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THE LAW OF THE INDIAN CONSTITUTION

THE LAW OF THE INDIAN CONSTITUTION

BEING

A LEGAL INTERPRETATION OF
THE GOVERNMENT OF INDIA ACT, 1935
(26 Geo. V. c. 2)

AND

A STUDY OF
THE STRUCTURE OF THE INDIAN CONSTITUTION,
BEFORE AND AFTER THE FEDERATION

BY

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WITH A FOREWORD

BY

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TO

MY FATHER

SIR M. N. KRISHNA RAU

FOREWORD

THE primary object of Mr. Ramaswamy in this work is to present to us a legal interpretation of the Government of India Act, 1935. But as an essential preliminary he has sketched the constitutional history of British rule in India through the Montagu-Chelmsford reforms up to the Act of 1935, and has explained clearly the position of the Indian States. This he has accomplished with accuracy and in sufficient detail to enable readers to appreciate the character of the changes brought about by the Act of 1935.

The author's exposition of the Act is full and clear, neither ignoring real difficulties nor raising problems unnecessarily by over-refinement. He has kept steadily in view the essential consideration that a Constitution must receive as far as possible a broad and generous interpretation fitting it to serve as an effective instrument for the furtherance of the national life. The feature which will be found of special interest in India is the adduction of parallels from the interpretation of the Constitutions of Canada, the Commonwealth of Australia and the United States of America. The framers of the Act of 1935 had these models before them, and the Act shows many signs of reaction to the results achieved by the courts in dealing with these instruments. It is in each case an interesting study to examine how far the Act of 1935 has adopted a definite solution for the problems found to exist in the older Constitutions. Opinions on several points will undoubtedly differ, and Mr. Ramaswamy has naturally felt that it is advisable to adduce rather fully the earlier evidence, and he has presented it in convenient form so that readers can easily appreciate the issues involved. In his treatment of these topics he shows himself commendably familiar with the most recent developments.

Mr. Ramaswamy is fully conscious of the defects of the Act of 1935, but he treats it as a necessary step towards the attainment of the goal of Dominion status, whose character he clearly defines in his introductory chapter, which forms not the least interesting feature of a helpful and suggestive treatise.

A. BERRIEDALE KEITH.

The University of Edinburgh,
October 25, 1937.

PREFACE

THE working of a federal constitution, even of the simplest type, is generally attended with considerable difficulty. When a number of governments, with their functions delimited under a written constitution, operate side by side, it is inevitable that doubts should arise in determining their respective spheres of operation. Professor Dicey pointed out many years ago that perhaps the most characteristic feature of federalism is its legalism. When we remember that the Indian Federation presents features peculiar to itself, it is reasonable to expect that this legalistic character will be more pronounced in Indian Federalism than in others. My main object in writing this book has been to explain the legal implications of the Federal Constitution which will function in India. To assist in arriving at a correct appreciation of the issues involved, I have, wherever possible, called into aid cases decided by the highest courts in parallel circumstances under the Constitutions of the Dominion of Canada, the Commonwealth of Australia and the United States of America.

The day is not far distant when India will take her place as an equal partner alongside the Dominions and Great Britain in the fellowship of nations constituting the British Commonwealth. I have devoted the greater part of the introduction to an elucidation of the present position and functions of the Dominions. The reader will thus be able to see for himself how India's position under the new constitution compares with that of the Dominions. In the first two chapters I have sketched the constitutional history of India under British rule up to the present time. The next chapter which deals with the Indian States completes the background for the new constitution, the legal interpretation of which is essayed in the chapters that follow.

The important developments which have, since this book was sent to the press, taken place in the Irish Constitution are dealt with in a Postscript.

I am under a great debt of gratitude to Professor A. Berriedale Keith for his kindness in contributing a foreword to my book.

Mr. N. Rama Rao, B.A., B.L., Retired Director of Industries and Commerce in Mysore has very kindly read a considerable

part of the book in manuscript, and this work has benefited from the valuable suggestions made by him in the course of our discussions. Mr. C. Ranganatha Rao Sahib, B.A. B.L., formerly Trade Commissioner for Mysore in London, has taken a kindly interest in my work and has rendered valuable help in arranging for the publication of the book in England. I cannot be sufficiently grateful to him for all the trouble he has taken on my behalf.

Basavangudi,
Bangalore.

March 5, 1938.

M. RAMASWAMY.

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INTRODUCTION

If in the difficult days of the Great War, the peoples of the different parts of the British Empire stood by the allied powers, it was doubtless because, they realized, that they were all fighting for a cause dear to all human hearts, the cause of human liberty and the right of all nations, big and small, to rule their own destinies. But who that has witnessed the events of the recent past, or has followed the progress of forces that are working in some parts of the world to-day, can confidently say that the ideals for which the Great War was fought are in process of being realized? Democratic principles are at a discount in many countries of the world; and the existence and liberty of the weaker nations in the gravest peril. Though it is difficult to foresee what the future has in store for humanity, it is well to realize that if all those countries who believe in freedom and in free institutions, should come closer together, they would be a great force in the cause of peace and stability in the disturbed conditions of the world of to-day

That the British Empire, or rather the British Commonwealth of Nations, can play a great and honourable part in the future of the world, cannot be seriously disputed. But certain important conditions have to be fulfilled if the Empire is to play the rôle which, by reason of its commanding position, its ideals and its resources, it deserves to play. Within the British Empire we have a microcosm of the whole world, a great association of communities, comprising different races and stationed in different parts of the globe. Already some of these great communities have attained to the full stature of their manhood, and are leading their own free and vigorous lives. The Inter-Imperial Relations Committee of the Imperial Conference of 1926, describing the relations of Great Britain to the Dominions, observed as follows: "The British Empire is not founded upon negations It depends essentially, if not formally, on positive ideals. Free institutions are its life-blood. Free co-operation is its instrument. Peace, security and progress are among its objects. Aspects of all these great themes have been discussed at the present conference; excellent results have been thereby obtained. And, though every Dominion is now and must always remain, the sole judge of the nature and extent of its co-

operation, no common cause will, in our opinion, be thereby imperilled."[1] In the long course of the Empire's history no wiser or more statesmanlike pronouncement was ever made. But it is well to remember that the British Empire does not consist of Great Britain and the Dominions alone. Surely the Empire, without India, would be very different from what it is now India, with a population of 340 millions represents more than seventy-five per cent. of the population of the whole Empire By her long history, her philosophy and ideals and her resurgent nationalism so much in evidence to-day, she is both qualified and destined to play a great part not only in the Councils of the Empire, but also in those of the free nations of the world.

But strangely enough, many of the British statesmen have neither formed a proper appraisal of the depth of feeling behind the demand of the Indian people to order their own affairs in the manner which seems to them best, in the same way as the peoples of the great self-governing Dominions do, nor have they realized the strength of the forces which are working in India and elsewhere to-day, and which must inevitably lead India, in the not very distant future, to her goal of absolute equality with the great Dominions, a goal on which she has set her heart and which she is determined to achieve. In the annals of the Empire, there have been occasions when the vision and courage of a great statesman have saved a dangerous and difficult situation. Nearly a century ago Lord Durham performed matchless service to the Empire. Lower Canada had become a land of acute racial unrest and the machinery of government had all but broken down. A civil war had broken out. The constitution of 1791 had been suspended and an Act had been passed by the Imperial Parliament on February 10, 1838, to make temporary provision for the government of Lower Canada. The conditions in Upper Canada were no better. Though the causes of unrest in Upper Canada were not racial in origin, the situation was, nevertheless, one which was full of danger. Lord Durham was sent to Canada as Governor-General charged with the high mission of suggesting a way out of the impasse. How well he performed his task his monumental report and the verdict of history alike bear out. He realized that it was impossible to govern Canada from London and that the chronic state of discontent and disaffection in that country could only be ended by granting her the freedom to govern herself. The legislative union of the two Canadas which he suggested in order

[1] *Cmd* 2768. *Imperial Conference* 1926 *Summary of proceedings*, p. 14.

to maintain a balance between the two races and effect a fusion between them, was carried out by an Act of the Imperial Parliament passed in the year 1840. This legislative union, in course of time, gave place to the great federal union of 1867. To-day, Canada occupies a proud and honoured place in the comity of nations that constitute the British Commonwealth. She has not only achieved full autonomy in internal affairs, but also attained national sovereignty in external matters. Canada is without doubt a nation, and Canadian nationality a very live and real thing. It is true that in one respect the hopes of Lord Durham have not been realized. He expected that, with the passage of years, there would be a fusion of the two races in Canada. That expectation has so far not been fulfilled. Each race is attached to its own religion, its language and its customs. But both races live and work in perfect amity, and both of them have contributed to the building up of Canada that we know and respect to-day. All these facts go to show that the foundation upon which Lord Durham sought to build the relationship of Canada with Great Britain, namely, that trust begets trust and that freedom is the greatest guarantee of mutual goodwill, has more than justified itself during all these years. Every well-wisher of the Empire wishes that those who control its destinies would show the vision and courage which Lord Durham brought to his task in Canada, in settling India's place in the Commonwealth.

Speaking at the Imperial Conference of 1921, the Right Honourable David Lloyd George, the then Prime Minister, recounting the great services rendered by India to the Empire during the Great War and extending a cordial welcome to her representatives, observed: "India's achievements were also very great. Her soldiers lie with ours in all the theatres of war, and no Britisher can ever forget the gallantry and promptitude with which she sprang forward to the King Emperor's service when war was declared. That is no small tribute both to India and to the Empire of which India is a part. The causes of the war were unknown to India, its theatre in Europe was remote. Yet India stood by her allegiance heart and soul, from the first call to arms, and some of her soldiers are still serving far from their homes and families in the common cause. India's loyalty in that great crisis is eloquent to me of the Empire's success in bridging the civilizations of East and West, in reconciling wide differences of history, of tradition and of race, and in bringing the spirit and the genius of a great Asiatic people into willing co-operation with our own. Important

changes have been effected in India this year and India is making rapid strides towards the control of her own affairs. She has also proved her right to a new status in our councils, that status she gained during the war, and she has maintained it during the peace, and I welcome the representatives of India to our great Council of the Empire to-day. We shall, I feel sure, gain much by the fact that her sentiments and her interests will be interpreted to us here by her own representatives."[1] In the critical days of the Great War, India stood shoulder to shoulder with her sister nations and helped Britain by her blood and treasure. She has acquired a new sense of self-esteem which it would be unwise to ignore. The tide of nationalism that is sweeping the country from end to end is an eloquent testimony to the new life and the spirit that animates it.

The new constitution that India gets is no doubt an advance on the old order of things. Indeed, one of its good points lies in the fact that it brings within one political framework, Indian India and British India, which even now are so much bound together by economic, racial and cultural ties. The strands which bind them both are now strengthened and drawn closer together and this is all to the good. But the constitution, both by reason of the safeguards in which it abounds and because of the important reservations made, neither enables India to be the mistress of her own household nor helps her to achieve that equality of status with the sister nations of the Empire in any reasonable space of time, a liberty and a status which have been promised to her in the most solemn manner in many authoritative pronouncements. I shall have more to say upon these matters hereafter. Before I deal with them it would not only be useful but necessary to give a brief sketch of the constitutional position which the Dominions have achieved in the British Commonwealth. Such an account would help us to understand how India's position under the new constitution would compare with what the Dominions have secured for themselves in the Empire.

A convenient starting point for investigation of the changes which have taken place in the status of the Dominions during the recent years, would be the eventful years of the Great War. Prior to the outbreak of the war, the Dominions enjoyed almost full autonomy in their internal affairs, while in foreign relations they had established a claim to have their interests consulted by the British Government and in respect of foreign commercial

[1] Keith, *Speeches and Documents on the British Dominions* 1918–1931, pp. 46–47

relations they had attained full and complete liberty. By reason of the common sacrifices which they had made in the war, it was inevitable that there should come about a distinct change in their status. The creation, or rather, the natural coming into being in 1917, of the Imperial War Cabinet, was a significant pointer of the coming change. The Prime Ministers of the self-governing Dominions and the representatives of India met at a common table to evolve a common policy for the conduct of the war. The British Empire Peace delegation at Paris, on which were represented not only the spokesmen of Great Britain but also those of the Dominions and India, was to all intents and purposes, the Imperial War Cabinet in a new rôle. It was an expression in concrete form, of the fact, that in the shaping of the common interests of the Empire, not only Great Britain, but also the other great sister communities of the Commonwealth should have their say. Sir Robert Borden, the Canadian Prime Minister, to whose powerful advocacy was mainly due the decision that the distinct status of the Dominions should be recognized in the mode of signature of the Peace Treaty, made the following interesting observations in the course of the last of the three lectures delivered by him at the University of Toronto, in October 1921 under the Marfleet Foundation. " When the question of procedure, including that of representation, came before the Peace Conference at Paris on January 12, the proposal for distinctive representation of the British Dominions aroused strong opposition. Again it was discussed in the British Empire delegation, and the representatives of the Dominions, standing firmly upon the principle recognized in London, declined to accept any inferior status. In the result their insistence prevailed, and through the combination of the panel system with their own distinct representation, the Dominions secured a peculiarly effective position. The conditions of peace were worked out through a series of Committees or Commissions, whose reports and resolutions were eventually consolidated into the treaty of peace. In the meetings of the British Empire delegation, of which the Dominion representatives were members, the report of each Commission was thoroughly discussed before final acceptance. On many of the Commissions, Dominion Ministers had important places and they took no inconsiderable part in the proceedings of the Conference. A further development relates to the signature and ratification of the various treaties concluded at the Conference. In view of the new position secured, and of the part played by the Dominion representatives at the peace table, it

was considered that the treaty should be signed by Dominion plenipotentiaries, and should be submitted for approval to the Dominion Parliaments. Accordingly the Prime Minister of Canada proposed that the assent of the King as High Contracting Party to the various Treaties should, in respect of the Dominions, be expressed by the signature of Dominion plenipotentiaries, and that the preamble and other formal parts of the treaties should be drafted accordingly. This proposal, having been adopted in the form of a memorandum by all the Dominion Prime Ministers, at a meeting summoned by the Prime Minister of Canada, was put forward and accepted. It involved the issuance by the King as High Contracting Party, of 'Full Powers' to the Dominion delegates, and in order that those issued to the Canadian plenipotentiaries might be based upon formal action of the Canadian Government, an Order in Council conferring authority for that purpose was passed on April 10, 1919."[1] Though the treaties were signed for the British Empire as a whole, the representatives of the Dominions and India affixed their signatures for their respective countries As signatories to the Peace Treaty, the Dominions and India also became original members of the League of Nations.

During the session of the Imperial War Conference of 1917, the future constitutional relations of the constituent units of the Empire were debated and the following resolution was adopted: "The Imperial War Conference are of opinion that the readjustment of the constitutional relations of the component parts of the Empire is too important and intricate a subject to be dealt with during the War, and that it should form the subject of a special Imperial Conference to be summoned as soon as possible after the cessation of hostilities. They deem it their duty, however, to place on record their view that any such readjustment, while thoroughly preserving all existing powers of self-government and complete control of domestic affairs, should be based upon a full recognition of the Dominions as autonomous Nations of an Imperial Commonwealth, and of India as an important portion of the same, should recognize the right of the Dominions and India to an adequate voice in foreign policy and in foreign relations, and should provide effective arrangements for continuous consultation in all important matters of common Imperial concern and for such necessary concerted action, founded on consultation, as the several Governments may determine."

The first important step in the examination of the constitu-

[1] Sir Robert Borden, *Canadian Constitutional Studies*, pp. 117–119.

tional relations of the component parts of the Empire was taken by the Imperial Conference of 1926 Indeed the Conference of that year is notable because of the important report submitted by the Inter-Imperial Relations Committee of that Conference. The Committee, which was presided over by Earl Balfour, defined the position and mutual relation of the self-governing communities composed of Great Britain and the Dominions in the following terms: "They are autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations."[1] This declaration which has become famous, is associated with the name of Earl Balfour, and is usually referred to as the Balfour declaration. The Committee, after laying down in the most definite terms that equality of status was the basis of the constitutional relationship of the self-governing Dominions and Great Britain, found that "existing administrative, legislative and judicial forms, were admittedly not wholly in accord with the position" so described as "most of those forms dated back to a time well antecedent to the present stage of constitutional development." The Committee undertook an examination of these forms in order to suggest the changes which should be effected to make them harmonize with the new declaration of equality of status. On two important matters they were able to make definite recommendations. The first was in regard to the alteration in the title of His Majesty the King, so as to accord with the altered state of affairs arising from the establishment of the Irish Free State as a Dominion. It may be mentioned in passing that the change in the Royal Title was carried out through the Royal and Parliamentary Titles Act, 1927. The second matter upon which the Committee found it possible to express its view in definite terms was in regard to the position of the Governor-General as His Majesty's representative in the Dominion. At this point it may perhaps be useful to mention certain facts connected with the constitutional crisis which arose in Canada in 1926 over the refusal by the Governor-General to grant a dissolution of Parliament, to the then Canadian Prime Minister, Mr. Mackenzie King. It is unnecessary to go into the details of this controversy. But one important feature of it requires mention. The action of the Governor-General in deciding to act contrary to the advice of the Prime Minister over the question of dissolu-

[1] *Cmd.* 2768, p. 14.

tion of Parliament was a serious infringement of the principle that the Crown must unreservedly accept the advice of responsible Ministers in all matters touching the government of the country and was in fact a direct challenge to the doctrine of equality of status of the Dominions and the United Kingdom. This episode was fresh in the memory of everybody when the Imperial Conference met in 1926. It was therefore natural for Mr Mackenzie King, when he went to attend the deliberations of the Imperial Conference, to seek an effective declaration of the proper functions of the Governor-General. As Professor Keith has observed, this demand of the Canadian Prime Minister for a clear statement regarding the constitutional position of the Governor-General, " could expect hearty support from the Irish Free State, which informally but effectively had already secured acceptance of its right to choose the representative of the Crown in the selection of Mr. Timothy Healy as the first occupant of that high office and from the Union, where General Hertzog had pledged himself to secure the fullest recognition of the complete equality of the Union with the United Kingdom in regard to status and its recognition as a sovereign international state."[1] The Inter-Imperial Relations Committee in dealing with this question, in the course of their report observed : " In our opinion it is an essential consequence of the equality of status existing among the members of the British Commonwealth of Nations that the Governor-General of a Dominion is the representative of the Crown, holding in all essential respects the same position in relation to the administration of public affairs in the Dominion as is held by His Majesty the King in Great Britain, and that he is not the representative or agent of His Majesty's Government in Great Britain or of any Department of that Government."[2] The report, however, did not deal with the procedure henceforward to be followed in the appointment of the Governor-General. The Imperial Conference of 1930, after giving this matter its earnest consideration, found it possible to enunciate the following propositions in regard to the procedure to be observed in the appointment of the Governor-General, having regard to the alteration in his position resulting from the resolutions of the Imperial Conference of 1926. They laid down as follows : " (1) The parties interested in the appointment of a Governor-General of a Dominion are His Majesty the

[1] Keith, *Speeches and Documents on the British Dominions*, Introduction, p. xxiv.

[2] *Cmd* 2768, p 16.

King, whose representative he is, and the Dominion concerned. (2) The constitutional practice that His Majesty acts on the advice of responsible Ministers applies also in this instance. (3) The Ministers who tender and are responsible for such advice are His Majesty's Ministers in the Dominion concerned. (4) The Ministers concerned tender their formal advice after informal consultation with His Majesty. (5) The channel of communication between His Majesty and the Government of any Dominion is a matter solely concerning His Majesty and such Government His Majesty's Government in the United Kingdom have expressed their willingness to continue to act in relation to any of His Majesty's Governments in any manner in which that Government may desire. (6) The manner in which the instrument containing the Governor-General's appointment should reflect the principles set forth above is a matter in regard to which His Majesty is advised by His Ministers in the Dominions concerned "[1] The office of Governor-General in a self-governing Dominion is no more than an office of dignity, and is a symbol of the Crown as the unifying element in the Empire. The appointment of the Governor-General is now solely a matter between the King and the Dominion Government concerned. Opportunity was taken of the abdication of His Majesty King Edward VIII in December 1936, by the Irish Free State to abolish the office of Governor-General and to eliminate the King from the internal affairs of its Government. This was effected by the Constitution (Amendment No. 17) Act, 1936. The functions formerly performed by the Governor-General have now been taken over partly by the Speaker of the Dail and partly by the President of the Executive Council The speaker will summon and dissolve the Dail and sign bills The other duties of the Governor-General will be discharged by the President of the Executive Council.[2]

The Inter-Imperial Relations Committee of the Imperial Conference of 1926, as I have already mentioned, were able to make specific recommendations with regard to only two matters pertaining to the internal affairs of the Dominions At the moment I am not considering the conclusions which the Committee were able to reach on certain aspects of the foreign relations of the Dominions, like the procedure in relation to treaties, the general conduct of foreign policy and other allied matters. These topics belong to another branch of the subject and will be considered separately. While examining the subject

[1] *The Imperial Conference*, 1930. *Summary of Proceedings Cmd.* 3717, p 27
[2] See Postscript for later developments in the Irish Constitution

of the operation of Dominion legislation, the Inter-Imperial Relations Committee were impressed with the complexity of the issues involved and took the view that it would be dangerous to make any immediate pronouncement upon them, other than a statement of certain general principles upon which those issues had to be resolved, and also recommended the setting up of a special expert committee to investigate into and make recommendations upon certain questions connected with restrictions on the operation of Dominion legislation in the light of the new declaration of equality of status of the Dominions. The Committee also recommended that a special sub-conference should be set up simultaneously with the Committee, " to consider and report on the principles which should govern, in the general interest, the practice and legislation relating to merchant shipping in the various parts of the Empire, having regard to the change in constitutional status and general relations which has occurred since existing laws were enacted." The full conference accepted the recommendations made by the Inter-Imperial Relations Committee in this regard It was found subsequently, that it would be more convenient if the Committee and Sub-Conference were organized as a single Conference.

Such a conference assembled in London in October 1929. The report of that Conference which was known as the Conference on the Operation of Dominion Legislation and Merchant Shipping Legislation, 1929, is published as Command Paper 3479. The Conference made a careful examination of the existing restrictions on Dominion Legislative competence and after reaching conclusions upon the manner in which they could be removed, suggested that an Imperial statute should be passed to render their removal legally effective and also formulated the clauses which were to appear in the proposed statute. The Imperial Conference of 1930 accepted with certain modifications the recommendations contained in the report of the Special Conference. The Conference further resolved, " (*a*) that the statute proposed to be passed by the Parliament at Westminster should contain the provisions set out in the schedule annexed, (*b*) that December 1, 1931, should be the date as from which the proposed statute should become operative, (*c*) that with a view to the realization of this arrangement, Resolutions passed by both Houses of the Dominion Parliaments should be forwarded to the United Kingdom, if possible by July 1, 1931, and, in any case, not later than August 1, 1931, with a view to the enactment by the Parliament of the United Kingdom of legislation on the lines set out in the schedule

annexed, (*d*) that the statute should contain such further provisions as to its application to any particular Dominion as are requested by that Dominion."[1] The schedule gives the clauses of the proposed legislation.

