp. 691 seq., 898 seq.

Commons. The papers were laid before the Transvaal Legislature and considered by a Joint Committee of the two Houses, who reported that the law officers were of opinion that the view of the President of the Legislative Council was correct and that the Bill was in effect a Money Bill, and under the letters patent could not be altered by the Legislative Council. They based their decision on the precise wording of the letters patent and not on the practice in the Imperial Parliament, which, as appeared from the letter of the Clerk of the House of Commons, would not have placed these Bills in the category of Bills to be treated as Money Bills. The Joint Committee did not advise that any action should be taken, in view of the fact that the Union was imminent, and that no useful purpose could have been served by any action, but they expressed clearly the view that the Upper House should have power to amend non-appropriation clauses in every case, even if they were introduced into Bills which dealt incidentally with appropriation. This solution was in accordance with the view of the President, who had held that though the Bill could not legally be amended still it was improper for the Government to introduce Bills containing incidentally appropriation clauses, and thus preventing any alteration of non-financial matters by the Upper House. It was also in general, but not absolutely, in accordance with the practice of the Imperial Parliament, and it may be compared with the law officers' opinion in 1863 regarding New Zealand, and s. 60 of the *South Africa Act*.

It should be noted that no difference has ever been made between nominee Houses capable of being swamped and Houses not so capable. The Secretary of State in 1855 said that Canada had adopted the British system,[1] and this remains true of the limited Senate of the Federation, and Natal and Nova Scotia also were cases of limited nominee Upper Houses.

In 1909 and in 1910 minor questions have arisen in the case of New Zealand as to the position of the Council. In

[1] *Constitution and Government of New Zealand*, p. 194. See also *Parl. Pap.*, H. C. 194, 1890, p. 9.

the former year the Council inserted an appropriation clause in a Reformatories Bill, which was validated *ex post facto* by a Governor's message being obtained to cover it, and the Speaker decided that that procedure was adequate for the occasion. In 1910 the Upper House altered the Crimes Amendment Bill by inserting an appropriation clause, and there was rather a warm discussion, the Speaker ruling that either a Governor's message must be obtained and the House formally by resolve decide not to insist on its privileges, or the Bill must be laid aside. The former course was adopted after a lively debate.

In Canada in 1911 a Bill which affected payments to judges wrongly introduced in the Senate was dropped on exception being taken by the Government. It proposed to grant pensions on certain conditions to all judges who had served as Lieutenant-Governors.[1]

[1] It was apparently meant to provide for the then Lieutenant-Governor of Quebec, the late Sir A. Pelletier, and was introduced by a French Canadian member.

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