The Parliaments of the various Dominions considered the clauses of the proposed statute, and after making such alterations, additions and reservations as they considered necessary, adopted resolutions requesting that the Parliament of the United Kingdom might pass the necessary statute on the lines suggested by them. The Imperial Parliament accordingly enacted such a statute. The Act which goes by the name of Statute of Westminster, 1931, received the assent of His Majesty on December 11, 1931. This statute, which is now part of the fundamental law governing the constitutional relations of Great Britain and the Dominions, gives legal shape to some of the propositions which naturally flow from the Balfour declaration of equality of status

So notable a landmark in the constitutional history of the Empire deserves more than mere passing notice The recitals contained in the preamble are in many respects unique. The preamble runs thus : " Whereas the delegates of His Majesty's Governments in the United Kingdom, the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, the Irish Free State and Newfoundland, at Imperial Conferences holden at Westminster in the years of our Lord nineteen hundred and twenty-six and nineteen hundred and thirty did concur in making the declarations and resolutions set forth in the Reports of the said Conferences : And whereas it is meet and proper to set out by way of preamble to this Act that, inasmuch as the Crown is the symbol of the free association of the members of the British Commonwealth of Nations, and as they are united by a common allegiance to the Crown, it would be in accord with the established constitutional position of all the members of the Commonwealth in relation to one another that any alteration in the law touching the Succession to the Throne or the Royal Style and Titles shall hereafter require the assent as well of the Parliaments of all the Dominions as of the Parliament of the United Kingdom: And whereas it is in accord with the established constitutional position that no law hereafter made by the Parliament of the United Kingdom shall extend to any of the said Dominions as part of the law of that Dominion otherwise than at the request and with the consent of that Dominion : And whereas it is necessary for

[1] *Cmd* 3717, p. 19

the ratifying, confirming and establishing of certain of the said declarations and resolutions of the said Conferences that a law be made and enacted in due form by authority of the Parliament of the United Kingdom : And whereas the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, the Irish Free State and Newfoundland have severally requested and consented to the submission of a measure to the Parliament of the United Kingdom for making such provision with regard to the matters aforesaid as is hereafter in this Act contained : Now, therefore, be it enacted by the King's Most Excellent Majesty by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in the present Parliament assembled and by the authority of the same, as follows :—"

The first thing to note about the recitals in the preamble is, that the Act was being enacted at the request and consent of the Parliaments of the Dominions concerned As I have already had occasion to point out, while sketching the trend of events which culminated in the passing of the Act, both the form and wording of the Act were largely the handiwork of the delegates of the various Dominions and the United Kingdom who took part in the Imperial Conferences already mentioned. The Parliaments of the various Dominions set the seal of their approval to the draft of the Act as agreed upon at the Imperial Conference of 1930, after making slight alterations The Solicitor-General speaking on the second reading of the Westminster Bill, made the following significant observations : " I may assure the House that whatever Amendments are brought forward shall be considered upon their merits. But let me add this It must not be supposed that the merits which will be considered will not include the consideration that, if any considerable Amendment were to be made to this Bill involving one of our great Dominions, that matter would have to be submitted to the Dominion concerned before this Bill could pass into law and I am bound to say, speaking for myself, and I think also for my Right Honourable Friend the Secretary of State for the Dominions, that it would be a matter of very grave responsibility to insert any Amendment in this Bill which would go contrary to the expressed desire of any of our Dominions—I am not speaking for the moment of the Irish Free State, but of any of our Dominions overseas."[1] The Act was, therefore, an agreed measure. We all know that as a matter of

[1] *Official Report, House of Commons, November* 20, 1931 , Vol 259, Columns 1246-1247

pure law, what one Parliament does another Parliament may undo. Can this legal power be invoked to alter or abrogate the provisions of the Act without the express consent of the Dominions concerned? The answer is of course in the negative. There is a world of difference between the existence of a legal power and the exercise of it as a matter of constitutional propriety. This is surely a case in which the Imperial Parliament does not possess the constitutional right though it may have the legal power, to modify or alter the provisions of the Act, except upon the concurrence of the Dominions concerned.

The second thing to notice about the preamble is the recital therein made, that any changes in the law of succession to the Throne or the Royal Style and Titles would hereafter require the assent as well of the Parliaments of all the Dominions as of the United Kingdom, as the Crown was the symbol of the free association of those nations and as all of them were united by a common allegiance to the Crown. It is important to notice that although this recital occurs in the preamble, it finds no place in the enacting clauses of the Act. We are accustomed to speak of a preamble as a guide to the ascertainment of the object behind a statute and, perhaps, also as an aid to the interpretation of an ambiguous provision therein, and that apart from these features, it has no other legal effect. But, can we say, that this recital in the preamble is just an expression of good sentiment, and that it has no legal validity? As I have said, this Act is in many respects unique, and nothing is more unique about it than its preamble. The recital in the preamble that any change in the law of succession to the Crown or of the Royal Title requires the concurrence of the Dominion Parliaments also, is, if I may venture to express an opinion, just as much effective legally as if it had found a place in the enacting clauses

Now we may pass on to consider some of the important sections of the Act itself. Section 1 states that the expression "Dominion" means any of the following Dominions, that is to say, the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, the Irish Free State and Newfoundland.

Section 2 is rather important. It may, perhaps, be useful to mention certain facts which would throw light upon the value and significance of this provision. The Colonial Laws Validity Act, 1865, was passed in view of a series of decisions given in the middle of the nineteenth century by Chief Justice Boothby of the Supreme Court of South Australia, in which by a strict

application of the common law rule that legislation by a Colonial Parliament was void if repugnant to the law of England, certain Acts of the South Australian Parliament were declared invalid The legal officers of the Crown in England examined the position so created, as it was realized that " if this interpretation of the law were sound, responsible government, then recently established by the release of the Australian Colonies from external political control, would to a great extent be rendered illusory by reason of legal limitations on the legislative power which were then for the first time seen to be far more extensive than had been supposed."[1] The Act of 1865 lays down only one criterion of repugnancy, that is to say, that any Act of a Colonial legislature repugnant to the provisions of an Act of Parliament of the United Kingdom extending to the Colony either by express words or by necessary intendment, or repugnant to any order or regulation made under the authority of such an Act, shall to the extent of such repugnancy be held void. By reason of this provision, it was open to a Colonial legislature to make laws, even though they were opposed to the common law of England. While it is a fact, as the Conference on the operation of Dominion Legislation pointed out in their report, that " the Act, at the time when it was passed, without doubt, extended the then existing powers of Colonial Legislatures," it is no less true that " definite restrictions of a far-reaching character upon the effective exercise of those powers were maintained and given statutory effect."[2] In view of the equality of status attained by the Dominions, the continued operation of restrictions on their legislative competence could hardly have been supported. In view of the provisions of the Act, the hands of the Dominions were tied in so far as they wanted to enact legislation suited to their needs, but in conflict with Imperial legislation extending to that Dominion either by express words or necessary intendment. The Conference on the operation of Dominion Legislation were of the opinion that inasmuch as a simple repeal of the Colonial Laws Validity Act, 1865, might have restored the common law doctrine, it was necessary to pass a substantive provision declaring the powers of the Parliament of a Dominion. That recommendation has been given effect to in Section 2 of the Statute of Westminster, 1931,which runs thus: " 2—(1) The Colonial Laws Validity Act, 1865, shall not apply to any law made after the commencement of this Act by the Parliament of

[1] *Cmd* 3479, p. 18.
[2] *Cmd* 3479, p 18.

a Dominion, (2) No law and no provision of any law made after the commencement of this Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future Act of Parliament of the United Kingdom, or to any order, rule or regulation made under any such Act, and the power of the Parliament of a Dominion shall include the power to repeal or amend any such Act, order, rule or regulation, in so far as the same is part of the law of the Dominion "

Section 3 provides that it is " declared and enacted that the Parliament of a Dominion has full power to make laws having extra-territorial operation." The section, it must be noted, is rather widely worded. The form in which the section appears in the Act is intended to give effect to the recommendation of the Conference on the operation of Dominion legislation, that it was not desirable to limit the powers of a Dominion to legislate with extra-territorial effect, either with reference to any class of persons (e.g , the citizens of the Dominion) or by reference to laws " ancillary to provision for the peace, order and good Government of the Dominion."

The effect of the more important of the remaining provisions of the Act may be summarized as follows

(1) Section 4 of the Act which provides that " no Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof " gives legal effect to the constitutional practice which had been observed for many years by the Imperial Parliament not to pass legislation operative in a Dominion unless the Dominion concerned had requested and consented to its enactment.

(2) The Dominions acquire the power to repeal legislation of the United Kingdom as to merchant shipping. This power is widened by expressly exempting bills from the necessity of reservation when dealing with the coasting trade and of confirmation by the Crown while dealing with registered shipping. As the Conference on the operation of Dominion Legislation and Merchant Shipping Legislation, pointed out in the course of their report : " the new position will be that each Dominion will, amongst its other powers, have full power and complete legislative authority over all ships while within its territorial waters or engaged in its coasting trade, and also over its own registered ships both intra-territorially and extra-territorially.

Such extra-territorial legislation will, of course, operate subject to local laws while the ship is within another jurisdiction." This result follows from Sections 2, 3, 4 and 5 of the Act. Under Section 6 of the Act certain sections of the Colonial Courts of Admiralty Act, 1890, will cease to apply to the Dominions.

(3) Section 7 (1) of the Act specifically provides that "nothing in the Act shall be deemed to apply to the repeal, amendment or alteration of the British North America Acts, 1867 to 1930, or any order, rule or regulation made thereunder" The British North America Act, 1867, does not contain provisions for its own amendment. Until the passing of the Statute of Westminster, the practice had been, that when any alteration was deemed necessary in the Act, the Imperial Parliament was making that alteration when requested to do so by the Canadian Parliament, subject, however, to the condition that if the alteration affected the provinces, the provinces were also agreeable to the same. If Section 2 of the Statute of Westminster stood unqualified, the Dominion Parliament would have acquired the right to repeal or amend the provisions of that Act. Some of the provinces of Canada, who are extremely jealous of maintaining their constitutional rights under the federal compact embodied in the British North America Act, were stoutly opposed to the vesting of any such power in the Dominion Parliament. The provision now under consideration is introduced to satisfy the Canadian provinces and the existing position regarding the mode by which constitutional amendments could be effected in the British North America Act is therefore maintained. It may also be interesting to mention that the wording of this provision Section 7 (1) was unanimously agreed upon at the Conference of the Dominion and Provincial delegates who met at Ottawa in 1931, some months prior to the consideration of the clauses of the proposed Statute by the Canadian House of Commons. In order to prevent any construction being placed on the Act, that the Dominion Parliament had acquired the right to extend its jurisdiction by trenching upon the legislative jurisdiction of the provinces under the existing scheme of distribution of powers, Sub-section (3) of Section 7 which provides that "the powers conferred by this Act upon the Parliament of Canada or upon the legislatures of the Provinces shall be restricted to the enactment of laws in relation to matters within the competence of the Parliament of Canada or of any of the legislatures of the Provinces respectively," has been purposely incorporated into the Act. It is

true, that in view of the fact that Canada has no power to amend her own constitution, her autonomy is not complete. But this limitation on her powers has been introduced because Canada wanted it. She can, of course, get constituent powers if she is able to persuade the provinces to come to an agreed arrangement regarding the exercise of constituent powers.

(4) Section 8 of the Act provides that " nothing in this Act shall be deemed to confer any power to repeal or alter the Constitution or the Constitution Act of the Commonwealth of Australia or the Constitution Act of the Dominion of New Zealand otherwise than in accordance with the law existing before the commencement of this Act." The Commonwealth of Australia Constitution Act, 1900, consists of a group of eight introductory clauses, generally referred to as the " covering clauses " and a ninth clause, by which the Constitution itself is enacted. There is a fundamental distinction between the eight " covering clauses " which cannot be altered by the people of the Commonwealth, but can only be altered by the Imperial Parliament, and the ninth clause, which enacts the Constitution and which can be altered by the joint action of Parliament and the electorate under the provisions contained in the Constitution. To the extent of modifications deemed necessary in the Constitution, the Commonwealth " need not have recourse to any authority external to itself for alterations of its instrument of Government."[1] As the Conference on the Operation of Dominion Legislation pointed out : " the Constitution of New Zealand is to a very considerable extent alterable by the Parliament of New Zealand ; but the powers of alteration conferred by the Constitution are subject to certain qualifications, and it is apparently a matter of doubt whether these qualifications have been removed by Section 5 of the Colonial Laws Validity Act "[2] In the cases of both these countries the existing position regarding amendments to their Constitutions are preserved, because of the desire among the peoples of those countries to leave that position intact.

(5) The Canadian Provinces have acquired the power to enact legislation repugnant to Imperial Acts, by virtue of Section 7 (2) read with Section 2 of the Act. The Colonial Laws Validity Act, 1865 no longer applies to the Canadian Provinces.

(6) Section 10 is rather important. It leaves the power to adopt Sections 2 to 6 of the Act as part of the law of the

[1] *Cmd* 3479, p 22
[2] *Cmd* 3479, p 22

Dominion, in the case of the Commonwealth of Australia, the Dominion of New Zealand, the Dominion of Newfoundland, to their respective Parliaments. Those Parliaments may adopt any one or more of the sections referred to, and even after adoption revoke it As a matter of fact the Commonwealth of Australia and the Dominion of New Zealand have not adopted these sections So far as Newfoundland is concerned, owing to financial difficulties, the Dominion Constitution has been suspended by an Imperial Act, the Newfoundland Act, 1933.[1]

Five years before the enactment of the Statute of Westminster, a case of great constitutional importance went up to the Privy Council from Canada That was the case of *Nadan v The King*.[2] The main question in that case related to the validity of Section 1025 of the Criminal Code of Canada which ran as follows: "Notwithstanding any royal prerogative, or anything contained in the interpretation Act or in the Supreme Court Act, no appeal shall be brought in any criminal case from any judgment or order of any Court in Canada to any Court of Appeal or authority by which in the United Kingdom appeals or petitions to His Majesty in Council may be heard." The appellant who had been convicted in the Province of Alberta, for carrying a consignment of liquor without a licence granted by the provincial authorities, obtained leave to appeal to the Privy Council by an order granted to him by the Appellate Division of the Supreme Court of Alberta. The Attorney-General for Canada who intervened in the proceedings contended that no appeal lay in view of the section already referred to The view was not seriously disputed that having regard to the provisions of Section 1025, the Supreme Court of Alberta was not right in granting the leave to appeal sought, as the Dominion Parliament having exclusive powers to deal with the procedure in Criminal matters had authority to deprive the Canadian Courts to grant leave to appeal in such matters. The question, therefore, was, whether the section in question, did prevent the King in Council from granting leave to appeal. Lord Cave in delivering the judgment of the Privy Council held that Section 1025 in so far as it intended to prevent the Sovereign in Council from giving leave to appeal from the order of a Canadian Court, was repugnant to the Judicial Committee Acts 1833 and 1844, and was void to that extent, having regard to Section 2 of the Colonial Laws Validity Act, 1865, which provides that any Colonial law which is in any respect

[1] Keith, *The Governments of the British Empire*, p 16.

repugnant to an Imperial Act extending to that Colony, is void to the extent of the repugnancy Nine years later, an identical question was raised in another Canadian case to the Privy Council, *British Coal Corporation v. The King*.[1] The Statute of Westminster had been passed subsequent to the decision in *Nadan v. The King* and this statute had a vital bearing on the result of the later case. The petitioners who had been convicted under certain sections of the Combines Investigation Act, 1923, in the Province of Quebec sought special leave to appeal. After the Statute of Westminster was passed, the section of the Canadian Criminal Code, which purported to take away the right of appeal to His Majesty in Council, and which had been pronounced inoperative in *Nadan v. The King*, was repealed and re-enacted by Section 17 of the Canadian Statute 23 and 24, George V, c. 53. If the new provision was validly enacted, it was clear that the petition for leave to appeal could not be granted. The Privy Council held that the new section was valid on two main grounds: (1) firstly because Section 2 of the Colonial Laws Validity Act was no longer operative in Canada in view of Section 2 of the Statute of Westminster and (2) secondly because under Section 3 of the same Statute the Dominion had acquired the right to pass laws having extra-territorial operation. In the case of *Moore v. The Attorney-General for the Irish Free State*,[2] the Privy Council upheld the validity of the Irish Free State Constitution (Amendment) Act, 1933, whereby appeals from the Irish Free State to the Privy Council were abolished. The petitioners, who claimed to be the owners of a fishery in the tidal waters of the River Erne, had lost their case in the Supreme Court of the Irish Free State. They sought special leave to appeal from that decision. The Privy Council held that the Act which had effectively abrogated the prerogative right to appeal to His Majesty in Council was competent legislation, as the Statute of Westminster had removed the fetter which originally existed on the powers of the Irish Free State Parliament to pass laws repugnant to Imperial enactments extending to that Dominion under the Colonial Laws Validity Act and that, therefore, no special leave to appeal could be granted.

The recent decision of the Imperial Parliament that it was not proper to entertain the petition of the State of Western Australia for secession from the Federation of the Commonwealth of Australia is an instance of the policy which has been

[1] (1935) A C 500
[2] (1935) A C. 484.

scrupulously observed for many years to respect the autonomy of a Dominion in matters concerning its domestic affairs. It is unnecessary to enter into the grounds upon which Western Australia asked for secession from the Commonwealth. Mr. Wilfrid Greene (now the Master of the Rolls), who represented the Commonwealth of Australia before the Joint Committee of the House of Lords and the House of Commons appointed to consider the petition of the State of Western Australia, in the course of his arguments observed: "My point is that it would be a breach of the constitutional usage which has grown up to harmonize relations between the Dominions and this country, for Parliament in this country to go back on the rule it has laid down for many years of non-interference and embark upon a discussion or an investigation or legislation affecting internal grievances in one of the great Dominions. It is unthinkable, in my submission, that the prayer of this petition could ever be acceeded to, that, in the face of opposition from the Dominion and other States, Parliament should destroy the Commonwealth of Australia Such a thing I submit is unthinkable. It would be an act of political suicide which no Parliament in this country would ever contemplate. It would not perhaps be putting it too high to say that it would tend very dangerously towards the disruption of this Empire"[1] The Joint Committee accepted the view of Mr. Greene. The Committee observed that, though the Imperial Parliament had in law full competence to legislate for secession of the State of Western Australia, it was constitutionally incompetent for it to do so, having regard to the established constitutional conventions of the Empire, "except upon the definite request of the Commonwealth of Australia conveying the clearly expressed wish of the Australian people as a whole."[2]

So far we have been considering the position which the Dominions have now attained in their own internal affairs. Now we may pass on to consider the status which the Dominions have acquired in the field of external affairs. The issues that confront us in examining this problem are indeed of a complex and controversial nature. In attempting an answer to it, it would be necessary to take note of some of the notable changes which have occurred in the external relations of the Dominions since the days of the Great War and the

implications which these changes have upon the problem now under examination.

The process of change commenced during the period of the Great War. The constitution of the Imperial War Cabinet on which the Dominions and India were represented and the signing of the Peace Treaty at Versailles in 1919 by the representatives of the Dominions and India for their own countries along with Great Britain, as members of the British Empire Peace Delegation, were significant. The change, though important, was not revolutionary. The Dominions and India had established their right to be represented in the Empire's foreign relations, but, since the British Empire Peace Delegation acted as one unit, in the eyes of International Law at any rate, the Empire as a whole continued to remain a single unit. Similar is the inference to be drawn from the procedure adopted at the Washington Conference on the limitation of naval armaments, 1921–2, when the representatives of Canada, Australia, India and New Zealand, along with those of Great Britain, formed the British Empire Delegation, and in accordance with the precedent established at the signing of the Peace Treaties, all of them signed for the Empire, though the delegates of the Dominions and India signed expressly for the countries they represented.

But, in the year 1923, a course different from what was theretofore adopted in the signing of a treaty, was taken by Canada in the case of the Halibut Fishery Treaty which was concluded between the United States and Canada. The treaty was negotiated by the British Ambassador at Washington at the instance of the Canadian Government. When the stage arrived for signing the treaty, the question arose whether in accordance with the existing precedent, the treaty had to be signed by the British Ambassador at Washington along with the Canadian Minister of Marines and Fisheries. Canada was firm that only the Canadian representative should sign the treaty as it concerned only Canadian nationals and the Canadian Government. This view was accepted by the British Government as well as the United States of America. And the treaty was signed by the Honourable Ernest Lapointe, the Minister of Marine and Fisheries of Canada on behalf of his Britannic Majesty. An incident of more than ordinary significance occurred very soon after this. At the negotiations connected with the treaty of Lausanne, the Dominions were not represented. And, when the question of ratification of the treaty by Canada came up for consideration, the Right Honourable

Mackenzie King, the Canadian Premier, refused to advise the Canadian Parliament to accept any responsibility under the treaty. Speaking in the Canadian House of Commons on June 9, 1924, on this question, the Canadian Premier made it clear that although in the eye of International Law the conclusion of a treaty on His Majesty's behalf by the Government of the United Kingdom, without express exclusion of Canada would bind that country, nevertheless, Canada was not morally bound to honour the obligations arising under a treaty, in the negotiation of which she had taken no part, and to which she had not subscribed her signature.[1]

The Inter-Imperial Relations Committee of the Imperial Conference of 1926 declared that the autonomous communities of the British Empire were in no way subordinate to one another not only in any aspect of their internal affairs but also in any aspect of their external affairs. This equality of status of the Dominions with the United Kingdom in external affairs was recognized by the Imperial Conference, 1926, when it placed on record the fact that no Dominion could be committed to the acceptance of active obligations arising under a treaty affecting foreign relations, without the definite assent of the Government of that Dominion.[2]

The precedent created by the signature of the Canadian representative alone to the Halibut Fishery Treaty, entered into by Canada with the United States in 1923, came up for consideration at the Imperial Conference of 1923. That procedure was approved and the Conference also enunciated certain principles to be followed in the negotiation, signature and ratification of treaties by the Dominions with other countries. The whole matter was again reviewed by the Imperial Conference of 1926, and the conclusions reached by the Conference of 1923 were modified in points of detail The present position in regard to this matter may be summarized in the following way: It is open to the Government of a Dominion to negotiate for a treaty affecting its own affairs. But due consideration must be had in such negotiation, as to the possible effect of the treaty on other parts of the Empire, when the same is concluded. If the interests of the other parts of the Empire are likely to be affected, they must be duly intimated of it and an opportunity given to them to participate in the negotiation. The original practice under which the treaties were signed by the British

[1] Keith, *Speeches and Documents on the British Dominions*, 1918–1931, pp 322–341

[2] *Cmd.* 2768, p 26.

plenipotentiaries, without specifying the part of the Empire for which they were acting, has been given up and the authority issued to plenipotentiaries show clearly for what part of the Empire they are to sign.

In the year 1920 Sir Robert Borden, the Canadian Premier, obtained from the British Government recognition of Canada's right to appoint its representative at Washington to take charge of Canadian affairs. The Minister plenipotentiary of Canada was to be appointed on the advice of the Canadian Ministers to His Majesty. But no action was taken in pursuance of this principle for some years. Now, Canada maintains legations at Paris, Tokyo and Washington And the United States, France and Japan have reciprocated by appointing their Ministers to Canada. The Irish Free State which, under the terms of its Treaty of 1921 with Great Britain had acquired a constitutional status similar to that of Canada, obtained in 1924 through the intercession of the British Government, the appointment of an Irish Minister plenipotentiary to Washington. At present, as Professor Keith has pointed out, "The Irish Free State exchanges representation with the United States the Holy See, France and Germany. The Minister to France is also accredited to Belgium. The Union of South Africa exchanges representation with the Netherlands, Italy, the United States, Germany, as well as France. The Minister at Paris is accredited also to Lisbon and that at Berlin to Stockholm."[1] The establishment of legations by the Dominions shows that their status as distinct communities in international relations has obtained recognition.

This distinct status of the Dominions in foreign relations is also illustrated by the fact that since 1931 the Irish Free State and from 1934 the Union of South Africa, have acted in direct communication with the King in foreign affairs, instead of through the medium of the Dominions Office or the Foreign Office.[2] These two countries have also secured the approval of the King to the use of their own seals.[3]

There are two problems of a special character which may now be considered. They are (1) the right of secession of a Dominion from the Empire, (2) the right of neutrality of a Dominion in a war in which Great Britain happens to become involved.

It is sometimes claimed that the right of secession of a

[1] Keith, *The Governments of the British Empire*, (1935), pp. 111–112.
[2] *Ibid*, p 96
[3] *Ibid.*, p. 80.

Dominion from the Empire is implicit in the Statute of Westminster, 1931. To my mind, that claim cannot be sustained as a matter of law. It is no doubt true, that the preamble to that Act speaks of the members of the British Commonwealth as freely associated. But the preamble does not stop with that. It says, that the nations are not only freely associated but that they are united by a common allegiance to the Crown, and that because of that common interest which all those nations have in the Crown, any changes in the law touching the succession to the Throne should require the assent of not only the Parliament of the United Kingdom but also of the Parliaments of all the Dominions. The common interest of the Dominions in regard to the alteration in the law of succession, it is declared, by the preamble, to be in accord with the established constitutional position of all the members of the Commonwealth to one another. It is clear from these recitals that the common link which binds the Empire is the Crown. That is the substratum upon which the constitutional relations of the various units of the Empire is founded. Can it, therefore, be said that it is open to any member of the Commonwealth to demolish that foundation which is at the basis of the Empire, a foundation which has received statutory recognition? The words employed in the preamble "freely associated" are only intended to emphasize the fact that Dominions were in point of status the equal of Great Britain. As a matter of fact the origin of this statute may be traced to the famous Balfour declaration of 1926. And that declaration, part of whose language is imported into the recitals in the preamble, speaks of the members of the Commonwealth as autonomous communities within the Empire. It seems, therefore, that as a matter of law, the right to secede is not only not implicit, but that it is clearly negatived by the Statute. If there is to be secession, it must be by a political act declaring independence. Such an act would be extra-constitutional.

There is one other problem of interest on which a few words may now be said Can a Dominion claim the right of neutrality in a war in which Great Britain may become involved? Even now, some of the highest attributes of external sovereignty, like the declaration of war or the conclusion of peace, are vested in the King. But like all other prerogatives of the King, in respect of even these great issues, the King has to be guided by the advice of his duly constituted Ministers. But the difficulty arises because there are a number of King's Governments. What is the King to do, if upon the question of the declaration

of war, he is faced with a divergence of advice from his different Governments. That is a matter upon which it is difficult to express any opinion. Supposing war becomes inevitable so far as Great Britain is concerned, and supposing also one or more of the Dominions wish to remain neutral, what is to be the position? Legally speaking it would be difficult to maintain, that the King can partly be at war and partly at peace. Nor can it be said that a country which has commenced hostilities with Great Britain is bound to respect the neutrality of a Dominion, as even now the British Empire, notwithstanding the great changes that have taken place in the status of some of its constituent units, namely, the Dominions, is in the eye of international law a single unit. Of course the position of a Dominion to render help to Great Britain in a war, to the prosecution of which she has not assented, stands on a different footing. That is a matter in which, having regard to her present position, she retains full liberty of action The claim to remain neutral in a British war has been raised by General Hertzog with reference to the Union of South Africa. As Professor Keith has pointed out, under South African law, " the mode of proclaiming such neutrality even against the personal wish of the King is available under the Royal Executive Functions and Seals Act, 1934. Under its terms the Governor-General would be bound on the advice of the Ministry to issue a proclamation of neutrality, should his Government so decide."[1] Professor Keith is, however, of the opinion that the claim to remain neutral cannot be reconciled with the obligation of South Africa " to protect, as regard land defences, the British Naval base at Simonstown, which was undertaken in 1921 by the Union, when the war department lands were handed over, free of cost, to the Union Government." " It would," he says " clearly be inconsistent with the obligation of true neutrality for the Union to make good this undertaking, while to fail to do so would be a grave breach of faith."[2] In the case of the Irish Free State, the obligation arising under the Treaty of 1921 to provide for His Majesty's Imperial forces in time of war or strained relations with a foreign power, such harbour and other facilities as the British Government may require, prevents that country from maintaining neutrality in international law.

Such is the position attained by the Dominions in the comity of nations constituting the British Commonwealth. Like most political terms, the term Dominion Status is not capable of

[1] Keith, *The Privileges and Rights of the Crown* (1936), p. 120.
[2] Keith, *Governments of the British Empire* (1935), pp. 98–99.

being defined with scientific precision. But, we all understand what that status means, notwithstanding the storm of controversy which has raged round this question during recent years. Eleven years before the enactment of the Statute of Westminster, Mr. Bonar Law, speaking for the Coalition Government of the day, on the second reading of the Government of Ireland Bill, 1920, observed as follows: "What is the essence of Dominion Home Rule? The essence of it is that they have control of their whole destinies, of their fighting forces, of the amounts which they will contribute to the general security of the Empire. All these things are vital to Dominion Home Rule. . . . There is not a man in the House who would not admit that the connection of the Dominions with the Empire depends upon themselves. If the self-governing Dominions, Australia, Canada, chose to-morrow to say 'we will no longer make a part of the British Empire' we would not try to force them. . . . Dominion Home rule means the right to decide their own destinies."[1] It is difficult to improve upon this statement The essence of Dominion Home Rule, as that great statesman put it, is the right of the Dominion to decide its own destinies. It seems to me that the famous Balfour declaration of 1926 was, in substance, a restatement of the principle involved in Mr. Bonar Law's statement of 1920 The Statute of Westminster, 1931, was an attempt to work out in certain directions the implications arising from the right of a Dominion to control its own destiny. That statute, as a matter of fact, removed some of the legal fetters which existed on the legislative freedom of the Dominions to enact legislation, which they deemed necessary in their own interest When we speak of Dominion Home Rule, or what amounts to the same thing, Dominion Status, with reference to a Dominion, we mean that that country exhibits the following characteristics, namely (1) full control over its internal and external affairs. As a corollary to this main principle arises the full legislative freedom of its Parliament to arrange its own affairs; (2) the full control of the fighting forces, and (3) Co-operation with Great Britain and other units of the Empire on a voluntary basis These, I apprehend, constitute the essence of Dominion Status. And from the long discussion we have had so far on the present position of the Dominions, it is, I think, clear that all the Dominions possess these features.

Now that status and all that it implies was promised to

[1] *ions, March* 30, 1920, Vol. 127. Columns

India in the famous pronouncement made by Lord Irwin, the Viceroy of India, in 1929, with the full authority of His Majesty's Government, for, he said, that it was " implicit in the declaration of 1917 that the natural issue of India's constitutional progress as there contemplated is the attainment of Dominion Status." Sir Samuel Hoare, the Secretary of State for India, speaking in the House of Commons on the motion that the India Bill be read a second time, said, that the Government stood firmly by the pledge contained in the preamble to the 1919 Act and by the interpretation put upon it by the Viceroy in 1929 [1] The goal of India's constitutional progress has therefore been made clear in these pronouncements

As to the means by which that goal was to be reached, the following extracts taken from the declaration made by the Right Honourable J. Ramsay Macdonald, the then Prime Minister, with the full concurrence of his colleagues, at the close of the first Round Table Conference, may be cited. " The view of His Majesty's Government is that responsibility for the Government of India should be placed upon legislatures Central and Provincial, with such provisions as may be necessary to guarantee, during a period of transition the observance of certain obligations and to meet other special circumstances, and also with such guarantees as are required by minorities to protect their political liberties and rights. In such statutory safeguards as may be made for meeting the needs of the transitional period, it will be the primary concern of His Majesty's Government to see that the reserved powers are so framed and exercised as not to prejudice the advance of India through the new Constitution to full responsibility for her own Government."[2] Now, if this declaration of policy were to be read in conjunction with the Viceroy's statement of 1929 the following facts become clear, namely, (1) that the natural issue of constitutional progress in India was Dominion Status, (2) that that Status was to be achieved after allowing a period of transition, and (3) that it would be the concern of His Majesty's Government to see that the reserved powers were so framed and exercised as not to prejudice the advance of India through the new Constitution to full responsibility for her own affairs. Though the period of transition has not been definitely fixed, it seems clear, that the word " transition " would cease to have any significance, unless the intention was to prescribe a reason-

[1] *Official Report, House of Commons, February* 6, 1935 Vol 297 Column 1173

[2] *Proceedings of the First Indian Round Table Conference*, p. 482.

able period, after which responsibility for the affairs of her Government would devolve upon her own nationals. Can we say that the new Constitution fulfils these essential conditions?

In answering this question, it is necessary to bear in mind certain important facts connected with the new Constitution. At the centre, the administration of the departments of defence, external affairs except the relations between the Federation and any part of His Majesty's Dominions and ecclesiastical affairs, will be under the sole responsibility of the Governor-General, who will have the aid of Counsellers, not exceeding three in number, and appointed by him to assist him in the discharge of these functions. The Ministers responsible to the Federal Legislature will have no voice in the administration of those departments. In every free country perhaps the most important of the functions discharged by its Government is its control over the fighting services and foreign affairs. One may go the length of saying that the department of defence is the cement that holds the several parts of the structure of the constitution together. The control over foreign affairs is so intimately connected with defence that both of them constitute the obverse and reverse of the same problem. These functions are, therefore, the very soul of Dominion autonomy.

A large body of opinion in India was prepared to accept the necessity for the reservation of defence and external affairs, for a short period, say ten to fifteen years, subject to the condition that after the termination of that period, the responsibility of administering these departments would automatically pass on to Indian shoulders. It was taken for granted that during this transitional period, the ground would be prepared and consolidated by the adoption of a definite programme for the building up of a national army, which would take over the function of defence from the hands of the British Government. The new Constitution neither prescribes a definite period, after which the reserved departments would pass on to Indian hands, nor does it adopt a definite programme by which India would be enabled to construct a national army of her own. This is perhaps the most striking defect of the new Constitution. Nor is this all.

Under the Statute of Westminster, 1931, the Dominions have acquired full legislative independence. The fetter imposed by the Colonial Laws Validity Act, 1865, whereby a Colonial Parliament was prevented from enacting legislation repugnant to any Act of the Imperial Parliament extending to the Colony either by express words or by necessary intendment, is now

removed so far as the Dominions are concerned. And the Imperial Parliament is precluded from enacting legislation applicable to a Dominion unless that Dominion has requested and consented to its enactment. What is the position of the Federal and the Provincial Legislatures under the Government of India Act, 1935? The whole of Chapters II and III of Part V of the Act deal with the restrictions imposed on legislative powers. It is unnecessary to traverse the ground covered by these chapters beyond observing that the Federal and Provincial Legislatures are hedged in by numerous restrictions on the exercise of their powers, to enact legislation adapted to the country's needs. In particular, the provisions which deal with so-called discrimination, tie the hands of India effectively to enact legislation designed to help in the building up of its national, infant and key industries. There is no precedent for these provisions in any of the Dominion Constitutions and how those provisions are likely to work are considered in the body of the book.

There are numerous other matters embodied in the new Constitution which militate against the freedom of India to manage her own affairs. For instance, the recruitment for the more important services, like the Indian Civil Service, the Indian Medical Service and the Indian Police Service, will continue to be vested in the Secretary of State, until Parliament otherwise directs. Elaborate provisions have been made by the Act to safeguard the conditions of employment in these Services, Pensions and other matters pertaining to them. The Secretary of State for India will be the final authority who will regulate all these. How, indeed, the vesting of responsibility in the Secretary of State over these matters can be reconciled with either provincial autonomy or even the qualified measure of central responsibility conferred by the new Constitution, it is difficult for one to comprehend.

These are some of the thoughts, which occur to my mind when I survey the new Constitution. It is well to remember that a Constitution is, after all, an instrument for promoting human welfare and prosperity. And if that instrument fails to fulfil its purpose, can it be doubted that it must be re-fashioned or even scrapped and replaced by a new one, so that it might harmonize with the facts of life? Though my object in writing this book is to give an account of the structure of the new Constitution and a legal interpretation of some of its important provisions, I have considered it necessary, in this introduction, to deal with some of the wider problems which form the setting

as it were for the new Constitution. And I feel I owe no apology for dilating upon these wider issues.

If the British Empire deserves to be called a Commonwealth of free nations, then India, which forms the most considerable unit of them all, must have the same freedom which her sister nations enjoy, to order her own affairs in the manner which seems to her best. And every well-wisher of the Empire hopes that that day is not distant, and that it will come, not by the pressure of political events, but through the recognition of the fact that freedom is a joyous privilege, not to be selfishly enjoyed, but to be willingly shared with others. When that day comes, as come it must, the British Commonwealth of Nations will have set a high example to the world of what can be achieved in human fellowship by goodwill and understanding.

CHAPTER I

A GENERAL SURVEY OF THE PERIOD 1600–1917

On May 17, 1498, three vessels varying from 60 to 150 tons burden, under the command of the Portuguese explorer Vasco da Gama, cast anchor off Kappat, a small village eight miles north of Calicut [1] The occasion was indeed a notable one ; and one can well imagine Vasco da Gama being thrilled by this experience. A prize which had for so long eluded the grasp of many a stout-hearted European navigator, had, by a stroke of good luck fallen into his hands. But even he could not have foreseen how far-reaching would be the repercussions of his discovery of a direct sea-route to India in the future years. The products of Eastern countries, chiefly spices and pepper, reached European markets across the overland route after encountering numerous trade barriers during their long journey. It had long been the ambition of many of the maritime States of Europe to capture the very valuable trade of the Eastern countries which had hitherto remained the monopoly of the Muslim and Venetian merchants. The original director of the Portuguese expeditions which made their way down the African coast, with the object of discovering a new way to India, was Prince Henry the Navigator, the grandson of John of Gaunt But he was not destined to see the fruition of his efforts in his lifetime. Vasco da Gama's discovery of a direct sea-route to India was, therefore, an event of more than ordinary significance ; and in the years that followed it, Portugal was destined to reap a rich commercial harvest. The Portuguese Indian possessions of Goa, Diu and Daman, which survive even to this day, are the relics of the Portuguese settlements established in India during the sixteenth century.

The immense prosperity which Portugal began to enjoy as the result of her sea-borne trade with India and other Eastern countries, naturally excited the jealousy of her European rivals. In the year 1580, Philip II of Spain annexed Portugal to his domains after the battle of Alcantara. But, though Portugal became incorporated in the Spanish Kingdom, the two countries came to an understanding with each other, that the trade of Africa, India and Persia should continue in

[1] R S Whiteway, *The Rise of the Portuguese Power in India*, 1497–1550, p. 78.

Portuguese hands.[1] Holland, which was at war with Spain, about this time, was endeavouring to assail the supremacy of the Portuguese Eastern trade. In the year 1595, a group of Dutch merchants had organized a trade expedition to Java. The commercial direction of this venture was placed in the hands of one Cornelius Houtman, a Dutchman who had considerable experience of the Portuguese Eastern trade. The Dutch vessels, after a long voyage, reached Bantam in Java Bantam was then a great trading centre, and the local inhabitants were favourably disposed to the opening of trade relations with the Dutchmen. But, owing to his injudicious behaviour, Houtman lost a favourable opportunity of making a commercial success of the venture. Houtman returned with his ships to Holland in August, 1597. This trade expedition, though it did not yield any profits, met with a favourable reception in Holland and was pronounced a success New companies were formed in several towns of Holland for carrying on trade with the East Indies. Twenty-two ships left for the Archipelago in 1598 and about forty more in the next three years.[2]

These trade expeditions had placed the Dutch East Indies trade on a fairly permanent basis. The Dutch Government soon realized that if different companies operated in the East Indies each in its own interest, they would hinder instead of promoting the Dutch trade and that a single organization, enjoying the monopoly of the Eastern trade, offered the finest chances of building up a lucrative trade connection with the East. A large group of Dutch merchants was, however, strongly opposed to the idea of monopolies. But this opposition was soon overcome. The various Dutch Companies operating in the East Indies became merged in a single organization known as the Dutch East India Company. A charter granted in 1602 made it a corporate body, endowed with the exclusive privilege of trading with the Eastern countries.

Elizabethan England was a beehive of maritime exploration and adventure. But Queen Elizabeth was rather averse to afford encouragement to her subjects to break through the Portuguese Eastern trade for fear of political complications. For some period, therefore, the English navigators bent their efforts towards the discovery of a new sea-route to the East, either through or round America or by the northern coasts of

[1] *Cambridge History of India*, Vol V, p. 24.
[2] *Cambridge History of India*, Vol V, p 30.

Europe and Asia. They hoped that if such a route were to be discovered they would be opening a valuable outlet for English trade in China and other Eastern countries But these attempts did not prove successful. The defeat of the Spanish Armada in 1588 had put new enthusiasm into all national activities in England Holland, as already noticed, had successfully organized trade expeditions to the East Indies in the last decade of the sixteenth century The Dutch ships had taken the Cape route on their way to the East It became increasingly clear, that the only practicable trade route available at the time was by the Cape of Good Hope. It is true that England was at this time politically an ally of Holland, but commercially there was keen rivalry between them. The success of the Dutch merchants in their trade ventures had brought home to the minds of the English merchants that unless they made a determined effort to carve out a place for themselves in Eastern commerce, the Dutch merchants would form an impregnable barrier to their entry very soon. The prize which was so long and so eagerly sought for by the English merchants was, therefore, in danger of slipping away from their hands to those of the Dutch. It was these factors that operated to draw the English merchants into the vortex of Eastern commerce.

The English East India Company which took its birth on the last day of the year 1600, under a charter granted by Queen Elizabeth, was indeed the instrument by which English commercial enterprise sought to get a permanent foothold in Eastern commerce. The Company was organized primarily for commercial ends. If, indeed, the course of future events had so shaped themselves that the only relationship which England was able to establish with India was on the plane of mutual trade, there would certainly have been very little in the history of that relationship which would interest the student of constitutional history. If that had happened, it would probably have afforded a promising field of investigation for students of economic history. But the course of events took a different turn altogether. The East India Company which largely maintained its commercial character for a century and a half after it commenced its career in India, began about the middle of the eighteenth century to assume the responsibilities and acquire the attributes of a territorial power. Eventually, the political side of its activities completely dominated and over-shadowed the commercial aspect of its life. The charters granted by the successive sovereigns

of England to the East India Company during the early part of its career, as we shall presently see, were documents which invested the Company with such elementary powers of government as would enable it to maintain order and discipline in its factories, as also powers to enable it to withstand the attacks of foreign powers. But when the Company began to acquire large territories in India and the problems of government became complicated and immense, Parliament had to intervene in Indian affairs Ultimately the Crown assumed full responsibility for the governance of India in 1858, after the Indian Mutiny. The constitutional history of the period subsequent to the assumption by the British Crown of the reins of the Indian Government is full of interest, as it is the history of experiments made by Great Britain to establish an ordered administration in India and to provide opportunities of association of Indians with the legislative and administrative activities of Government To understand the present constitutional position properly, it is necessary to possess an acquaintance at least in broad outline, with the constitutional history of India from the time of the advent of the English into India, down to this day.

This chapter will be a rapid survey of the constitutional history of India beginning from 1600, the year which saw the birth of the English East India Company and ending with 1917, the year in which the Right Honourable Edwin Montagu, the then Secretary of State for India, made the famous pronouncement on British policy towards India. The term constitutional history of India is employed in this chapter in a restricted sense as referring to the history of the origin and growth of British authority in India as well as the history of the various experiments made by Great Britain in the sphere of Indian administration. The period to be spanned by this chapter will, therefore, be a long one, extending over a period of over three centuries. The history of this long span of years will be considered in three periods. The first period begins from 1600 and extends up to 1765, a period of over a century and a half during which the East India Company was primarily a trading concern. In 1765 came a momentous change in the Company's career. The grant of the Diwani or the revenue administration of Bengal, Behar and Orissa to the East India Company by the Moghul Emperor Sha Alam made the Company the supreme master of these territories. The second period begins from 1765, when the East India Company began to acquire the attributes of a

territorial sovereign, and ends with 1858, when the British Crown assumed the direct responsibility for the government of all its Indian possessions. This period which spans an interval of nearly a century saw the consolidation and extension of British possessions in all parts of India. The first direct intervention of Parliament in the affairs of the Government of India occurred in 1773 when the Regulating Act was passed. From that time onwards the responsibility for the Government of India was shared by the British Crown with the East India Company in increasing proportion until eventually the East India Company dropped out and the administration of India passed solely into the hands of the British Crown. The third period extends over a span of nearly sixty years from 1858 to 1917. This period saw the passing of a number of Parliamentary enactments whose main objective was to construct an ordered administrative edifice in India and to give opportunities for Indians to voice their opinions when legislative measures were on the anvil. Even the Minto-Morley reforms which were inaugurated during this period cannot be considered to mark any radical change in the Englishman's approach towards Indian political problems. These reforms were primarily designed to make the Indian legislatures more truly representative of the Indian peoples than they had hitherto been, by enlarging the non-official Indian element and by substituting election in the place of the nomination of members. In dealing with each of these three periods certain prominent landmarks will be selected and referred to. This method of approach to the study of the constitutional history of this long period is, I think, perhaps the best that could be selected.

We have already noticed the anxiety on the part of the English merchants in the closing years of the sixteenth century to enter the field of Eastern commerce in an organized manner in order to capture as large a part of the East Indies trade as possible. On September 24, 1599, a group of English merchants met in the Founder's Hall, London, under the presidency of the Lord Mayor, and decided to form an association to carry on trade with India and other Eastern countries. They then petitioned to Queen Elizabeth for the grant of a trading charter. On December 31, 1600, Queen Elizabeth complied with the request of the petitioners by the grant of a charter which incorporated the said petitioners as a " body corporate and politic, in deed and in name, by the name of the Governor and Company of merchants of London, trading

into the East India" The management of the Company's affairs was entrusted by the charter to a Governor, and twenty-four other members (referred to in the charter as Committees) who were to have " the direction of the voyages of or for the said Company, and the provision of the shipping and merchandizes thereto belonging, and also the sale of all merchandizes returned in the voyages . . . and the managing and handling of all other things belonging to the said Company." The Company was given the exclusive privilege for a period of fifteen years to " freely traffic and use the trade of merchandize by sea, in and by such ways and passages already found out or which hereafter shall be found out and discovered . . . into and from the East Indies, in the countries and parts of Asia and Africa, and into and from all the islands, ports, havens, cities, creeks, towns, and places of Asia and Africa, and America, or any of them, beyond the Cape of Bona Esperanza to the streights of Megellan." The Company was authorized to grant trading licences to others, and persons who sought to trade without the Company's permission, in the region marked out as the limits in the charter for the Company's exclusive privilege to be operative, were liable to have all their belongings forfeited and also be liable for punishment. In order to enable the Company to administer its affairs effectively, it was empowered to meet from time to time in any convenient place, either " within our dominions or elsewhere," and there hold court to make " such and so many reasonable laws, constitutions, orders and ordinances," as may seem " necessary and convenient " for the good government of the Company and of its factors, masters, mariners and other officers, and for the better advancement and continuance of the trade; such laws, constitutions, orders and ordinances being reasonable and not contrary or repugnant to the laws, statutes, or customs of the English realm ; and also empowered to enforce such " pains, punishments, and penalties, by imprisonment of body ; or by fines and amerciaments or by all or any of them," as might seem appropriate. The charter explicitly referred to the fact that if at the end of the term of fifteen years it was found that the trade was not " prejudicial or hurtful " to the realm but profitable, it might be renewed for another term of fifteen years.

The first two voyages by the ships of the East India Company were made to the East Indies and not to India. The first fleet of four vessels under Captain James Lancaster visited Achin in Sumatra and Bantam in Java. An English

factory was established at Bantam. The second fleet which sailed from England called at the Spice Islands When preparations were made for the third voyage to Bantam, it was decided that one of the ships of the fleet should call at Surat and found a factory there after securing the permission of the Moghul Emperor. The ship selected for this task was the *Hector*, under the command of William Hawkins, an English merchant who had gained considerable experience in the Levant. Hawkins carried a letter from King James to the Emperor Akbar (whose death was still unknown in London) desiring permission for the English merchants to trade in the Moghul dominions Hawkins landed in Surat on August 24, 1608, and four months later he set out on his long journey to the Moghul Court He arrived in Agra in April, 1609, and presented himself before the Emperor Jehangir. He was treated with great consideration and courtesy at the Court, but he did not succeed in securing from the Emperor Jehangir the necessary permission for the English merchants to open trading factories in his territories. This was mainly due to the opposition on the part of the Portuguese Jesuits, who wielded great influence at the Moghul Court. But the tide turned in favour of the English a few years later. On December 23, 1612, Captain Thomas Best with only two vessels, the *Hosiander* and the *Dragon*, inflicted a severe defeat on a large Portuguese squadron.[1] A factory was established at Surat by permission of Emperor Jehangir ; and subordinate agencies were also opened in the interior. More English naval victories over the Portuguese followed, and the Moghul Emperor who had heard of these adopted a friendly attitude towards the enterprise of the English to open permanent trade relations with India.

In the meanwhile, King James I had renewed the charter granted by Queen Elizabeth to the East India Company, even though six years of the period of fifteen years fixed in the original charter of Queen Elizabeth had still to run. The charter granted by King James I in 1609 confirmed the privileges and powers already given to the Company by the earlier charter with one important change. The monopoly of trade was made a perpetual one, though it was subject to determination "with three years' notice," on proof of injury to the nation.

Several factories were founded by the East India Company in the seventeenth century. In 1611 Captain Hippon

[1] *The Nations of To-day*, Edited by John Buchan, India : by Sir Verney Lovett, p. 46.

established a trading settlement at Mushpatam on the east coast. In 1639, Francis Day, a member of the Muslipatam factory council, entered into an arrangement with a local Hindu chieftain by which permission was secured to build a fortified English factory on a strip of land, situated to the north of the old Portuguese settlement of San Thomé This was the origin of the Madras factory. In 1651 Gabriel Boughton, an English doctor who was employed as a family physician by the Subhadar of Bengal, had succeeded in securing permission from his master for the establishment of an English factory at Hugli. A branch factory was founded in 1686 by Job Charnock, the chief of the Hugli settlement on the site of Calcutta. The factory had to be abandoned soon after owing to the hostility of Nawab Shaista Khan, the Moghul Governor. But in 1690, the English were able to come back under the authority given by Aurangzeb, and founded a small settlement at Sutanuti And this settlement has now grown into Calcutta. When Charles II married Infanta Catherine of Portugal, in 1661, the island of Bombay came to him as part of the marriage dowry. On March 27, 1668, King Charles II transferred the island of Bombay to the East India Company in consideration of the Company having accommodated him with a temporary loan of £50,000 at six per cent. interest. The Company was required to pay a quit rent of £10 per annum.[1] Surat was the headquarters of the English trading settlements on the west of India for a long time. But in 1687 Bombay became the headquarters of the western settlements, as it possessed a magnificent harbour.

The charter granted by Queen Elizabeth did not contain any provisions for dealing with the more serious classes of offences ; nor did it place sufficient powers in the hands of the Company for maintaining discipline during the long voyages. The charter granted in 1615 supplied these omissions. The Company was authorized to issue a commission to the "General" in charge of a particular voyage to punish offenders found guilty of non-capital offences as also to put in execution the law martial. With regard to capital offences, the verdict of a jury was made imperative. In the year 1623 King James I granted another charter by which the Company was empowered to issue similar commissions to the Presidents and other Chief Officers of the trading settlements to inflict punishments in the case of serious offences and to administer the law martial.

[1] *The Cambridge History of India*, Vol V, p. 87

From the year 1624 to 1660 the East India Company was subjected to considerable harassment by Dutch merchants and English interlopers. Their trade also suffered to a great extent. Cromwell granted a charter to the Company in 1657. After the Restoration, conditions for carrying on trade became favourable and the Company also prospered.

On April 3, 1661, Charles II granted a new charter to the Company. While the existing privileges and powers were renewed and confirmed, certain new and important powers were for the first time given to it. The most notable additions were in the judicial, political and military spheres. The charter provided that "all plantations, forts, fortifications, factories, or colonies where the said Company's factories and trade are, or shall be in the East Indies," were henceforth to be under the power and command of the Governor of the Company who should have "full power and authority to appoint and establish governors, and all other officers to govern them." The Governor and Council of each factory were given full authority "to judge all persons belonging to the said Governor and Company or that shall be under them, in all causes, whether civil or criminal, according to the laws of this Kingdom and to execute judgment accordingly." It is clear from the wording of this clause that the Governor and his Council were given almost unlimited powers to deal with all classes of cases arising in the area subject to their jurisdiction. But until the year 1678, no attempts seem to have been made to carry out the provisions made in this regard. It is true, that at Madras two or more officers of the Company used to sit as justices in the "Choultry" to deal with petty cases. But there were no tribunals appointed to inquire into the serious class of offences. But, in 1678, the Madras administration decided that in view of the extensive powers granted by the charter of 1661, the judicial machinery should be organized properly to deal with all causes criminal and civil. It was in pursuance of this decision that the Governor and Council began to sit in the Chapel in the Fort every Wednesday and Saturday to deal with all kinds of cases. But this superior tribunal did not oust the jurisdiction of the justices of the choultry who continued to deal with petty cases.[1]

The military and political powers granted under the charter of 1661 were equally wide and extensive. The relevant clauses among other powers gave "free liberty and

[1] Ilbert, *Government of India* (3rd Edition), pp. 17–18.

license for the said Governor and Company, in case they conceive it necessary to send either ships of war, men or ammunition into any of their factories, or other places of their trade in the said East Indies, for the security and defence of the same; and to choose Commanders and officers over them, and to give them power and authority by commissions under their common seal or otherwise, to continue or make peace or war with any prince or people that are not Christians in any places of their trade . . ." Power was also given "to erect and build such castles, fortifications, forts, garrisons, colonies or plantations at St. Helena, as also elsewhere," within their limits and bounds of trade, as "they in their discretion shall think fit and requisite."

There is one more important section of this charter which needs consideration. The Company was, as already mentioned, subjected to considerable annoyance and trouble on account of the invasion of its exclusive rights of trading, by unauthorized persons. Numerous complaints had been made to the Crown to put an end to this state of affairs. This charter, therefore, armed the Company with powers to deal with unauthorized traders "Full power and lawful authority" were given by the charter "to seize upon the persons of all such English, or any other our subjects in the said East Indies, which shall sail in any India or English vessel, or inhabit in those parts, without the leave and licence" of the Company, "or that shall contemn or disobey their orders, and send them to England" Thus the provisions of this charter were indeed notable in many respects They indicate the direction in which the current was moving. The powers of military and civil government, which were provided for in such detail, showed that the Company was slowly acquiring the attributes of a territorial sovereign.

A charter of 1677 gave the Company the power of minting coins at Bombay; such coins having circulation only in the East Indies, and not in England. These coins were to be called "rupees, pices and budjrooks."

By a charter of 1683 the Company was given the power to make war and peace with any of the "heathen nations." The same charter authorized the Company to "raise, arm, train, and muster such military forces as to them shall seem requisite," and to execute and use martial law for the defence of the plantations, ports and places belonging to the Company during the time of any foreign invasion or domestic insurrection. A Court of Judicature was also established by this

charter, and this was to hold its sittings at such place or places as the Company may determine This Court was to consist of "one person learned in the Civil law and two assistants"; and it was to exercise both admiralty and civil jurisdiction. One Dr John St. John, a person of great legal attainments, was appointed under the powers conferred by this charter on the Company. But owing to differences which arose between Sir John Child the Governor and Dr John St John, the jurisdiction of the latter to hear civil actions was taken away. His jurisdiction was restricted to maritime cases.

King James II gave a charter in 1686. The powers already granted to the Company were renewed and confirmed In addition to these, the Company was authorized to appoint naval officers like admirals, vice-admirals, rear-admirals, captains and other sea officers to take charge of the Company's ships The Company could authorize these naval officers to raise naval forces and to administer the law martial during times of war.

In 1687, James II delegated to the Company the authority to establish at Madras a Municipal Corporation The Madras Corporation which was created in pursuance of this power conferred on the Company was to consist of a Mayor, twelve aldermen, and sixty or more burgesses.

A perusal of these documents clearly shows that the Company was, by the sheer logic of circumstances, slowly finding that governmental activities were as important a feature of its life as its trading functions

Attempts had been made for quite a long time by a section of the people to break through the monopoly of trade enjoyed by the East India Company. It was maintained by these persons that every Englishman had the right to trade in the East Indies and that the Crown in granting exclusive trading privileges to a single corporation was exceeding its prerogatives. They contended that the Parliament, which was the chosen representative of the peoples, was alone competent to curtail the liberty of an Englishman for equal opportunities for trade, and that the Crown had no power to do so. It is true that, when an attempt was made by one Thomas Sandys to trade within the limits of the Company's charter unauthorizedly, the East India Company had succeeded in obtaining a verdict from Lord Chief Justice Jeffreys in the well-known case of *East India Company* v. *Sandys* (1683–85) that the Crown had the power to grant to the Company the exclusive right to trade in the East Indies, and that such a

grant was a good grant. But the victory gained by the Company, however, proved to be more a technical than a substantial victory. The Company had obtained a renewal of their charter in 1693 The question of the monopoly granted by that charter to the East India Company became the subject of controversy very soon afterwards. The occasion for the question to assume importance arose in the following manner. The directors of the East India Company seized a ship called the *Red Bridge* which was then on the river Thames and which, it was presumed, was preparing for a voyage beyond the Cape of Good Hope. The action of the directors of the East India Company in detaining the ship was attacked , and the matter was brought up before Parliament. The result was that on January 11, 1694, Parliament passed a resolution stating " that all the subjects of England have equal right to trade to the East Indies, unless prohibited by Parliament " As Ilbert has observed: " The question whether the trading privileges of the East India Company should be continued was removed from the Council Chamber to Parliament, and the period of control by Act of Parliament over the affairs of the Company began "[1]

The Government of King William was then in need of funds. The monopoly of trade was practically put up for auction between the new organization which was vigorously trying to assail the exclusive trading privileges of the East India Company and the East India Company itself. The New Company, however, succeeded in this contest An Act of Parliament passed in 1698 incorporated the members of the organization who had agreed to subscribe a sum of two million pounds to be lent to the Government as a loan, into a " General Society " endowed with exclusive privileges of trading in the East Indies. The old Company was allowed to have a concurrent right of trading with the New Society for three years thereafter, after which the former's privileges were to cease. The members of the New Society were allowed the option either to trade separately to the value each year of the amounts they had severally subscribed, or to form a new company on a joint stock basis, to which His Majesty was empowered to grant a charter with suitable conditions. A large majority of the members elected to form a joint stock company and on September 5, 1698, a royal charter incorporated them under the name of " The English Company trading to the East Indies."

[1] Ilbert, *Government of India* (3rd Edition), p 26.

The old East India Company could not, however, be easily dislodged from its entrenched position. In the first place, this Company was acute enough to subscribe a sum of £315,000 to the loan in the name of its Treasurer. This enabled the old company to trade in his name each year to the extent of the amount subscribed by it even after its privileges terminated. In the second place, the old Company owned considerable property in India and possessed a great deal of experience of Indian conditions, both of which placed it in a position of vantage. The New Company could not, therefore, make much headway The result was that a way out of this situation had to be found Thanks to the intervention of Lord Godolphin, an amalgamation of the two companies on a basis satisfactory to both was effected. The United Company of Merchants of England trading to the East Indies arose out of the fusion of the old and the new companies. Up to the year 1833 when the charter of that year was passed, the Company was known by its new name of " The United Company of Merchants of England trading to the East Indies."

The Company having been established on a firm basis, its attention naturally turned towards the provision of some of its essential needs. The Directors of the East India Company made a representation to George I that the existing organizations for the administration of justice both Civil and Criminal at Bombay, Madras and Calcutta were not satisfactory, and that adequate provision should be made for the more speedy and effectual administration of justice in those places George I granted a charter in 1726 providing for the establishment or reconstitution of Municipalities at Madras, Bombay and Calcutta, and the setting up or remodelling of the Mayor's and other Courts at those places At each of these places the Mayor and nine aldermen, seven of whom were to be British subjects, sat as a Court to hear civil cases. In regard to cases whose subject matter did not exceed 1,000 pagodas, an appeal lay from these Courts to the Governor and Council, and in cases exceeding that value there was an appeal provided for the King in Council.[1] The Governor and five senior members of Council were invested with criminal jurisdiction. They functioned as justices of the peace and held quarter sessions, every three months. In 1753 another charter was granted, by which certain modifications were made in the jurisdiction exercised by the Courts constituted

[1] Mukherjee, *Indian Constitutional Documents*, Vol. I, 2nd Edition . Introduction, p. ix.

under the charter of 1726 The Mayor's Court was not to exercise jurisdiction in civil actions arising between Indian natives only, unless the parties chose to submit their disputes to its decision. A Court of Requests to try petty cases of the value not exceeding five pagodas was also constituted under the charter of 1753, in each of these three places.[1]

It is time that we should turn to an examination of the political conditions prevailing in India in the eighteenth century as that provides the key to the understanding of the process of evolution of the Company from a trading corporation into a territorial power. By the beginning of the eighteenth century, the Company had already been able to found a large number of trading settlements in the various parts of India After the death of Aurangzeb in 1707, the gradual dissolution of the Moghul Empire set in, and in the disturbed and chaotic political conditions of the time the East India Company was driven to depend on its own strong arm to afford the necessary protection to its trading stations and employees. This was also a period when the various Indian and foreign powers were trying to establish territorial supremacy in different parts of India. In the south of India the French, through the instrumentality of Dupleix, the brilliant French Governor of Pondicherry, were rapidly trying to extend their influence over the neighbouring Indian States. The rivalry engendered by this policy brought the French into conflict with the English in the south ; and in the wars that ensued between them, the English were able to deal a decisive blow at the French power and establish their political supremacy in the south of India. The defeat of Suraj-ud-Dowla by Clive in 1757 at the battle of Plassey was a turning point in the fortunes of the East India Company in Bengal and paved the way for the establishment of English supremacy in that region At the battle of Buxar in 1764 the English forces under the command of Major Munro gained a decisive victory over the combined forces of Mir Khasim and the Nawab Vazir of Oudh. The victory gained by the English at Plassey and Buxar led to the military subjugation of Bengal and Bihar. The grant of the Diwani by the Moghul Emperor Sha Alam in 1765 furnished a *de jure* basis for the exercise of British authority in Bengal, Behar and Orissa, an authority which had already been established *de facto* there, some time before.

[1] Mukherjee, *Indian Constitutional Documents*, Vol I, 2nd Edition : Introduction, p. ix

For many years Parliament took no active interest in the affairs of the East India Company But it could no longer afford to do so. We have seen how the Company was able to acquire territorial possessions in the various parts of India This indeed attracted the attention of the English statesmen at home and naturally the implications of this position had to be thought out by them in all its bearings. Again, the enormous fortunes which several of the Company's merchants were able to amass in India, and the overbearing attitude which they adopted in their social intercourse with their fellow countrymen, lent a piquancy to the situation. Stories began to be told that the merchants of the Company resorted to questionable expedients to enrich themselves. The result was that the House of Commons, on November 25, 1766, appointed a Committee of the whole House to inquire into the state and condition of the East India Company. The labours of this Committee led to the passing of no less than five Parliamentary enactments with reference to Indian affairs in the year 1767 alone But the Act which marks a conspicuous landmark in Indo-British history is the well-known Regulating Act of 1773 associated with the name of Lord North; and with this enactment we pass on to the second period of our survey.

Before examining the provisions of this important Act, it is necessary to give a brief résumé of the principal features of the administrative organization of the territories of the East India Company just prior to the introduction of this enactment. The Company's territories had been constituted into three administrative divisions or presidencies, namely, the Presidencies of Madras, Bombay and Bengal Each of these presidencies was presided over by a Governor who conducted its administration with the help of a Council. But the presidencies were independent units, not subject to any central control in India. The personnel of the Governor's Council in each presidency was drawn from the officers who were in charge of the subordinate factories. These members were usually absent from headquarters. In view of the fact that the administration of each of these presidencies was vested in the President and Council jointly, and no business of any importance pertaining to its government could be transacted without the assent of a majority of the Council, the administrative machinery became difficult to work. In the presidency towns the courts set up in pursuance of the charters of 1726 and 1753 attended to both civil and criminal

cases. So far as the presidency towns were concerned, there was nothing to complain of in the matter of judicial administration. But no attempts had been made to attend to the satisfactory organization of the judicial machinery in the interior of the presidencies.

When Warren Hastings became the Governor of Bengal he assiduously applied himself to the task of organizing the administration of justice in the interior of Bengal. The Court of Directors had also realized the seriousness of the situation arising not only from the absence of a proper revenue organization to safeguard the interests of revenue, but also from the inadequacy and inefficiency of the existing machinery to deal with civil and criminal cases in the interior of Bengal. They accordingly directed the Governor of Bengal and four members of his Council to formulate a scheme whereby the revenue and judicial departments may be placed on an efficient basis The report sent by this Committee became the foundation of the future revenue and judicial systems in Bengal In accordance with the proposals sent by Warren Hastings and his Council, which were approved by the Court of Directors, a Board of Revenue consisting of the Governor and members of his Council was created. Each revenue unit was placed in charge of a collector. In each collectorate, a Civil Court called the Diwani Adalat, presided over by the collector, was established The Foujdari Adalat or Criminal Court attended to the criminal work in the district. At the capital the Sadr Diwani Adalat and Sadr Nizamat Adalat functioned as superior tribunals. These Courts were in theory the courts of the Moghul Emperor and not of the British Crown, the reason being that the East India Company were only the Diwans or the revenue administrators of these provinces under a grant made by the Moghul Emperor.

Now a few words may be said of the corruption that was so largely prevalent among the officers of the Company at this time. It is true that the Company allowed to its servants comparatively small salaries. But they more than made up for the Company's parsimony in other ways. They traded on their own private account and built up handsome fortunes. The practice of extorting bribes by the Company's officers whenever they happened to deal with the Princes and natives of Bengal was so widely prevalent that it became nothing short of a public scandal. The Regulating Act passed in 1773 tried to combat both these evils.

The East India Company Act of 1773, which was called "An act for establishing certain Regulations for the better management of the affairs of the East India Company as well in India as in Europe," forms a detailed code of provisions for the administration of the Company's Indian territories. This act marks the first direct intervention of Parliament in Indian affairs. The following are some of the more important provisions of the Regulating Act: (1) A Governor-General and four counsellors were to be appointed to administer the Presidency of Fort William in Bengal. (2) The Governor-General and Council were bound to act upon every question in accordance with the opinion of the majority present at the meetings of the Council. In case the Council was equally divided upon any question the Governor-General or, in his absence, the eldest counsellor present was to have a casting vote. (3) The presidency of Bengal became the premier presidency. The Governor-General and Council were given the general power of superintendence and control over the presidencies of Madras, Bombay and Bencoolen in Sumatra (which was later on given over to the Dutch in exchange for Malacca and Dutch settlements in India). The subordinate presidencies were expressly forbidden to commence hostilities or to negotiate or conclude peace with any Indian Princes or Powers, without the previous consent of the Governor-General in council unless, in a case of imminent necessity when to postpone such hostilities or peace until the orders of the Governor-General and Council arrived, would be definitely dangerous. (4) Warren Hastings was appointed the first Governor-General. John Clavering, George Monson, Richard Barwell, and Philip Francis were appointed the first four counsellers. These persons were appointed by name in the Act itself. (5) The Act authorized His Majesty to establish by charter a supreme Court of Judicature at Fort William in Bengal, consisting of a Chief Justice and three other judges, who were to be barristers in England or Ireland, of not less than five years' standing, and who were to be named from time to time by His Majesty, his heirs and successors. (6) The Governor-General and Council were required to pay due obedience to the orders issued by the Court of Directors and " to correspond, from time to time, and constantly and diligently transmit to the said court an exact particular of all advices or intelligence, and of all transactions and matters whatsoever, that shall come to their knowledge, relating to the government, commerce, revenues, or interest, of the said

United Company." (7) The Governor-General and Council were empowered, from time to time, " to make and issue such rules, ordinances, and regulations, for the good order and civil government of the said United Company's Settlement at Fort William aforesaid and other factories and places subordinate, or to be subordinate thereto, as shall be deemed just and reasonable (such rules, ordinances, and regulations, not being repugnant to the laws of the realm) and to set, impose, inflict, and levy, reasonable fines and forfeitures for the breach or non-observance of such rules, ordinances and regulations " These rules, ordinances and regulations were required to be duly registered and published in the Supreme Court of Judicature to be valid and acquire legal force. (8) The acceptance of presents, or gifts, in any form whatsoever by the Governor-General, the members of his Council and the Judges of the Supreme Court was forbidden. They were also forbidden to carry on any dealing or transactions by way of traffic or commerce of any kind whatsoever. (9) The jurisdiction of the Supreme Court was defined in the charter, but not clearly The clauses relating to this matter gave rise to a good deal of doubt and difficulty in the years that followed.

The provisions of the Regulating Act disclosed serious shortcomings when put in operation. The Act had set up two independent and supreme authorities in India, viz., the Governor-General and his Council and the Supreme Court. The Act was silent as to what should happen when conflicts arose between the two, as it did happen in actual practice. The clauses relating to the nature and extent of the jurisdiction of the Supreme Court were not drawn up in precise terms. The extent of the authority exercisable by the Governor-General and Council was not defined accurately. The result was that the Supreme Court came into conflict with the executive on several matters.

An amending Act passed in 1781 settled some of the difficulties which had arisen in connection with certain provisions of the Regulating Act. The following are some of the main provisions of this Act : (1) The Governor-General and Council of Bengal were definitely placed beyond the jurisdiction of the Supreme Court for anything counselled, ordered, or done by them in their public capacity. (2) The Supreme Court was not allowed to exercise any jurisdiction pertaining to revenue or to any act done in the collection thereof, according to the usage and practice of the country or in pursuance of any

regulations made by the Governor-General and Council. (3) The Supreme Court was to have jurisdiction over all the inhabitants of Calcutta, " provided that their inheritance and succession to lands, rents, and goods, and all matters of contract and dealing between party and party, shall be determined in the case of Mahomedans, by the laws and usages of Mahomedans, and in the case of Gentus by the laws and usages of the Gentus ; and where only one of the party shall be a Mahomedan or a Gentu by the laws and usages of the defendant." (4) The powers of the Governor-General and Council to exercise appellate jurisdiction over country cases were recognized and confirmed (5) The Act also empowered the Governor-General and Council to frame regulations from time to time " for the provincial courts and councils " Copies of such regulations had to be forwarded to the Court of Directors and to the Secretary of State. The King in Council could disallow or amend such regulations ; but they were to remain in force unless disallowed within two years.

The next important piece of Parliamentary legislation relating to India was Pitt's East India Company Act of 1784. The main provisions of this Act are the following· (1) The Act created a Board of six Commissioners to be called "Commissioners for the affairs of India," but more popularly known as the Board of Control Out of the six Commissioners, all of whom were required to be members of His Majesty's Privy Council, one had to be one of His Majesty's principal Secretaries of State for the time being, and the second the Chancellor of the Exchequer, for the time being. (2) This Board of Commissioners were to be invested with " the superintendence and control over all the British territorial possessions in the East Indies, and over the affairs of the United Company of Merchants trading thereto." (3) The quorum of this body was fixed at not less than three. Three or more of the said Commissioners, could, therefore, execute the several powers which were vested in the Board by the provisions of this or any other Act. (4) The Secretary of State, and in his absence, the Chancellor of Exchequer, and in the absence of both of them, the senior of the other Commissioners, was to preside at, and be the President of the Board. When the Commissioners were equally divided on any matter, the President was to have " two voices or the casting vote." (5) The Board was fully authorized and empowered from time to time " to superintend, direct, and control, all acts, operations, and concerns which in any wise relate to the civil or military

Government of the British territorial possessions in the East Indies." (6) The proceedings of the Board were required to be entered in proper books. (7) The members of the Board were to have free access to " all papers and muniments of the said United Company " and be entitled to ask for and be furnished with such extracts or copies thereof as they might require. (8) The Board of Control might approve, disapprove or modify the dispatches proposed to be sent by the Directors in relation to the civil or military government and revenues of the British territorial possessions in the East Indies, and might require the Directors to send out the dispatches as modified by them, and also to send their own dispatches in case the Directors neglected or delayed in carrying out the instructions of the Board. (9) A small committee of the Court of Directors consisting of not more than three members was required to be appointed by the Court of Directors to form a secret committee. In cases, in which the Board of Commissioners were of opinion " that the subject matter of any of their deliberations concerning the levying of war or the making of peace, or treating or negotiating with any of the native Princes or States in India, shall require secrecy," they were empowered to communicate with the Governments of the Presidencies in India through the channel of the Secret Committee of the Court of Directors (10) The number of members of the Governor-General's Council was reduced from four to three. The Commander-in-Chief of the Company's forces, who was to be a member of the Council was to have rank and precedence next after the Governor-General. (11) The Governments of each of the Presidencies of Madras and Bombay was to consist of a Governor and three counsellors, one of whom was to be the Commander-in-Chief in that presidency. (12) The Governor-General and Council were given power and authority to superintend, control and direct the several Governments and presidencies now or hereafter to be established in regard to " all such points as relate to any transactions with the country powers, or to war or peace, or to the application of the revenues or forces of such presidencies in time of war, or any such points as shall, from time to time, be specially referred by the Court of Directors of the said Company to their general superintendence and control."

The system of double government which was established by the Act of 1784 though modified in points of detail continued to function in the main until the year 1858. The powers of the Board of Control were in practice exercised by

the Senior Commissioner of the Board other than the Secretary of State or the Chancellor of the Exchequer. This person was popularly known as the President of the Board of Control. The first person to hold that office was Henry Dundas, who afterwards became Lord Melville. He held this appointment for a period of seventeen years from 1784 to 1801. The position occupied by the President of the Board of Control in relation to Indian affairs was somewhat analogous to that of a modern Secretary of State for India, and we may, without unduly straining language, describe him as the historical forerunner of the Secretary of State for India.

In 1793, when the question of the renewal of the trading privileges of the Company came up for consideration, the Charter Act of 1793 was passed. It was mainly a measure of consolidation. The changes introduced in the governmental sphere were only of a minor character. One important change may, however, be noticed In 1786, an Act had been passed empowering the Governor-General to override the majority of his Council on his own responsibility Lord Cornwallis, when he was offered the post of Governor-General, appears to have made it a condition precedent to his acceptance of that office that the power to override his colleagues in important matters in the exercise of his discretion should be given to him. This provision had worked well and the Act of 1793 extended this power of veto to the Presidency Governors of Madras and Bombay also.

The Charter Act of 1813 deprived the Company of the monopoly of the India trade and threw it open to all British subjects. But the Company was, however, allowed to retain the monopoly of the China trade and the tea trade. While the Act continued to vest the Indian possessions and revenues in the Company for a further period of twenty years, the preamble made it clear that such vesting was " without prejudice to the undoubted sovereignty of the Crown of the United Kingdom of Great Britain and Ireland in and over the same."

The Charter Act of 1833 is the next important enactment and is termed " An Act for effecting an arrangement with the East India Company, and for the better government of His Majesty's Indian territories, till the thirteenth day of April one thousand eight hundred and fifty-four." The following were the main provisions of the Act : (1) While the Company was allowed to administer the Indian possessions and revenues for another period of twenty years the sovereignty of the Crown over the Indian territories was definitely

asserted in the Act. (2) The Company was deprived of the monopoly of even the China and tea trades It was called upon to wind up its commercial activities with despatch. (3) The Act declared that the superintendence, direction and control of the whole civil and military government of all the territories and revenues should be vested in a Governor-General and Counsellors to be thereafter known as "The Governor-General of India in Council" (4) The Governor-General of Fort William in Bengal became "the Governor General of India in Council" The membership of the Governor-General's Council was increased from three to four. The fourth member was to be in charge of the Law department. He was however entitled to sit and vote only at meetings of the Council convened for the purpose of making laws and regulations Macaulay was the first occupant of the office of Law Member (5) Until the present Act was passed the three presidencies were framing their own regulations, each independent of the other. This Act took away the legislative powers of the presidencies of Madras and Bombay. The Governor-General in Council became the Supreme Legislative authority in India. Henceforward the presidency Governors and their Council could only send "drafts or projects of any laws or Regulations," which they considered it expedient to be enacted for the consideration of the Governor-General in Council (6) Section 53 of the Act provided that whereas it was expedient that, "subject to such special arrangements as local circumstances may require, a general system of judicial establishment and police, to which all persons whatsoever, as well Europeans as Natives, may be subject, should be established in the said territories at an early period; and that such laws as may be applicable in common to all classes of the inhabitants of the said territories, due regard being had to the rights, feelings, and peculiar usages of the people, should be enacted, and that all laws and customs having the force of law within the same territories should be ascertained and consolidated, and, as occasion may require amended;" the Governor-General should appoint a Law Commission to formulate proposals for the overhauling of the Judicial and Police machinery and the codification and revision of the Indian law. (7) The Law Commission was to undertake a comprehensive inquiry into the jurisdiction, powers and rules of the existing Courts of Justice and police establishments, and all existing forms of judicial procedure and into the nature and operation of all laws, civil and

criminal, written or customary, in force in any part of the Indian territories, to which any inhabitants of these territories were subject, and to submit a report to the Governor-General in Council giving the result of their inquiries, and suggesting suitable alterations in respect of those matters. The first law commission, of which Macaulay was a distinguished member, was responsible for the draft of the Indian Penal Code. (8) The Act provided that, as the territories forming the Presidency of Fort William in Bengal had become too extensive, they should be divided and reconstituted into two presidencies. But this provision was never put into operation (9) The Act further provided that no native of India, nor any natural-born subject of His Majesty resident in India, shall be disabled from holding any place, office or employment under the Company by reason only of his religion, place of birth, descent, colour, or any of them.

The Charter Act of 1853 is the last of the Charter Acts This Act, while providing that the Company should continue to administer the Indian possessions, however prescribed no time limit for the exercise of that power as the earlier Charter Acts had done. The Company, the Act proceeded to state, should continue to govern the Indian territories in trust for the Crown until Parliament chose to otherwise provide The more important of the provisions of this Act are : (1) The law Member of the Governor-General's Council who, hitherto, took part in the deliberations of the Council only when legislative measures were taken into consideration, was by this Act given the right to sit and vote in the Council on all occasions as an ordinary member (2) For purposes of legislation the Governor-General's Council was augmented by the addition of certain extra members. Two of these were to be the Chief Justice of Bengal and one other judge of the Supreme Court. The local Governments were entitled to depute one member each to the Governor-General's Council. The member so deputed was required to be a person holding an appointment in the civil service of the Company and of not less than ten years' standing. (3) The sittings of the legislative council were made public. The transactions of that body were to be preserved in reports officially published. (4) The right of patronage in the making of appointments hitherto exercised by the Court of Directors was taken away and placed in the hands of the Board of Control. The Board of Control had to make appointments in accordance with regulations made in that behalf, and

the covenanted civil service was thrown open to general competition.

After the Mutiny came a great change. The rebellion having been suppressed, the Crown took over the direct responsibility for the government of India from the East India Company. The system of "double government" which had hitherto operated, of the Crown and the East India Company sharing the burdens of government, with all its complications and difficulties, was definitely done away with. The paramountcy of the British Crown over the whole of India had been placed on a permanent basis. There was no power left in India which was in a position to contest the position of the British Crown as the paramount authority. The Indian States had acknowledged at various periods prior to the Mutiny the suzerainty of the British Crown and accepted its protection.

The Act of 1858 is the next notable enactment and forms the last landmark in the second period of our survey. The important provisions of the Government of India Act, 1858, are (1) The Indian territories were hereafter to be governed by and in the name of Her Majesty. The Government of the territories in the possession of or under the government of the East India Company and all powers vested in or exercised by the Company in relation to such government on behalf of and in trust for Her Majesty were to pass on to Her Majesty. The powers of the East India Company were to cease. (2) One of the principal Secretaries of State, subject to certain conditions specified in the Act, was to perform all the duties and exercise all the powers which were hitherto being performed or exercised by the Court of Directors, or Court of Proprietors, either alone or with the sanction of the Board of Commissioners for the affairs of India, in relation to the Government and revenues of India. Power was given under this Act to appoint a fifth principal Secretary of State to be in charge of Indian affairs. (3) The Secretary of State was to have the assistance of a council of fifteen members, of whom eight were to be nominees of the Crown and seven elected by the Court of Directors. The major part of the members were required to be persons who should have served or resided in India for at least ten years. (4) The members of the Secretary of State's Council were to hold office during good behaviour; and be removable by Her Majesty upon an address of both Houses of Parliament. (5) The Council, under the direction of the Secretary of State, and subject to the provisions of the Act, was to

conduct the business transacted in the United Kingdom in relation to the Government of India and the correspondence with India. (6) The Secretary of State was to be President of the Council, with power to vote. He was to have the power to override the opinion of the majority of his council, in the exercise of his discretion except in regard to certain important matters. (7) The appointments of the Governor-General of India and the Governors of the presidencies were hitherto being made by the Court of Directors with the approbation of Her Majesty. After the passing of the Act, Her Majesty was empowered to make these appointments under the Royal Sign Manual. (8) All lands and hereditaments, monies, goods and other properties of the Company, subject to any liabilities or debts existing on them, the benefits of all contracts, covenants, engagements, etc., were to become vested in Her Majesty to be applied and disposed of subject to the provisions of the Act, for the purposes of the Government of India (9) The Secretary of State in Council with the concurrence of the majority of votes at a meeting, was to have the power to sell and dispose of real and personal estate vested for the time being in Her Majesty under the Act, to purchase lands, goods or chattels, and to raise moneys on the mortgage of such properties. (10) The expenditure of the revenues of India in India and elsewhere, was to be subject to the control of the Secretary of State in Council, and no grant or appropriation of any part of such revenues or of any other property coming into the possession of the Secretary of State in Council, was to be made, without the concurrence of a majority of votes at a meeting of the Council. (11) Any part of the revenues or monies of India as shall be remitted to Great Britain or held there to its credit was to be used for purposes of this Act (12) The Secretary of State in Council was created a quasi-corporate institution. It could sue and be sued in the name of the Secretary of State in Council. (13) All contracts, covenants, treaties and engagements made with the company were to be binding on Her Majesty. (14) All the naval and military forces of the Company were to be transferred to the service of the Crown.

Now we enter the third period of our historical survey. The first landmark in this period is the Indian Council's Act of 1861. The provisions of this Act require careful consideration as they introduced several important changes into the executive and legislative spheres. Indeed, the provisions of this Act created the framework of the internal

administration of India which endured until the inauguration of the Montagu-Chelmsford reforms in 1920. As we have already observed, under the Charter Acts of 1833 and 1853, the Supreme Legislative authority for the whole of India became vested in the Governor-General's Council. But complaints had been frequently made that a central legislative organ could not do justice to the provincial administrations because of the lack of the necessary local experience amongst its members to deal with provincial legislative measures. It was therefore considered necessary to restore to the provincial administrations the legislative powers which they had exercised prior to the charter Act of 1833. It was also realized that the time had arrived for associating the non-official Indian element with the process of legislation The changes introduced into the administrative structure by this Act were principally designed to secure these objects The following are the more important of the provisions of the Act (1) The Act of 1861 restored to the Governments of Madras and Bombay the powers of legislation, which had been taken away by the Act of 1833. But the Act made the assent of the Governor-General necessary for every law or regulation passed by the local legislature to acquire legal validity. Again, in regard to certain specified matters, the previous consent of the Governor-General was made obligatory before any legislative proposals relating to them were introduced in the local legislatures (2) The strength of the Council of the Governor-General, while functioning as a legislative body was reinforced by additional members, not less than six nor more than twelve who were to be nominated by the Governor-General and to hold office for two years. It was also prescribed by the Act that not less than one half of the persons so nominated should be non-official persons, that is to say, persons who should not be in the civil or military service of the Crown in India at the time of such nomination. (3) The Governor's councils were also similarly expanded for legislative purposes. (4) The legislative power of the Governor-General in Council was declared to extend over all persons, British or Indian, foreigners or others within the Indian territories under the dominion of Her Majesty and over all places and things in those territories, for all courts of Justice, and for all servants of the Government of India within the dominions of the Princes and States in alliance with Her Majesty. (5) The Governor-General was given power to make and promulgate ordinances for the peace and good government of the Indian

territories, such ordinances having the force of law for six months unless disallowed by Her Majesty. (6) There was no attempt made to demarcate the powers of the central and local legislatures under the Act. The Governor-General's council was competent to legislate for the whole of India; while the provincial councils were competent to legislate for their respective provinces, subject to the limitation, as has already been noticed, that in regard to certain topics the previous permission of the Governor-General was made imperative. (7) The Governor-General in Council was authorized to constitute, by the issue of a proclamation, a legislative council for Bengal, and similar legislative councils for the North-Western provinces and the Punjab. These two latter bodies were created in 1886 and 1897 respectively. (8) The Governor-General was given the power to constitute new provinces from time to time to be placed in charge of Lieutenant-Governors (9) The strength of the Governor-General's council was raised from four to five

In the year 1861, the Indian High Courts Act was passed. The Act authorized the Crown to constitute by Letters Patent High Courts of Judicature at Calcutta, Bombay and Madras. On the establishment of these Courts, the old chartered supreme courts and the Sadr Adalat Courts were to be abolished, and the powers and jurisdictions exercised by them vested in the former. Each of these High Courts was to consist of a Chief Justice and not more than fifteen puisne judges. It was prescribed by the Act that not less than one third of the entire strength of each of the High Courts including the Chief Justice was to consist of barristers, and not less than another third of Indian Civil Servants. The judges were to be appointed by and hold office during the pleasure of the Crown. The High Courts were given the power of superintendence over the subordinate courts subject to their appellate jurisdiction. The High Courts were authorized to enact rules of practice for all the subordinate courts.

Between the years 1861 and 1892 several Acts, of more or less minor importance were passed. The Indian Councils Act of 1869 enabled the Governor-General's council to pass laws for all native Indian subjects of Her Majesty in any part of the world, whether in India or out of it. An Act of 1873 dissolved the East India Company with effect from January 1, 1874. The Indian Councils Act of 1874 made provision for the appointment of a sixth member to the Governor-General's council to hold charge of Public Works. The

Royal Titles Act of 1876 was passed to enable the Queen to assume the title of Queen Empress of India.

The Indian Councils Act of 1892 is the next important enactment. This Act enlarged the size of the legislative councils and widened the range of their functions. The number of additional members of the Governor-General's council was fixed at not less than ten nor more than sixteen; while the number of the additional members of the councils of the Presidencies of Fort St. George and Bombay was fixed at not less than eight nor more than twenty. The maximum number of additional members of the Bengal legislative council and that of the North-Western Provinces council was fixed at twenty and fifteen respectively. The Governor-General in Council was empowered by the Act to make from time to time, with the approval of the Secretary of State, "regulations as to the conditions under which such nominations, or any of them, shall be made by the Governor-General, Governors, and Lieutenant-Governors respectively." By regulations made under this provision, the elective principle in the selection of members to the legislative councils, both Imperial and local, was recognized It is true that the term "election" was scrupulously avoided in the Act itself; so violent was the opposition in England to give recognition to the principle of election, even in a rudimentary form. But Lord Dufferin as Viceroy had taken a bold stand in favour of using the elective method in the selection of non-officials to the legislative councils. Lord Cross, as the Secretary of State, had rejected the proposal of the Viceroy on the ground that "it would be unwise to introduce a fundamental change of this description without much more positive evidence in its favour than was forthcoming."[1] Lord Dufferin had no doubt left India in the meanwhile. But Lord Lansdowne's Government was inclined to take a favourable view of the matter. They considered that they should not be precluded from employing some form of election where conditions justified its use, and they therefore wanted power to be given by the Act to make rules for the appointment of additional members either by way of election or otherwise. That is the origin of the clause above referred to, which empowered the Governor-General to make regulations governing the condition of nomination of members. Inasmuch as the nominations made by the recommending bodies were invariably accepted, the elective principle was recognized in substance though not

[1]Cited in *The Report on Indian Constitutional Reforms*, 1918. p 44

in form. But of the ten non-officials who were to be appointed to the Governor-General's Legislative Council under the regulations made, five were nominated on the recommendations made by the Bengal Chamber of Commerce, and the non-official members of the Legislative Councils of Madras, Bombay, Bengal and the United Provinces.[1] In the provincial councils a certain number of the non-officials were nominated on the recommendations made by bodies like municipal corporations, Universities, groups of District Boards, classes of large landholders, and associations of merchants or manufacturers. The Act further empowered the Governor-General to make rules for authorizing the discussion of the annual financial statements and the asking of questions by the members of the Governor-General's Legislative Council. Similar powers were granted to the provincial governors to make similar provisions for the provincial legislatures. But the members, however, were not to have the power to submit or propose any resolution or to divide the council, in respect of any such financial discussion, or the answer to any question put under the authority of the Act, or the rules made thereunder.

Now we arrive at the threshold of the Minto-Morley reforms. The proposals which were sponsored by Lords Minto and Morley, the Viceroy and the Secretary of State for India, respectively, eventually formed the basis for the Indian Councils Act of 1909. These reforms open a fresh chapter in the history of the political relations of Britain and India. As we shall see presently, these reforms, though in a way important, cannot be regarded as being inspired by any wide change in the British outlook towards the Indian administrative problem. They embody no new policy. In fact these reforms did no more than carry forward the process of association of Indians with legislative and administrative functions of Government which had already begun, a step further. Lord Morley in a speech which he delivered in the House of Lords on December 17, 1908, explaining the scope of the new proposals indeed admitted this, for, he said " If I were attempting to set up a Parliamentary system in India, or if it could be said that this chapter of reforms led directly or necessarily up to the establishment of a Parliamentary system of Government in India, I, for one, would have nothing at all to do with it."[2]

[1] Mukherji, *Indian Constitutional Documents*, Vol I, 2nd Edition Introduction, p xxxiv

[2] Viscount Morley : *Indian Speeches* (1907–1909), p. 91.

It is manifest from this significant utterance that Lord Morley repudiated any intention on his part to initiate by these reforms, any fundamental departure in the British policy towards Indian affairs. The old conception that the Government of India was to play the role of a benevolent despot in Indian affairs, continued to hold sway over and to inspire the policy of the prominent British statesmen of the time; and the parliamentary enactments which were placed on the Statute Book between the years 1861 and 1909 were no more than attempts to secure the consultative association of non-official Indians in the formulating of legislative measures and to create an ordered administrative machine in India. But there was no idea on the part of those who were in charge of Indian affairs in England to create conditions in India favourable for the future transfer of administrative power to the hands of persons drawn from and responsible to the elected Indian legislatures. After all, resonsibility of the executive to an elected legislature is of the essence of popular government, and the first stage—though in a very rudimentary form—in the process of the establishment of self-government in India was initiated by the Montagu-Chelmsford reforms An account of the genesis of these reforms and the changes wrought by it in the Indian administrative structure will be reserved for the next chapter.

Now, a few words seem necessary to explain the causes which operated in the formulation of the Minto-Morley reforms The experience which had been gathered in the working of the reforms of 1892 had established the wisdom of the step to provide opportunities for Indian non-officials to voice their views in the central and provincial legislatures; indeed, these non-officials had brought valuable suggestions and enlightened criticism into the discussions of the council chamber. Education, in the interval, had made much headway; and a growing volume of Indian opinion was anxious that Indians should take a prominent share in the administration of their country. The Russo-Japanese war of 1904–5, the Universities Act of 1905, the partition of Bengal, all these contributed their own quota to the stirring up of Indian political life. The reforms introduced by the Indian Councils Act of 1909 were designed to satisfy the political aspirations of the Indian people at that time.

We shall now consider the important changes introduced into the Indian administrative framework by the Indian Councils Act, 1909, read in conjunction with the regulations

framed under it. Among the important changes introduced into the Indian administration were the following. (1) The sizes of the various legislative councils were considerably increased. The maximum number of additional members (nominated and elected) of the Governor-General's Council was increased from sixteen to sixty. The maximum number of additional members of the Councils of Bengal, Madras and Bombay was similarly raised from twenty to fifty In the case of the United Provinces it was raised from fifteen to fifty The maximum number of additional members of the Councils of Punjab and Burma was increased from fifteen to thirty. (2) The principle of election as a method of selecting members for the various legislative councils was given statutory recognition. But the fixing of the proportion of the elected to the nominated element in the various Councils was left to regulations framed under the Act. The rules and regulations made as to elections and nominations were so framed as to obtain as far as possible a fair proportion of the different classes and interests in the various provinces. The elected portion of the Governor-General's Council was constituted of members returned by the non-official members of the provincial councils, by the landholders, Mahommedan communities in the provinces, and the chambers of commerce of Bombay and Bengal.[1] The seats thrown open for election in the provincial councils were to be filled by persons returned from constituencies of landholders, municipalities and District Boards, the Mahommedan community, Universities, chambers of commerce and special interests like the tea interests in Assam and the planting community in Madras.[2] The regulations framed under the Act also provided for a non-official majority in the provincial councils. But in the Governor-General's Council an official majority was retained. (3) Under the Indian Councils Act of 1892, the members were prohibited from moving resolutions or to divide the Council on the budget. This ban was removed by this Act. Even in regard to matters of general public importance, the Councils were given power to move resolutions and to divide the house. But these resolutions though passed by the house were only recommendatory in character; the executive government was free to accept or reject the principles involved in these resolutions. The right of putting questions to Government was enlarged by permitting the member who had put the

[1] Mukherji, *Indian Constitutional Documents*, Vol I, 2nd Edition Introduction, p. xxxix.

[2] *Ibid*

original question to put a supplementary question. (4) The Governor-General as well as the provincial Governors were required to appoint Vice-Presidents from among the members of their Council to transact business on their behalf, during their absence. (5) The number of ordinary members of the executive councils of Madras and Bombay was increased from two to four, of whom two at least were to be persons who at the time of their appointment, had been in the service of the Crown in India for at least twelve years. (6) The Act also empowered the Governor-General in Council with the approval of the Secretary of State, by a proclamation to create executive councils to assist Lieutenant Governors in the executive government of the provinces Except in the case of Bengal, the draft of the proposed proclamation had to be laid before both Houses of Parliament for not less than sixty days during the session of Parliament, such proclamation being subject to disallowance if, within that period, either House moved an address to that effect.

There is one matter of some importance, which requires mention. Lord Morley in the course of a speech which he delivered in the House of Lords on December 17, 1908, on the proposed reforms, referred to the question of the appointment of an Indian Member on the Governor-General's executive Council. In fact there was no statutory bar to the making of such an appointment Lord Morley definitely stated that if during his tenure of office a vacancy arose on the executive Council of the Governor-General, he would recommend to the King that an Indian might be appointed. Mr. Sinha (later Lord Sinha) was appointed to occupy the post of the Law Member of the Governor-General's Executive Council in March, 1909. Some time later Indian members were appointed to the Governors' Executive Councils of Madras, Bombay, Bengal and Behar and Orissa.

On December 12, 1911, King George V and Queen Mary presided over the Coronation Durbar at Delhi. This was an occasion of more than ordinary importance, as it was the first time a reigning sovereign of England had come out to India. On that occasion it was announced that the seat of Government had been transferred from Calcutta to Delhi. The change in the capital of India had been prompted by certain considerations of policy. The correspondence which passed between the Viceroy and the Secretary of State in that connection, explained the reasons which had operated in the decision to transfer the capital. The Government of India's

dispatch dated August 25, 1911, visualized a time in the near future when India would consist of provinces, enjoying a large measure of self-government, with a strong central government above them; and in that dispensation it was considered appropriate that the seat of the Central Government should be located at a place where the influence of the provincial administrations would not be felt. The city of Delhi and a portion of the Delhi district was constituted in 1912 into a separate unit administered by a Chief Commissioner. In pursuance of the announcement made by His Majesty the King at the Coronation Durbar at Delhi, the new province of Behar, Orissa and Chota Nagpur was constituted under a Lieutenant Governor with its headquarters at Patna; Assam which formed a portion of Eastern Bengal was detached from it and formed into a new province under a Chief Commissioner, while the five Bengali speaking divisions of the old province of Bengal became the presidency of Bengal administered by a Governor in Council. All these changes were effected in the year 1912

The Government of India Act, 1915, consolidated the various Acts relating to the Government of India. The Government of India Act, 1916, was passed to amend the consolidated Act, in certain respects

The Minto-Morley reforms which were ushered into existence by its sponsors, as a measure which would go far to satisfy the aspirations of the Indian people for a long time to come, were soon found to have outlived their period of usefulness. The next chapter will be devoted to a consideration of the impulses that were at work to bring about a change in the Indian Constitutional structure, and to a description of the main features of the Constitutional framework of British India, after the passing of the Montagu-Chelmsford reforms.

CHAPTER II

THE MONTAGU-CHELMSFORD REFORMS

THE changes introduced into the Indian Constitutional structure by the Minto-Morley reforms, as we have observed, broke no fresh ground in constitutional experimentation These reforms were no more than a stage in the evolutionary process of a system which had been in existence for a long time ; a system the cardinal feature of which was the direct rule of His Majesty's Government exercised through the Secretary of State and a hierarchy of British Officials in India. It is true, that there was a steady growth in the influence of Indian opinion on both legislation as well as administration ; and, it is also a fact, that Indians were recruited to superior appointments in increasing numbers. But, there was no attempt made to introduce responsible government even over a small range of administration ; the first steps in this direction were taken by the reforms inaugurated in 1919 by the Government of India Act, passed during that year.

Though the idea of a Parliamentary system of Government as the goal of Indian Constitutional progress, was not seriously entertained by responsible British statesmen, it was, nevertheless, realized that the direction in which reforms should proceed in the coming years was in a steadily increasing measure of decentralization of the administrative machinery In fact, the Government of India despatch dated August 25, 1911, addressed to the Secretary of State for India, in regard to the proposed transfer of the capital from Calcutta to Delhi foreshadowed the coming of a time in the near future, when Indians would have to be allowed a larger share in the government of their own country than they were so far allowed, and emphasized that the only practicable way in which that could be done was " gradually to give the provinces a larger measure of self-government, until at last India would consist of a number of administrations, autonomous in all provincial affairs, with the Government of India above them all and possessing power to interfere in cases of misgovernment, but ordinarily restricting their functions to matters of Imperial concern." This passage in the Government of India despatch was interpreted by a section of the politicians as indicating that Great Britain would so shape her future policy as to make Indian Constitutional advance closely follow the

lines of colonial self-government. But the correctness of this construction was strongly repudiated by Lord Crew, the then Secretary of State for India. But, in politics, what may be the dangerous heresies of to-day, become the commonplaces of tomorrow.

India was slowly evolving a national consciousness. Education had made rapid strides of progress. People were becoming increasingly dissatisfied with the existing autocracy; they wanted sufficient power in their own hands to mould their own destinies. The Great War gave an added impetus to national aspirations.

On the outbreak of hostilities, India made the cause of Great Britain and her allies her own and poured forth men and money unceasingly in the prosecution of a war, ostensibly fought to preserve the rights of the smaller nations, and to make the world safe for democracy The Indian regiments fought with conspicuous gallantry in the various theatres of the War and won the admiration of the world It was, therefore, natural for India to feel that she had increased her stature among the nations of the world and that a position worthy of her recent achievements and her age-long civilization and culture should be given to her in the comity of nations constituting the British Commonwealth The speeches made by the British and allied statesmen at the time, that the War was being fought in the cause of justice and liberty and in order to ensure the right of self-determination for all nations, had a moral for India also. It was only natural, under these circumstances, for India to feel that if these declarations were inspired by genuine feelings and were not the momentary effusions of the moment to enlist moral and material support for their cause, then she, in common with the other nations of the world, should have full liberty to order her own affairs as she pleased. It was under the stress of these and other factors that Mr. Edwin Montagu, the Secretary of State for India, made his famous pronouncement on British policy towards India, in the House of Commons on August 20, 1917.

Mr. Edwin Montagu arrived in India early in November 1917. He went on an extensive tour throughout India, interviewed representatives of all classes and interests, held consultations with official spokesmen, all these with a view to formulate proposals for a scheme of reforms, designed to give effect to the principles enunciated in the famous declaration of his. The result of the arduous labours which Mr. Montagu undertook in collaboration with the Viceroy of India, Lord Chelmsford,

became crystallized in the famous report on Indian Constitutional reform, bearing their joint names. The proposals made in that report became the basis of the Government of India Act, 1919.

I now proceed to give an account of the Indian political system after the passing of the Government of India Act, 1919. Whenever references are made in the course of this chapter to appropriate provisions of the Government of India Act, it may be understood that these have reference to the sections of the last consolidating enactment. (The title of this Act is The Government of India Act, without date, 5 and 6 George V, c. 61, 6 and 7 George V, c. 37 and 9 and 10 George V, c. 101.)

(a) *The Crown*

Section I of the Government of India Act provides that the territories for the time being vested in His Majesty in India, are governed by and in the name of His Majesty, the King Emperor of India. The Act reserves certain powers to the Crown. Some of the more important of them are given here. The Crown appoints the Governor-General (Section 34), Governors (Section 46), members of the Governor-General's Executive Council (Section 36) and also the members of the Governor's Executive Council (Section 47). The Crown also appoints the permanent Chief Justices and Judges of the High Court (Section 101), and the Advocates-General for the Presidencies of Bengal, Madras and Bombay (Section 114). Under Section 67 B(2), an act which has been certified by the Governor-General cannot come into effect until His Majesty has given his assent to it. Under Section 68 the Governor-General may reserve any bill which has been passed by both chambers of the Indian legislature for the signification of His Majesty's pleasure; in that event the bill cannot become an act until His Majesty has given his assent to the same. Sections 69 and 82 (1) deal with His Majesty's power to disallow the Acts of the Indian Legislatures, central and provincial. With regard to certain ecclesiastical matters, the Crown is given certain powers (Section 115, 117, 118, 120 and 121).

(b) *The Secretary of State and his Council*

The office of the Secretary of State for India and the Council of India were first created by the Government of India Act, 1858, which vested in them the authority formerly exercised by the Board of Control under Pitt's Act of 1784, as well as the

functions performed by the Court of Directors of the East India Company. The Secretary of State for India, as a member of the cabinet, is held accountable to Parliament for the discharge of all those powers and responsibilities which the Act vests in him, in relation to Indian affairs. Under Section 2 Sub-section (2) of the Act the Secretary of State has powers of superintendence, direction and control over all acts, operations and concerns which relate to the government or revenues of India ; and these powers are controlled by the other provisions of the Act and the rules framed thereunder. Under Section 33 of the Act it has been expressly laid down, that the Governor-General-in-Council, who is to have the superintendence, direction and control of the civil as well as the military government of India, must pay due obedience to all such orders as the Secretary of State may issue to him. Every local government, as Section 45 provides, is, in its turn subject, in all matters relating to the government of the province, to the superintendence, direction and control of the Governor-General. Thus a regular chain of responsibility extending from the Secretary of State for India downwards is created As we shall see presently, the Secretary of State does not bear the burden of responsibility all alone ; he shares it, however, in certain matters, with the Council of India.

Though certain limitations on the powers of the Secretary of State for India have been imposed both by the provisions of the Act and the rules framed thereunder, the powers which are actually exercised by him in relation to Indian affairs are both wide and important. So extensive and important is this authority, that one might well be tempted to say, that the Government of India enjoys no very real measure of autonomy. Apart from the specific powers vested in him by the statute, there is a wide field of authority resting upon the general power of superintendence and control and regulated by practice and usage, which is exercised by him in relation to the Indian administration. In view of the existence of this general supervisory power of the Secretary of State, it is impossible for the Government of India to take any final decision upon any measure of consequence, without reference to that authority.

Now we pass on to the consideration of the more important of the provisions, which relate to the Secretary of State and the Council of India.

The Council is to consist of from eight to twelve members, appointed by the Secretary of State, and holding office for a term of five years. The Act prescribes that one half of the

members must have had recent experience of India, that is to say, they must have served or resided in India for at least ten years, and must have not last left India more than five years prior to the date of their appointment. A member of this Council can be removed from office by His Majesty on an address presented by both Houses of Parliament. The powers which are required to be exercised by the Secretary of State in Council and all powers of the Council of India can only be exercised at meetings of the Council, the Secretary of State being authorized to fix the quorum of members to be present by means of general directions Except in regard to matters, with respect to which a majority of votes is declared to be necessary under the provisions of the Act, the Secretary of State when he is present at a meeting, is free to act as he thinks fit, in case of any difference of opinion

The Council exercises the powers and performs the functions which are set out in certain sections of Parts II and III of the Act The main functions performed by this body may be summarized in the following way. The Council shares with the Secretary of State the responsibility of control over the expenditure of the revenues of India (Section 21) , for the sale, transfer, or purchase of any stock, or the receipt of dividends on securities (Section 24) , and the disposal of all securities held by or lodged in the Bank of England for, or on account, or on behalf of the Secretary of State in Council (Section 25) ; the disposal of any real or personal estate for the time being vested in His Majesty for the specific purpose of the government of India as well as the raising of money on any such property by mortgage (Section 28) ; and the entering into of contracts (Section 29) and the institution or the defending of suits (Section 32).

(c) *The Government of India*

(i) THE EXECUTIVE

Under Section 33 of the Government of India Act, the superintendence, direction and control of the civil and military government of India is, subject to the provisions of the Act and the rules framed thereunder, vested in the Governor-General in Council, who is required to pay due obedience to all such orders as he may receive from the Secretary of State The Governor-General is appointed by His Majesty, by warrant under the Royal Sign Manual. The Act makes no specific provision for the appointment of a Commander-in-Chief in India, though the terms of Section 37 for instance imply the existence of such a

functionary. It provides that if the Commander-in-Chief of His Majesty's forces is a member of the Governor-General's Executive Council, he shall have rank and precedence next after the Governor-General The Act provides that the members of the Executive Council of the Governor-General shall be appointed by His Majesty the King by warrant under the Royal Sign Manual. The Act leaves the number of members of the Governor-General's executive Council to be fixed at the discretion of His Majesty. But of the ordinary members three at least must have been in the service of the Crown in India for at least ten years, one a barrister of England or Ireland or a member of the Faculty of Advocates of Scotland or a pleader of a High Court of not less than ten years' standing (Section 36, Sub-Sections 1 to 3). There are six ordinary members. Each is in charge of one of the following groups of departments of Government, namely, Home, Finance, Law, Commerce and Railways, Industries and Labour and Education, Health and Lands The portfolios held by the members of the Executive Council are, however, subject to alteration The Governor-General is the President of the Executive Council. He presides over the meetings of his Council and in his absence the Vice-President, who is nominated for that office by him from among the members of his Council, takes the Chair. The Governor-General is bound by the opinion of the majority of his executive council and in case the members are equally divided on any matter, the Governor-General or other person presiding has a second or casting vote But in case of any measure brought before his Council whereby the safety, tranquillity or interests of British India are affected, the Governor-General has authority to override his Council, though in such a case any two of the dissentient members may ask for the matter being referred to the Secretary of State (Section 41) It need hardly be observed that the Executive Council bears no analogy whatsoever to a cabinet in a self-governing country. Unlike the members of such a cabinet, who belong generally to the same political persuasion, the members of the Governor-General's Council are persons holding widely divergent views and also drawn from different sources. Some are officials ; the others are selected from the ranks of the non-officials. Again, the Executive Council is irremovable and in no way responsible to the Legislature.

(ii) THE INDIAN LEGISLATURE

The Indian Legislature consists of the Governor-General and two chambers, the Council of State and the Legislative

Assembly. Ordinarily no Bill can be deemed to have been passed by the Indian Legislature unless it has been agreed to by both the Chambers, either without amendment or with such amendments only as may have been agreed to by both the Houses (Section 63). The Council of State is to consist of not more than sixty members, nominated, elected and official. Of these, not more than twenty may be officials The Governor General has the power to appoint one of the members of the Council of State as its president. The strength of the Legislative Assembly is fixed by Section 63 B at one hundred and forty, of whom the non-elected portion shall be forty, and of these, twenty-six shall be official members. The Governor-General has the right of addressing either of the two chambers. Provision has been made for a president of the Legislative Assembly who shall, for the first four years, be a person appointed by the Governor-General and thereafter be a member elected by the Assembly and approved by the Governor-General (Section 63 C). There is also provision made for a Deputy President, elected by the Assembly from amongst its members, such election being approved by the Governor-General. The term of the Council of State is fixed at five years, and that of the Assembly at three years But the Governor-General has the power to dissolve either of these Chambers even before the full term has expired He has also the power to extend the normal life of the assembly or the Council of State in special circumstances. A person cannot be a member of both chambers If he is returned to both Houses, he must elect of which chamber he wishes to be a member. In regard to the franchise, a number of rules have been made.

The powers of the Indian Legislature under the Government of India Act are set out in Section 65 (1) clauses (*a*) to (*f*) The Indian Legislature has power to make laws :

(*a*) For all persons, for all Courts and for all places and things, within British India ; and

(*b*) for all subjects of His Majesty and servants of the Crown within other parts of India , and

(*c*) for all native Indian subjects of His Majesty, without and beyond as well as within British India ; and

(*d*) for the Government officers, soldiers, airmen and followers in His Majesty's Indian forces, wherever they are serving, in so far as they are not subject to the Army Act or the Air Force Act ; and

(*e*) for all persons employed or serving in or belonging to the Royal Indian Marine Service ; and

(*f*) for repealing or altering any laws which for the time being are in force in any part of British India or apply to persons for whom the Indian Legislature has power to make laws.

Sub-section (2) of Section 65 provides that the Indian Legislature has no power, without being expressly authorized by an Act of Parliament to make any law repealing or affecting (i) any Act of Parliament passed after the year 1860 and extending to British India including the Army Act, the Air Force Act and any Act amending the same; or (ii) any Act of Parliament enabling the Secretary of State in Council to raise money in the United Kingdom for the Government of India, or (iii) to make any law affecting the authority of Parliament, or any part of the unwritten laws or constitution of the United Kingdom of Great Britain and Ireland whereon may depend in any degree the allegiance of any person to the Crown of the United Kingdom, or affecting the sovereignty or dominion of the Crown over any part of British India. Section 65 Sub-section (3) provides that the Indian Legislature has also no power without the previous approval of the Secretary of State in Council, to make any law empowering any Court other than a High Court to sentence to death any of His Majesty's subjects born in Europe, or the children of such subjects, or abolishing any High Court. Under Section 67, Sub-section (2) the previous sanction of the Governor-General is necessary for the introduction into either chamber of any measure relating (*a*) to the public debt or revenues of India; or (*b*) the religion, or religious rites and usages of any class of British subjects in India, or (*c*) the discipline or maintenance of any part of His Majesty's Military, Naval or Air Forces, or (*d*) the relations of the Government with foreign Princes or States, or (*e*) any provincial subject or part of a provincial subject which has not been declared by rules made under the Act to be subject to legislation by the Indian Legislature, or (*f*) the repealing or amending of any Act of a local legislature; or (*g*) for replacing or amending any Act or ordinance made by the Governor-General.

Section 67 Sub-section (3) provides for the summoning of a joint sitting of both the Houses in the event of any disagreement between the two.

With regard to the provisions regarding the Indian budget, the following points call for notice. The annual estimates and expenditure are laid in the form of a statement before both the chambers but no proposal for the appropriation of any revenue or moneys for any purpose can be made except upon the recommendation of the Governor-General (Section 67 A (1) and

(2)). Certain heads of expenditure are votable ; but others not. Among the protected heads of expenditure are (i) interest and sinking fund charges on loans, (ii) expenditure of which the amount is prescribed by or under any law, (iii) salaries and pensions of persons appointed by or with the approval of His Majesty or by the Secretary of State in Council, (iv) salaries of Chief Commissioners and Judicial Commissioners, and (v) expenditure classified by the order of the Governor-General in Council as (*a*) ecclesiastical, (*b*) political, (*c*) defence. The Governor-General may restore any demand not assented to by the Legislative Assembly.

The power of certification is granted to the Governor-General under two sections, namely, Sections 67 and 67 B. Under Sub-section (2 a) of Section 67, where in either chamber of the Indian Legislature any Bill has been introduced, or is proposed to be introduced, or any amendment to a bill is moved, or is proposed to be moved, the Governor-General might certify that the Bill, or any clause thereof, or the amendment, affects the safety or tranquillity of British India, or any part thereof, and may direct that no proceedings, or that no further proceedings, shall be taken by the chamber in relation to the Bill, clause, or amendment. This is a negative or what has been termed a preventive power. But there is also a positive power ; for, under Section 67 B, where either chamber of the Legislature has refused leave to introduce, or has failed to pass in a form recommended by the Governor-General, any Bill, he is empowered to certify that the Bill is essential for the safety, tranquillity or interests of British India, and the said Bill will become law, after the procedure prescribed in that section is followed.

There is one very important topic which remains to be considered The Act itself does not enable us to say what are the powers assigned to the central and provincial governments, in the legislative, administrative and financial spheres. The demarcation of powers has been carried out by what are called the devolution rules framed under the authority given under Section 45 A of the Government of India Act. This is a very important section and among other things provides for rules being made for (*a*) the classification of subjects in relation to the functions of government, as central and provincial subjects, for the purposes of distinguishing the functions of local governments and local legislatures from the functions of the Governor-General in Council and the Indian Legislature ; (*b*) for the devolution of authority in respect of provincial subjects to

local governments and for the allocation of revenues or other moneys to those governments, (*c*) for the use being made by the Governor-General in Council of the agency of local governments in relation to central subjects and to determine the financial conditions of such agency; (*d*) to demarcate among the provincial subjects those subjects (called transferred subjects) which the Governor has to administer acting with ministers appointed under the Act, as also for the allocation of moneys for such administration. Power is also given under this section to fix the contributions payable by the provincial governments to the Central Exchequer. The classification of subjects into "central subjects" and "provincial subjects" has been carried out, under the devolution rules; and the schedule to Rule 3 of these rules contains the full list of subjects classified as central and provincial. There is one provision in this classification which requires special mention. Any subject not included among provincial subjects is central; in other words the residue not allocated between the two Governments is reserved to the centre as in the Canadian Constitution. But the federal analogy of delimitation of powers with a federal court interpreting the fields of activity earmarked for the centre and provinces cannot be applied to this classification. I shall presently mention the reasons. But before doing so, certain general points may be noted. In classifying the subjects into central and provincial, the general principle followed is that where extra-provincial interests come in, the subject is allotted to the centre, while, where local interests predominate, the subject is given to the provinces. In accordance with this principle, defence, foreign affairs, railways, customs and tariffs, relations with States in India, post and telegraphs, income tax, currency and coinage, public debt of India, commerce and shipping, civil law including laws regarding status, property, civil rights and liabilities and civil procedure, criminal law and procedure, the Indian Audit Department, are among the principal subjects allotted to the centre. While the provinces are given subjects like local self-government, medical administration and public health, education (with some reservations), public works and irrigation, land revenue administration, famine relief, agriculture, forests, police, prisons and administration of justice. It may also be observed that the subjects assigned to the provinces may be considered as so classified both for purposes of administration and for purposes of legislation. But, notwithstanding this classification, theoretically the Indian legislature remains

supreme and competent to legislate over the whole field. Moreover, no question of the validity of any piece of legislation could be raised in any legal proceeding on the ground that it had not been passed by the proper legislature. Section 84 (2) of the Government of India Act makes these points quite clear. Again under Section 80 A (3) the local legislature cannot legislate in respect of certain subjects enumerated therein without the previous sanction of the Governor-General. But here again, no court of law can call into question the validity of any legislative measure, on the ground of want of previous consent of the Governor-General, as such defect could be cured by obtaining such assent subsequently. The previous sanction of the Governor-General is necessary for the central legislature to trench upon the field allotted to the provinces (*vide* Section 67 (2) (i) and (ii)) So that these provisions show clearly, that there is no place for a court of law to keep the central and provincial administrations within the spheres marked out to them In fact the allocation of powers is an allocation made as a matter of convenience; theoretically at any rate the central legislature continues supreme. The Constitution of British India even after the changes introduced into it by the Government of India Act, 1919, continues to be that of a unitary State.

(*d*) *The Governors' Provinces*

(1) THE EXECUTIVE

There are ten units of administration known as the "Governors' provinces" namely the three presidencies of Bengal, Madras and Bombay and the provinces of the Punjab, Bihar and Orissa, Assam, the United Provinces, Central Provinces, the North West Frontier Province and Burma. Each is administered by a Governor with the assistance of an Executive Council and a body of Ministers drawn from the local legislatures. The Governor in Council administers the reserved subjects, while the Governor acting with the Ministers administers the transferred subjects. It may be mentioned that, in the list of subjects allotted to the provinces, certain subjects are classified as "reserved" and certain others "transferred." But the subjects known as "transferred subjects" are not uniform in all the provinces. It is, however, unnecessary to go into the details of these variations as between one province and another The most important of the transferred subjects in all the provinces are local self-government, education, (subject

to certain exceptions), public health, sanitation and medical administration, agriculture and fisheries, co-operation, industries and excise so far as alcoholic liquor and intoxicating drugs are concerned but excluding opium Forestry is a transferred subject in certain provinces and in others not Among the important reserved subjects are, irrigation and canals, land revenue administration, famine relief, administration of justice, police, prisons, borrowing of money on the credit of the province, factory inspection and settlement of labour disputes The scheme of the Montagu-Chelmsford reforms was that in each province, Government should consist of two separate sections The first section was to consist of the Governor and his Executive Council and the second the Governor and the Ministers. The members of the Executive Council were either officials drawn mostly from the ranks of the India Civil Service or non-officials specially appointed. The Ministers were chosen by the Governor from the ranks of the elected members of the Legislature. The Governor in Council was to have charge of the reserved subjects. The departments comprised in the "transferred subjects" were distributed among the Ministers. In respect of these subjects the administration was carried on by the Governor acting with the Ministers This system of division of the functions of government goes by the name of dyarchy Under Section 52 (3), in relation to the transferred subjects, the Governor is required to be guided by the advice of his Ministers unless he sees sufficient cause to dissent from their opinion and act in his discretion. In regard to the joint deliberation of the two halves of Government, the Act itself makes no specific provision, though the joint parliamentary committee attached considerable importance to joint meetings in regard to "a large category of business of the character which would naturally be the subject of Cabinet consultation." But, in actual working, the practice has not been uniform in all the provinces. One of the strongest criticisms levelled against the system of dyarchy is, that the activities of government cannot be compartmentalized as various important matters impinge upon the activities of more than one government department. Again, though the dyarchical form of government, even as conceived by its authors involved joint deliberation, there was no question of joint responsibility for the decisions taken by the two halves, although joint responsibility is of the very essence of cabinet government.

Under Section 45 of the Act, subject to the provisions of the Act and rules made thereunder every local government was

required to obey the orders of the Governor-General in Council, and keep him constantly and diligently informed of its proceedings and of all matters which ought, in its opinion, to be reported to him, or as to which he required information and further every local government was to be under the superintendence, direction and control of the Governor-General in Council in all matters relating to the government of its province. This provision clearly brings out the essentially subordinate character of the local governments to the central government and shows that the Indian Constitution even after the Government of India Act, 1919, was passed continued to be unitary.

(II) THE LOCAL LEGISLATURES

Under Section 72 A of the Government of India Act, every Governor's Province is provided with a Legislative Council, which shall consist of the members of the Executive Council and of the members nominated or elected as provided by the Act. The number of members of the several legislative councils varies from province to province; Bengal has the largest number, namely 125; Madras and the United Provinces 118 each; Bombay 111, Bihar and Orissa 98; Punjab 83; Central Provinces 70 and Assam 53 (*vide* the First Schedule to the Act) The Act prescribes that not more than twenty per cent of the members of each council shall be officials, while at least seventy per cent. shall be elected (Section 72 A (2)) The normal life of a Legislative Council is three years (Section 72 B). The powers of the Governor in regard to the dissolution of the Council before the expiry of its normal term, the summoning of the next Council and its adjournment, are similar to those of the Governor-General in relation to the Indian Legislature, except in one respect namely that he has no authority to extend the period of his Council for more than one year (Section 72 B (1)). The first presidents of the Legislative Councils are appointed by the Governors. But after the first four years, the Councils can elect their own presidents, though the elections have to be approved by the Governors. The procedure laid down in regard to the presentation of the estimated annual expenditure and revenue of the province, is similar to that prescribed for the Legislative Assembly. Certain heads of expenditure cannot be submitted to the vote of the Council viz., (i) Contributions payable by the local governments to the Governor-General in Council, (ii) Interest and Sinking Fund charges on loans, (iii) Expenditure of which the amount is

prescribed by or under any law, (iv) Salaries and pensions of persons appointed by or with the approval of His Majesty or by the Secretary of State in Council and (v) Salaries of Judges of the High Court of the province and of the Advocate-General (*vide* Section 72 D (3)) The Governor has the same preventive power of certification in regard to Bills affecting the safety or tranquillity of British India under Section 72 D (5) as the Governor-General has under Section 67 (2 a). Section 72 E, deals with the Governor's affirmative power of certification of Bills. But the language of this section is different from that of the corresponding provision relating to the Governor-General's power of certification (Section 67 B) Section 72 E says that where a Governor's legislative council has refused leave to introduce, or has failed to pass in a form recommended by the Governor, any Bill relating to a reserved subject, the Governor may certify that the passage of the Bill is essential for the discharge of his responsibility for the subject and thereupon the Bill shall, notwithstanding that the Council have not consented thereto, be deemed to have passed and shall on signature of the Governor become an Act of the Legislature. The point to observe is that this power can be exercised only in relation to the reserved subjects and not with reference to transferred subjects. Section 80 A of the Act defines the legislative powers of the provincial legislature It says that subject to the provisions of the Act it has power to make laws for the peace and good government of the province But, under Sub-section (3) of that section, there are certain matters on which it cannot legislate even for its own territorial area, without the previous sanction of the Governor-General. The local legislature cannot make or take into consideration, without the previous sanction of the Governor-General, any law (*a*) imposing or authorizing the imposition of any new tax, unless the tax is a tax scheduled or exempted from this provision by rules made under the Act, or (*b*) affecting the public debt of India, or the customs duties, or any other tax or duty for the time being in force and imposed by the authority of the Governor-General in Council for the general purposes of the Government of India, provided that the imposition or alteration of a tax scheduled as aforesaid shall not be deemed to affect any such tax or duty ; or (*c*) affecting His Majesty's naval, military or air forces ; or (*d*) affecting the relations of the Government with foreign princes or States; or (*e*) regulating any central subject , or (*f*) regulating any provincial subject which has been declared by rules under the Act to be, either in whole or in part, subject to legislation by the

Indian Legislature, in respect of any matter to which such declaration applies, or (*g*) affecting any power expressly reserved to the Governor-General in Council by any law for the time being in force; or (*h*) altering or repealing the provisions of any law which, having been made before the commencement of the Government of India Act, 1919, by any authority in British India other than that local legislature, is declared by rules under this Act to be a law which cannot be repealed or altered by the local legislature without previous sanction, or (*i*) altering or repealing any provision of an Act of the Indian Legislature made after the commencement of the Government of India Act, 1919, which by the provisions of such first-mentioned Act may not be repealed or altered by the local legislature without previous sanction. The local legislatures have also no power to make any law affecting any Act of Parliament. I have already dealt with the classification of subjects into provincial and central while dealing with the allocation of powers made by the devolution rules framed under Section 45A of the Government of India Act, and it is therefore unnecessary to refer to them once again in this context.

(e) *Special Areas*

There are five tracts of territory, which though forming part of British India have been excluded from the category of the Governors' provinces, either because of their geographical position or for other special reasons. The North-West Frontier province was one of these excluded areas, but some years back it was constituted into a Governor's province and got the benefit of the Montagu-Chelmsford reforms. The five special areas are British Baluchistan, Delhi, Ajmer-Merwara, Coorg and the Andaman and Nicobar Islands. Each of these units is placed in charge of a Chief Commissioner. It would occupy a great deal of space to describe the details of their administrative system, and I propose to leave this topic by making the general observation that the governmental machinery in these areas is conditioned by and is adjusted to the varying local conditions.

(f) *The Judiciary*

Part IX of the Government of India Act deals with the constitution of the High Courts. The High Courts in the presidencies of Madras, Bombay and Calcutta, have inherited the functions of the old Supreme Courts and the Sadr Courts.

In addition to the appellate jurisdiction which they exercise over all the Civil and Criminal Courts in the presidency proper, they have also an original jurisdiction extending over Civil and Criminal cases arising within the presidency towns as courts of first instance or as Sessions Courts. There are also High Courts at Allahabad, Patna, Lahore, Rangoon and Nagpur.

The Crown has got the power to create additional High Courts by letters patent and define their jurisdiction. Each High Court has its own letters patent defining its jurisdiction which can be amended from time to time by His Majesty. Under Section 106, Sub-section (2) the High Courts have no original jurisdiction in any matter concerning the revenue, or concerning any act ordered or done in the collection thereof according to the usage and practice of the country or the law for the time being in force. The High Courts are courts of record and exercise superintendence over all courts subject to their appellate jurisdiction. Under Section 112 of the Act the High Courts at Calcutta, Madras and Bombay are required in the exercise of their original jurisdiction in suits against inhabitants of Calcutta, Madras and Bombay, in matters relating to inheritance and succession to lands, rents and goods, and in matters of contract and dealing between party and party, when both parties are subject to the same personal law or custom having the force of law, decide according to that personal law, or custom having the force of law and when the parties are subject to different personal laws, decide according to the law or custom to which the defendant is subject.

As regards the composition of the High Courts, Section 101 of the Government of India Act prescribes that each High Court shall consist of a Chief Justice and as many other judges as His Majesty may think fit to appoint. The maximum number of judges of a High Court including the Chief Justice is fixed at twenty. The Act prescribes certain qualifications for the judges appointed to the High Courts. They must be (*a*) barristers of England or Ireland or members of the faculty of advocates of Scotland, of not less than five years' standing, or (*b*) members of the Indian Civil Service of not less than ten years' standing and having for at least three years, served as or exercised the powers of a District Judge ; or (*c*) persons having held judicial office, not inferior to that of a Subordinate Judge, or a Judge of a Small Cause Court, for a period of not less than five years, (*d*) or persons who have been pleaders of a High Court for a period of not less than ten years. Not less than one-third of the Judges of the High Court, including the Chief Justice,

should be barristers or advocates as aforesaid, and not less than another one-third members of the Indian Civil Service. Every judge of a High Court holds office during His Majesty's pleasure.

The Privy Council is the final Court of appeal for British India.

Finance

No account of the constitutional structure of British India, after the introduction of the Montagu-Chelmsford reforms, can be regarded as complete, without a survey of the financial structure both at the centre, as well as in the provinces. It may perhaps be necessary to state at the outset, that a full treatment of this subject would involve considerable space which a book of this character cannot hope to provide ; and what is herein attempted is no more than an outline of the financial system which was in operation so far. I shall have occasion to deal at some length with the financial structure contemplated for federal India under the new Constitution ; and it will be realized that an account of the financial structure under the Montagu-Chelmsford reforms will go far to explain the features of the new system which retains in large measure the impress of the system which it replaces. But even the existing system which was hitherto in operation, was the result of a process of gradual evolution extending over a period of a century and it is therefore necessary to give a brief account of the financial landmarks in the history of Indian public finance, from the year 1833, the year in which the public finances became centralized in the hands of the Government of India.

The Parliamentary Acts of 1853 and 1858 continued to treat the revenues of India as a single fund which had to be applied for the purposes of the administration of India as a whole. The Government of India was the sole custodian of the public purse ; and all demands upon it had to be made to that authority, and met from that centralized fund. The provincial Governments were solely dependent upon the central government to finance their local needs, and in sanctioning these grants for the various departments the Central Government followed no definite principles. Moreover, the Government of India were not in possession of the necessary local knowledge to enable them to make a proper and equitable distribution of funds to the provinces, and the result was that no intelligible principle was followed in such distribution. The more vociferous and insistent the demand of a provincial government, the greater its chance of securing a larger apportionment. No

attention was bestowed in making the distribution of funds to a province either upon the revenues contributed by it to the Central Exchequer or upon the claims of its administration. Sir Richard Stratchey has described the situation in the following words: "The distribution of public income degenerated into something like a scramble in which the most violent had the advantage, with very little attention to reason."

Lord Mayo attempted a certain amount of financial decentralization in the year 1871. His object was to allow the provinces a certain amount of autonomy in the husbanding of their own finances. Under his scheme the provincial Governments were entrusted with the administration of certain definite departments like police, jails, education and the medical services and fixed grants were made from the centre to run these departments. The provinces were authorized to add on the departmental receipts to the fixed grants made to them and were also given full power to distribute the funds for the services entrusted to their charge in the manner which to them seemed most suitable, subject to certain financial rules. In making these grants, the Government of India were solely guided by the level of expenditure which had been reached in each province, a basis of allotment far from reasonable, as the level of expenditure was determined by fortuitous circumstances and bore no relation either to the revenue yield of the province, or the claims of its administration.

But the scheme met with considerable success and Lord Lytton in 1877 carried the policy of decentralization a step further. The idea which underlay his scheme was to offer to the local governments an inducement to develop their resources and to encourage the habit of economy. This he proposed to do in the following manner. They were made responsible for the expenditure over all ordinary provincial services. In order to finance their services, they were given the whole or part of certain heads of revenue. In fact the system inaugurated during Lord Lytton's regime classified for the first time the Indian revenues into three categories, Imperial, provincial and divided. The Imperial heads of revenue were solely meant for the central government; the provincial heads were likewise meant to be at the disposal of the provinces. But there were certain other heads of revenue, which were to be shared between the provinces and the centre in certain proportions. The essential features of this system survived till the inauguration of the Montagu-Chelmsford reforms in 1920.

The distribution of resources to the provinces were subject to

quinquennial revisions; though the system itself was not changed. In determining the distributions of revenues at the time of each quinquennial settlement, the scale of expenditure which each province had reached at the time was the primary factor taken into consideration. The provinces, in order to have the best of the bargain, were induced sometime prior to these periodical revisions to increase their expenditure, exhaust their cash balances and put on an air of financial stringency. The system instead of encouraging thrift and wise husbanding of resources on the part of the provinces actually promoted extravagance and irresponsibility. It is no doubt true that in the year 1904 a certain measure of reform, calculated to mitigate this evil was undertaken. The system of resuming the provincial cash balances during the time of these quinquennial revisions was given up, and the provincial share of the public revenues was placed on a semi-permanent basis by fixing the share of the provinces in the divided heads definitely. But even so, the system of divided heads was itself open to criticism, and the inequalities which hitherto prevailed continued to exist, though in a mitigated form. The method adopted in the allocation of revenues is well brought out in the following extract from the Government of India's resolution of 1912, relating to the last of the pre-reform financial settlements:

"To meet its own expenditure, the Government of India retains, in the first place, the entire profits of the commercial departments and, secondly, all the revenues whose *locale* is no guide to its true incidence, such as the net receipts from customs, salt and opium The income derived from these sources is, however, insufficient to cover the cost of the Imperial services and an arrangement had therefore to be made by which other sources of revenue should be distributed between the Central and the various provincial Governments."

One of the fundamental principles enunciated by the sponsors of the new reforms in 1919 in their joint report was, that the provinces should have the largest measure of freedom of the Government of India—Legislative, Financial and Administrative—in order that they may develop their administrations on proper lines. To secure this object it was necessary that the local governments should have the wherewithal to finance their activities. We have already observed, while considering the allocation of subjects as between the provinces and the centre under the new reforms, a clear-cut division of functions was brought into being. The subjects which had a national importance like defence, railways and customs, were entrusted to the

centre, while other subjects like education, civil and judicial administration were made over to the provinces. Now if there was to be a demarcation of functions in the administrative and legislative spheres it would follow, as a matter of course, that there should be a financial separation as well The central sources of revenue had to be marked off from the provincial sources. In view of these considerations, the authors of the joint report proposed that the system of divided heads of revenue should be swept away and the provinces given definite sources of revenue and also limited powers of borrowing. They proposed that in this distribution, customs and salt should go to the centre. They also suggested that income tax and revenue from non-judicial stamps should be given to the centre. The provinces were to be given in addition to the provincial heads already enjoyed by them, the income from the sources which were so far classified as divided heads like land revenue, judicial stamps, excise and irrigation. But it was realized that if a classification of resources in the manner above mentioned were to be made, the centre would be left with a large deficit, and this they proposed to cover by contributions levied from the provinces. The scheme formulated by Mr. Montagu and Lord Chelmsford in the financial sphere was in the main accepted. At the suggestion of the Government of India, which was approved by the Joint Select Committee, a Committee called the Financial Relations Committee was constituted under the chairmanship of Lord Meston, mainly to evolve an equitable scheme of provincial contributions and to investigate into the claim of Bombay to a share in the proceeds of the revenue from income tax. The well-known Meston settlement is based upon the recommendations made by this Committee. The Meston award has come in for some severe criticism ; but it is very often overlooked that no scheme for the complete separation of revenues can escape criticism as it is bound to react upon different provinces differently, and the Meston Committee, it must be observed, was in no way responsible for the scheme of separation of resources.

The distribution of sources of revenue as between the centre and the provinces as well as the financial relations between the two are prescribed by the devolution rules framed under the Government of India Act. We have already had occasion to consider one part of the devolution rules which regulates the classification of subjects into central and provincial. The more important of the heads of provincial revenue are defined as follows :

(1) Receipts accruing in respect of provincial subjects (which include irrigation, land revenue, forests, excise or alcoholic liquors and narcotics, stamps and minerals).

(2) A share in the growth of revenue derived from income tax collected in the provinces, so far as the growth is attributable to an increase in the amount of the income assessed.

(3) The proceeds of any taxes which may be lawfully imposed for provincial purposes.

The rules themselves do not, however, specify what are the new taxes which are within the competence of the provinces to impose. But under Section 80 A of the Government of India Act, which prescribes the mode governing the levy of such taxes, the previous sanction of the Governor-General in Council is required for the introduction of any legislation in provincial councils imposing new taxes (except those specified in a schedule as exempted from this provision), or affecting the public debt of India or the customs duties or any other central tax. The taxes which are mentioned in the schedule are: succession duties, taxes on betting, amusements and advertisements, registration fee and tax on any specified luxury.

The principal sources of central revenue are, income tax, salt, post and telegraphs, customs, railways, opium, profits from coinage and currency and tributes levied from certain Indian States

A brief reference may now be made to the convention regulating the tariff arrangements of the Government of India. The Joint Select Committee on the Government of India Bill, 1919, in dealing with this topic, observed .

" Whatever be the right fiscal policy for India, for the needs of her consumers as well as for her manufacturers, it is quite clear that she should have the same liberty to consider her interests as Great Britain, Australia, New Zealand, Canada and South Africa In the opinion of the Committee, therefore, the Secretary of State, should as far as possible avoid interference on this subject when the Government of India and its Legislature are in agreement and they think that his intervention, when it does take place should be limited to safeguarding the international obligations of the Empire or any fiscal arrangements within the Empire to which His Majesty's Government is a party."

This recommendation has been accepted by the British Government. The tariff policy of the Government of India is regulated in accordance with this convention.

CHAPTER III

THE INDIAN STATES

If a person were to look at one of the pink maps of India he would find pink and yellow spaces scattered pell-mell. The history of India is writ large on its map, which is a veritable medley in colours. The pink spaces comprise British Indian territory, while the yellow spaces represent the domains of the Indian Princes and Chiefs. It has been computed that the total area of the territories which are ruled over by the Indian Princes and Chiefs is approximately 600,000 square miles and that their total population is about eighty-one millions, which would roughly represent two-fifths of the area and one-fourth of the population of India, including the States but leaving out Burma

According to the report of The Indian States Committee, 1928-29, which was presided over by Sir Harcourt Butler, there are 562 Indian principalities and of these 235 are said to be States, while 327 come under the category of estates, jaghirs and others Hyderabad, which is the most important of the Indian States, has an area of 82,700 square miles and a population approaching fourteen and a half millions. It has and exercises many of the important powers of sovereignty, such as full civil and criminal jurisdiction, as well as powers of taxation, coinage and currency. At the other end of the gamut are to be found small holdings in Kathiawar, with but a trace of sovereign power, and consisting of just a few acres of land and having populations not even approaching a hundred in some cases. But whatever may be the size, population or sovereign character of these Indian principalities, they share one common feature, in that they do not form part of the dominions of His Majesty, though they come under his suzerainty While British India is amenable to the legislative authority of the Imperial Parliament, none of the Indian States, not even the tiniest of them, is subject to such legislative authority. See *Hemchand v. Chhotamlal.*[1] The writs of His Majesty's Courts do not run in the territories of the Indian rulers. Not being full-fledged nations—even the biggest of them are shorn of their external sovereignties—they occupy no place in international law and relations ; but in the constitutional laws of the British Empire

[1] (1906) A.C. 212.

they find a definite place and enjoy a distinct status. One of the main themes to be considered in this chapter will be the position of the Indian States *vis à vis* the British Government.

From the standpoint of geography Indian India and British India form a single unit. The territories of the Indian States are closely interwoven with those of the adjacent British Indian provinces. In many cases no natural boundaries or barriers separate them; the line of demarcation between the territory of an Indian State and an adjoining British Indian tract, is in many instances an imaginary line existing in appropriate and authoritative records only. But, politically speaking, the Indian States exist in isolation. It is true that even now the economic, cultural and racial ties which bind the Indian States and British India overstep the boundaries which separate them; and it is also a fact that some of the all-India services, like posts and telegraphs, currency and coinage, customs and defence, serve both parts of India. The main objective of the present constitutional changes is to knit together into one political fabric Indian India and British India which by nature, at any rate, are already a single geographical unit. They are to form a Federated State. The purpose of this chapter is to give a short descriptive account of the Indian States, to sketch in brief outline their historical background and to indicate their constitutional position. It need hardly be emphasized that without an adequate knowledge of these topics it is difficult to understand properly the position which the Indian States are going to occupy in the future constitutional alignment of India.

To go back once again to the pink and yellow map of India, we find at the extreme north the great State of Kashmir, of a size almost equal to that of Great Britain and with a population of over three and a half millions. The northern frontiers of the State touch Central Asia. It is a state famous all over the world for the sublime grandeur of its snow-clad mountains, for the bewitching beauty of its wonderful lakes and valleys, and for the wealth and variety of its fruits and flowers. On the north-eastern portion of the Punjab are to be found the Sikh States of Patiala, Kapurthala, Jind and Nabha. A number of the small Rajput Hill States of the Punjab were carved out by Rajput adventurers during a time anterior to the advent of the Moghuls. On the north-west of India are to be found the states of Bahawalpur and Khairpur which are ruled over by Muslim Princes. In Baluchistan is to be found the territories of the Khan of Kalat. Below Bahawalpur to the south a solid

patch of yellow meets the eye. This is Rajputana which, for the most part, is an arid and inhospitable region with patches of fertile territory here and there. Rajputana has been the home of some of the most ancient princely dynasties of the world. Not that these Rajput houses have escaped the shock of the centuries of conflicts, turmoils and warfares, but they have survived all these though with considerable territorial readjustments. Among the more important of the Rajput States are Udaipur (Mewar,) Jaipur, Jodhpur (Marwar) and Bikanir. The present ruler of Bikanir is the well-known soldier-statesman, Maharaja Sir Ganga Singh, who has played a notable part in the recent constitutional pourparlers. The two Jat States of Bharatpur and Dholpur and the Mahommedan State of Tonk which was founded by the Pindari leader, Amir Khan, owe their origin to the efforts of alien adventurers to carve out principalities in Rajputana in the chaos that followed the break up of the Moghul Empire.[1] The great Mahratta State of Gwalior is situated further east. The Central India agency is the next great block of Indian State territory. It contains a large number of States, both big and small. The Mahratta State of Indore is also situated in this region. As students of Indian history will remember, the Mahratta rulers of Indore and Gwalior in the latter part of the eighteenth century were two of the distinguished members of the great Mahratta Confederacy, at the head of which was the Peshwa, a confederacy which swept the greater part of India like a storm and founded a Mahratta Empire which, at its zenith, reached the confines of the Punjab on the north, Bengal on the east and Malabar on the south. In this region are also to be found some of the other well-known states of India, like Dhar, Rewa and Bhopal. On the west of India lies the territory of the Mahrao of Cutch and the peninsula of Kathiawar, which contains nearly 200 States, estates and jaghirs. Among the well-known Kathiawar principalities are the States of Porbandar, Junagadh, Nawanagar, Bhavanagar, Morvi, Dhrangadhra, Rajkot, Wankaner, Gondol and Limbdi. On the west of India are the widely scattered domains of the great Mahratta ruler, the Gaekwar of Baroda. Okhamandal, which is the important port of the Baroda State, is situated on the north-western tip of the peninsula of Kathiawar, far away from the bulk of the State's territories. Several of the Kathiawar States possess only a very attenuated form of sovereignty, a large part of the civil, criminal and revenue jurisdiction being exercised by the

[1] *The Imperial Gazetteer of India*, Vol. IV (1909), p. 65.

British Government. The rulers of the States of Sachin, Janjira and Jafarabad are the descendants of the Abyssinian admirals of Deccan fleets, who received ruling powers sometime prior to the break up of the Moghul Empire [1] The State of Kolhapur, situated also on the west of India, is ruled over by a Mahratta prince, who traces his descent from the great Mahratta king, Sivaji. On the eastern side of India, there are only a few States and most of these are to be found in Orissa. In the United Provinces are three States, namely, Rampur, Tehri and Benares In Bengal and Assam are situated the States of Cooch-Behar, Tripura and Manipur. Now, coming to the south of India, we find some of the most important and progressive of the Indian States. Hyderabad, a land-locked State, and the premier Indian principality, has an area approaching that of Great Britain and a population of about 14,436,000. The State was founded by Asaf Jah, the great Subhadar or Viceroy of the Moghul Emperor in the Deccan. The State is well endowed with natural resources and two of the great Indian rivers, Kistna and Godavari, flow through it. To the south of Hyderabad is the great State of Mysore, which has had a chequered history and is reckoned one of the most progressive and best administered in India. The State is blessed by nature with great natural resources, and in hydro-electric development, the beginnings of which go back to the year 1902, it has taken a leading part in India. On the extreme south of India along the west coast, are Travancore and Cochin, two well-known Indian States These States are far ahead both of the British Indian provinces and their sister Indian States in point of education. The comparative freedom enjoyed by the women of these States for ages past, and the progressive character of their administrations, are points to be noted in regard to them.

The ancient Hindu and Muslim cultures are still cherished and preserved in their pristine purity in some of the Indian States. The old world atmosphere which still lingers in some of these principalities, with all their grace and charm, is now experiencing the full blast of the relentless sweep of modern civilization. To the person to whom the pomp and pageantry of Kingship make an appeal, there is a great deal in the Indian States to attract and even to enthrall him The rulers of some of the Indian States have absorbed the best of the old and the new civilizations ; and the States over whose destinies such rulers preside are among the most progressive in India. In all the

[1] *The Imperial Gazetteer of India*, Vol. IV (1909), p. 66.

States, however, there is the personal and intimate contact of the ruler in the affairs of administration. In some of the progressive States which are ruled by constitutionally-minded rulers, like Mysore, Travancore, Cochin and Baroda, provision has been made for representative bodies, the members of which can influence the course of legislation and also have a voice in the shaping of administrative policies. But the governments of even these advanced States make not the remotest approach to the democratic form of government [1] As has been sometimes put to describe the situation in the best administered of these States, the governments are responsive to public opinion and minister to the well-being of their people. But the inevitable march of events is bound to affect the administrations in the Indian States and liberalize them, sooner perhaps than most people expect The other side of the picture is afforded by some of the Indian States, whose rulers have no fixed privy purse, who treat their States as personal properties and order their administrations in the manner best suited to their whims and caprices, and with little regard to the welfare of their subjects. But even in these the pressure of public opinion, both inside and outside their territories, in conjunction with the time spirit is working a slow but sure change in the proper direction. Some of the Indian States have also proved to be nurseries of Indian administrative talent of a high order, thanks to the favourable atmosphere that prevails in them. Such, indeed, are the Indian States.

Now we pass on to the second topic to be touched upon in this chapter, namely, the chequered course of Indian history in so far as it serves to explain and elucidate the position of the Indian States *vis-à-vis* the British Government.

The East India Company which began its career in India as a purely trading concern in the year 1608, without any territorial ambitions, began to assume, about the middle of the eighteenth century, the role of a political power. Two important factors contributed to this transition. The first was the gradual break up of the Moghul Empire after the death of Aurangzeb in 1707, owing to the absence of successors capable of presiding effectively over the destinies of a great Empire. The second was the rivalry that existed among the powerful elements then

[1] The Maharaja of Cochin announced on January 4, 1938, that he had decided to " make the Legislative Council responsible in a more effective manner for the administration of certain nation-building departments " Accordingly, a Minister, who will be an elected member of the Legislative Council, will be associated with the Dewan in the administration of Public Health, Panchayets, Co-operation, Agriculture, Ayur Veda and uplift of the Depressed classes

in the ascendent in India, both indigenous and foreign, contending for supremacy in the various parts of India. Among these were the English and the French East India Companies, the Mahrattas, Haidar Ali and his son, Tippu Sultan of Mysore, and Asaf Jah, the Moghul Subhadar of the Deccan who had ceased to pay allegiance to the Moghul Emperor and had become virtually independent. The history of India during practically the second half of the eighteenth century and the first half of the nineteenth is largely made up of the history of conflicts between two or more of these powers or rulers until eventually the English East India Company was left in the field as the paramount authority in India.

An event of more than ordinary significance occurred in 1748, namely the death of Asaf Jah, the Moghul Viceroy of the Deccan. The gadi of Hyderabad became the bone of contention between two rival claimants, Muzaffar Jung and Nazir Jung. The French took the side of Muzaffar Jung, while the English supported the claims of Nazir Jung. The Carnatic with its capital at Arcot, was a province of the Deccan and was subject to the control of the Moghul Subhadar of the Deccan. Muzaffar Jung appointed Chanda Sahib as the Nawab of Arcot while Mahomed Ali, a rival claimant to the office, was backed up by the English and the Mahrattas The intervention of the English in the affairs of Arcot brought them into conflict with the French. Hostilities broke out between them; Clive captured Arcot in 1751 and Lawrence defeated the French at Trichinopoly. The result was that the English supremacy in the south was established; but in Hyderabad the French continued to wield great power; and as a matter of fact they were not only able to secure the succession of Salabat Jung to the Hyderabad throne after the death of Muzaffar Jung, but also able to secure from him the cession of the Northern Circars to meet the cost of a French auxiliary force to be raised and equipped for the protection of his State. But French power in Hyderabad was destined to be short-lived. War broke out once again between the French and the English in 1756. This is what is known in history as the Seven Years' War. The hostilities extended to India. At the battle of Wandiwash in 1760, Eyre Coote defeated the French forces and thereby dealt a decisive blow to the French power in India. The course of events in the south had its inevitable repercussions all over. The Nizam gave the Northern Circars to the East India Company under a treaty dated November 12, 1766, and the Company undertook " to have a body of troops ready to settle the affairs

of His Highness's Government in everything that is right and proper whenever required."[1]

On the termination of the Mysore wars in 1799, the Nizam who had joined hands with the English in vanquishing Tippu Sultan got a large slice of Mysore territory. The relations of the English with the Nizam were placed on a basis of friendly co-operation. Mysore was restored to its original Hindu rulers from whom Haidar Ali had usurped it. The civil and military government of the territories of the Nawab of Carnatic were permanently taken over by the East India Company under an arrangement entered into with Nawab Azim-ud-dowla, after the death of the Nawab of Carnatic Umdat-ul-Umara in 1801.[2] These events established the British power in the south in a fairly strong position, though the Mahrattas were making a strong bid for the supremacy of India.

We might briefly consider the position of the British in Bengal. Calcutta was the seat of the British settlements on the east. Nawab Suraj-ud-dowla, on his accession to power as the Subhadar of Bengal in 1756, demanded the surrender of an official who had taken refuge in the Company's factory and also the destruction of the Company's settlements. When these demands were refused, war broke out. At the battle of Plassey in 1757, Clive scored a victory over the forces of Nawab Suraj-ud-dowla. At the battle of Buxar in 1764, the English defeated the combined forces of the Nawab of Oudh and Mir Khasim. The Moghul Emperor Sha Alam granted the Diwani of Bengal, Bihar and Orissa in 1765. Oudh was created a subordinate buffer State between the Company's territories and the Mahratta kingdoms. Oudh was, however, absorbed into the British domains during the Governor-Generalship of Lord Dalhousie.

We may briefly recount the course of events in the west and centre of India which eventually led to the break up of the Mahratta power and the consolidation of British supremacy in that region. The Mahratta Confederacy which at one time threatened to successfully challenge the British power in India was in the closing years of the eighteenth century torn up by internecine feuds. In October 1802, Jaswant Rao Holkar of Indore inflicted a severe defeat on the combined forces of the Sindhia and the Peshwa at Poona and looted the capital. Peshwa Baji Rao who was forced to flee from his capital sought the intervention of the English to regain his throne and by the treaty of Bessein which he concluded with the English in that

[1] *The Cambridge History of India*, Vol. V, pp. 274–275.
[2] *The Cambridge History of India*, Vol V, pp 361–362.

connection on December 31, 1802, he bound himself to maintain a subsidiary force of not less than six battalions to be stationed in his domains, to exclude all Europeans in his employment, and to refrain from commencing hostilities or to carry on negotiations with any other State, without consulting the English beforehand. General Arthur Wellesley marched with his forces and occupied Poona ; he forced Holkar to retire to Malwa and installed Baji Rao as Peshwa in May 1803.

The Mahratta leaders were frankly alarmed at the treaty entered into by the Peshwa with the British ; they regarded Lord Wellesley's system of subsidiary alliances as a clever move on their part to reduce the Mahratta rulers into a position of complete subordination. Plans were set on foot to break down the British power. But concerted action on the part of the Mahratta rulers was not possible as the Gaekwar held himself aloof and Holkar had withdrawn to Malwa. Sindhia of Gwalior and the Bhonsla Raja of Nagpore were, however, militant. Both these rulers had crossed the river Nerbada. The English asked them to separate their armies and recross the river. This was refused. Thereupon war was declared in August 1803 by the English against the two great Mahratta leaders. General Arthur Wellesley defeated the combined forces of Sindhia and the Bhonsla Raja at Assaye, near Aurangabad, in September 1803 ; and in November 1803 he gained a decisive victory over the army of the Bonsla Raja at Aragaon in Berar. At Laswari in Alwar, the remnants of the Gwalior forces were defeated by General Lake. The French, who had helped Sindhia in the training of his regular troops and officered them, had supported him in these campaigns. These defeats inflicted by the English on Sindhia and the Bhonsla Raja meant the death knell of French influence in the north. Sindhia was forced to come to terms with the English, and by the Treaty of Sarji Arjungoan concluded on December 30, 1803, he accepted a " subsidiary alliance " and surrendered in favour of the Company all the territory in the Doab between the Ganges and Jumna which had hitherto formed part of his dominions The Bhonsla Raja of Nagpore by the Treaty of Deogaon, dated December 15, 1803, was similarly compelled to accept a " subsidiary alliance," and to cede the province of Cuttack in Orissa in favour of the East India Company.

Holkar of Indore had maintained his independence so far; but he came into conflict with the English in 1804 when he attempted to pillage the territory of the Raja of Jaipur. The Jat ruler of Bharatpur joined Holkar and both attacked Delhi;

but this attack was repulsed by Ochterloney. After a series of conflicts, in some of which Holkar was successful, his armies met with defeat at Dig; but Holkar's power was not broken even then.

The third Mahratta war finally broke up the Mahratta power. The Peshwa, the Bhonsla and Holkar made one more attempt to destroy British power. Peshwa Baji Rao was decisively defeated at Kirki, near Poona, by a British detachment on November 13, 1817, and forced to flee from his capital. At Sitabaldi only thirteen days later, the forces of the Bonsla Raja were severely beaten ; and at Mahadipur, which is situated north of Ujjain, on December 21, 1817, Holkar's army was defeated and routed. In January 1818 the Peshwa's army was again vanquished at Koregoan and Ashti. Holkar came to terms on January 6, 1818, and under the Treaty of Mandsor signed on that date he gave up his possessions south of Nerbuda, agreed to maintain a contingent to assist the British when called upon, and accepted a British Resident at his Court. Appa Sahib, the Bhonsla Raja of Nagpore, who had fled to the Punjab after his defeat at Sitabaldi, was deposed and a minor grandson of his, Ragoji Bhonsle, was placed on the gadi after a portion of the Bhonsle kingdom had been annexed to the British possessions The Peshwa was pensioned off and was allowed to reside at Bithur, near Cawnpore. It was at this time, too, that pacific settlements were made with some of the other Mahratta Chiefs, like those of Akalkot and Bhor and the Patwardhans.

Sind and the Punjab were the only portions of India which had yet to come under British rule. Sind, with the exception of Khairpur, became part of British India in 1843, and the great Sikh kingdom in the Punjab disappeared from the Indian scene in 1849 after the second Sikh war. The cis-Sutlej States in the Punjab which had already accepted the British protection were, however, able to maintain their separate existence.

Sir William Lee-Warner, in his well-known book on the Native States, observes that the policy of the British towards the Indian States varied from time to time and that the history of their relationship may be divided into three periods, during each of which a distinct policy was pursued. According to him, the British were inclined, during the first period (1753–1813), as far as it was practicable, to live within a ring-fence and beyond it to avoid intercourse with the native chiefs. During the second period (1813–1857), the policy changed into one of subordinate isolation of the States ; and during the third period from 1858 onwards the British policy was one of subordinate

co-operation with the Indian States. We shall now pass on to consider some of the salient features of the policies pursued during these periods.

In the beginning the East India Company was content to devote all its energies to its commercial activities. It maintained an attitude of strict non-intervention in the affairs of local powers. About the middle of the eighteenth century, however, the Company began to interest itself in political matters. As we have already seen, the immediate causes which operated to draw the Company into the vortex of local wars and conflicts was the rivalry that existed between the various powers in India to establish territorial supremacy, during the rapid disintegration of the Great Moghul Empire after the death of Aurangzeb in 1707. Partly because of the pressure of local circumstances, and partly because of the desire to establish its own authority in India, the East India Company was drawn into these conflicts But it was yet cautiously feeling its way in the thorny path of political conflicts and alliances of the time; and it was, therefore, not anxious to enlarge its responsibilities beyond the limits of safety during the early years. The case of Oudh, for instance, illustrates this policy. After the defeat of the Nawab of Oudh at the battle of Buxar in 1760, the East India Company could have annexed Oudh to its domains But it chose not to do so. The reason was, that the Company's hands were already sufficiently full with territorial responsibilities and it was therefore not anxious to add to them. By annexing Oudh, the problem of involving the Company almost immediately in a conflict with the Mahrattas, who were then in the ascendant, would indeed have become serious. That accounts for the fact that Oudh was created a buffer State, in subordinate and friendly alliance with the Company as a barrier against the Mahrattas. As Sir William Lee-Warner has put it: "The treaty of reciprocal friendship dated August 16, 1765, which he (Clive) concluded with the State of Oudh, marks the first step in the endeavour maintained by the Company in their foreign policy for nearly half a century to enclose British interests within a ring-fence and to remain, as far as possible, unconcerned spectators of what might go on beyond it." It was not long before the Company's new ally required their help. The Mahrattas threatened Rohilkhand, on the frontier of Oudh, and political rather than moral considerations induced Warren Hastings to annex the Rohilla district to Oudh, thus continuing Clive's policy of preserving a buffer State beyond which events might shape themselves.

Behind the curtain of native rule the Mahratta tempests might rage, the rapid process of the decay of Imperial rule might go on, or the striking genius of the then infant Ranjit Singh might found a new Empire."[1]

One important feature of the treaties entered into by the East India Company with the local powers during the first period, requires notice. At any rate during the first forty years, the Company concluded treaties with the local powers on the basis of equality with them, and the language employed in these treaties was also appropriate to instruments entered into between equal and independent powers The object with which the East India Company negotiated these treaties was to secure the aid of one or more of these powers in order to put down some other power which threatened to imperil its position. For instance the triple alliance termed the "Treaty of Offensive and Defensive Alliance" arranged between the East India Company, the Peshwa Madhao Rao and the Hyderabad ruler Asaf Jah in 1790 was intended to break down the growing power of Tipu Sultan of Mysore. The provisions of this instrument show that the parties treated one another as equals. For instance Article 8 of that treaty provides that in order to "preserve as far as possible consistency and concert in the conduct of this important undertaking," namely, to launch a war against Tipu Sultan, a Vakeel (i.e., an emissary) from "each should be permitted to reside in the army of the others, for the purpose of communicating to each other the respective views and circumstances" Again, Article 9 provides that "in the event of peace being adjudged expedient" it shall only be made by mutual consent.

But Lord Wellesley, during his Governor-Generalship (1798–1805), made a departure in this policy, and in fact advanced beyond the ring-fence, and entered into treaty alliances with some of the Rajput Chiefs in which phrases like "obedience" were introduced. It was also during his tenure of office that a system of subsidiary alliances was forced upon some of the Indian rulers like the Peshwa and those of Baroda, Gwalior and Hyderabad. The East India Company which was just then gaining a foothold in India was slowly trying to enlarge the circle of its influence. The principal features of these subsidiary alliances were that the Indian rulers with whom such engagements were concluded were required to surrender "their rights of negotiating with foreign nations and with States in

[1] Sir William Lee Warner, *The Native States of India*, 2nd Edition, pp. 64–65.

alliance with the Company" ; to exclude from their service persons of European origin and especially the French ; to agree to the entertainment of subsidiary forces under the control of the Company; and to cede territories to meet the cost of maintenance of these subsidiary forces.

But the successors of Lord Wellesley in the Governor-Generalship again reverted to the policy of retiring into the ring-fence and of avoiding entanglement in the affairs of local powers. But, with the arrival of Lord Hastings as Governor-General in 1818, this policy was completely reversed and yielded place to what is compendiously put as the policy of subordinate isolation of the Native States.

When we enter the second period we find the East India Company firmly established in its saddle The Mahratta power, which seriously challenged the British authority in India, had been completely broken. No longer did the Company require the aid of Indian rulers to maintain its position. The Company now began to assert its own supremacy and sovereignty over the Indian States, and concluded treaties and engagements with various Indian rulers, wherein the Company promised to protect them, while the States for their part, recognized the Company's supremacy, agreed not to negotiate with any foreign Prince or Chief without its knowledge, and to act in subordinate co-operation with it. These features are well reflected in the several treaties entered into by the East India Company with the Indian States. For example, we may examine the provisions of one such treaty, namely, the treaty concluded by the East India Company with the Maharana of Udaipur, dated January 13, 1818, as they bring out the main features of the policy adopted by the British towards the Indian States at this time. Article 1 begins by saying that " there shall be perpetual friendship, alliance, and unity of interests between the two States from generation to generation," and proceeds to state that " the friends and enemies of one shall be the friends and enemies of both." Article 2 provides that " the British Government engages to protect the principality and territory of Oudeypore." Article 3 provides that " The Maharana of Oudeypore will always act in subordinate co-operation with the British Government and acknowledge its supremacy and will not have any connection with any other Chiefs or States." By Article 4 the Maharana is forbidden to enter " into any negotiation with any Chief or State without the knowledge and sanction of the British Government." Article 6 provides for the payment of a tribute to the British

Government. The quantum of tribute payable is fixed by that Article. Article 9 provides that " The Maharana of Oudeypore shall always be absolute ruler of his own country, and the British jurisdiction shall not be introduced into that principality." Sir William Lee-Warner has observed : " In particular the administration of Lord Moira, better known as Lord Hastings, deserves attention, not merely because it extends through the ten most important years in Indian history, but because a new departure was taken by him. Opposed as he evidently was to annexation, he felt that the proper position of the States in the interior of India was one of isolation and subordinate co-operation ; and at the same time he realized the fact, that it was the duty of the Paramount Power to make a political settlement in the distracted areas of Native territory, and not to leave India to stew in its own juice."[1]

While Lord Hastings was opposed, as we have just now observed, to the policy of annexation of States, his successors in office were strong believers in it. Lord Dalhousie, for instance, was strongly inclined to the view that the wiser course to adopt in the case of Indian principalities which were the scene of gross misrule was to annex instead of reforming them. In fact, it was during his regime that several Indian States were absorbed into the British domains, when their rulers died without natural heirs. Satara, Jhansi and Nagpur were all annexed to the British domains under this doctrine of lapse. The State of Oudh was annexed to the British possessions during the closing days of Lord Dalhousie's tenure of office on the ground of chronic misgovernment on the part of the King of Oudh.

After the Mutiny came a great change. The Crown succeeded to the inheritance of the East India Company. As Lord Canning wrote in 1860 : " The last vestiges of the Royal House at Delhi from which we had long been content to accept a vicarious authority, have been swept away. The Crown of England stands forth the unquestioned ruler and paramount in all India, and is brought face to face with its feudatories." A new policy was adopted by the British Government in its relations with the Indian States. It was one of subordinate co-operation with the Indian States. The policy of annexation of the States in the event of a ruler dying without natural heirs was definitely given up ; the States were assured of continued existence by the conferment of the power to adopt successors when the rulers had no natural heirs. The British Government

[1] Sir William Lee Warner, *The Native States of India*, 2nd Edition, p. 102.

asserted its right to interfere in the affairs of an Indian State when there was gross misrule on the part of its sovereign. The ruler was sometimes deposed in grave cases. In ordinary governmental activities, the States were treated as partners with British India and several schemes calculated to benefit the States were undertaken by the British Government in co-operation with the Indian Princes. Posts and Telegraphs, Railways and Currency, may be mentioned as typical instances. A unique instance of co-operation between British India and the Indian States is furnished by the Sutlej Valley project, consisting of four colossal weirs built by the Punjab Government in partnership with the States of Bahawalpur and Bikanir. An idea of the magnitude of the project can be formed from the fact that it is planned to irrigate an area of 5,108,000 acres of which 1,942,000 acres are in British India, 2,825,000 in Bahawalpur and 341,000 acres in Bikanir. Out of the total outlay incurred on the project up to the end of 1932–33 which has amounted to Rs. 21.12 crores, the States of Bahawalpur and Bikanir have contributed Rs. 11.63 crores. The total area which will be irrigated by this project will be approximately 8,000 square miles.[1]

The third topic to be considered in this chapter will be the constitutional position of the Indian States *vis-à-vis* the British Government The problems that arise in connection with this topic are indeed difficult as well as intriguing. Few constitutional questions have provoked more controversy, or given rise to greater divergence of opinion. The various views put forward in regard to the constitutional position of the Indian States are generally coloured by the predilections of the expounders. On the one hand, the claim has sometimes been made that the Indian States enjoy full sovereign powers and that their relationship to the British Government is founded upon a basis of absolute equality. The persons who take this view contend that the rights and obligations arising from their relations are purely contractual, that the treaties entered into between them should be interpreted in the light of the well-known canons of international law, and that beyond what is contained in these treaties the British Government can neither claim any rights as against the States nor take upon itself any obligations towards them. On the other hand, there are those who contend that the Indian States are mere " feudatories," and that the British Government as suzerain can exercise

[1] *The Indian Year Book*, 1936–37. Published by The Times of India Press, Bombay, p. 283.

plenary powers over them According to this view the "sovereignty" of an Indian State is a mere pretence, devoid of any real content, and the relationship between the British Government and the Indian States is very much like that between a superior and his vassals But it appears to my mind that both these positions are equally wide of the mark, and that the truth indeed lies somewhere between these two extremes. The difficulty, however, lies in fixing the constitutional position of the States and expressing it in precise legal terms. And this is the task attempted in the paragraphs that follow. But before doing so it is necessary to be clear about the exact import of certain terms that we have to use hereafter, as for instance an independent sovereign state, sovereignty, divided sovereignty and international law.

According to writers on Jurisprudence, an independent sovereign State must possess three essential attributes. The State must occupy a defined territory It must represent a permanently established society of human beings organized for a political end. It must owe no allegiance to any human superior and be independent of all external control. Sir Thomas Holland, in his treatise on Jurisprudence observes: "Every State is divisible into two parts, one of which is sovereign, the other subject . . . The sovereignty of the ruling part has two aspects It is 'external' as independent of all control from without; 'internal,' as paramount over all action within. Austin expresses this its double character by saying that a sovereign power is not in a habit of obedience to any determinate human superior, while it is itself the determinate and common superior to which the bulk of a subject society is in the habit of obedience."[1] In a Constitutional State like England, the sovereignty is vested in the King in Parliament. In an absolute monarchy, the ruler is himself the sovereign. The two aspects of sovereignty referred to by Holland in the passage above cited, relate to the functions which a sovereign exercises, one with reference to his own subjects and the other in relation to the powers beyond his own frontiers. According to the view hereinbefore set out, the sovereign must have unquestioned authority over his own subjects and owe no kind of obedience to any known human superior. We may for convenience call these two aspects of sovereignty as "internal sovereignty" and "external sovereignty," respectively. For a State to be called a sovereign independent State, these two attributes must co-exist. The Indian States, as we shall here-

[1] Sir Thomas Holland, *Jurisprudence*, 13th Edition, pp 49–50.

after see, have, without exception, parted with their external sovereignty in favour of the British Government. They cannot make war, nor conclude peace with any power, local or foreign. Indeed, they cannot even negotiate with any of the foreign States directly. A similar restriction on the Indian States communicating with one another operated till the close of the last century. But as the Indian States Committee, 1928–29, have observed: "during the present century circumstances have combined to lead to a greater intercommunication between the States. But they cannot cede, sell, exchange or part with their territories to other States without the approval of the paramount power, nor without that approval can they settle interstatal disputes"[1] So that it is manifest that all the Indian States have been deprived of one of the essential attributes of sovereignty They are, therefore, not entitled to be designated as independent sovereign States. We shall later on examine the question whether or not the States possess even internal sovereignty in full measure It is sometimes said, following the view of Austin, that a State which has parted with its external sovereignty, is not entitled to be called sovereign at all. The reason being that sovereignty cannot be divided without destroying it in that process.

But on the other hand there is a large volume of opinion in favour of the view that sovereignty is capable of division and that it is quite possible to conceive of a case in which certain of the attributes of sovereignty are exercised by one authority and the rest by another. Sir Henry Maine is an exponent of this view. In his minute on Kathiawar in 1864, Sir Henry Maine stated as follows. "Sovereignty is a term which, in international law, indicates a well ascertained assemblage of separate powers or privileges The rights which form part of the aggregate are specifically named by the publicists who distinguish them as the right to make war and peace, the right to administer civil and criminal justice, the right to legislate and so forth. A sovereign who possesses the whole of this aggregate is called an independent sovereign; but there is not, nor has there ever been, anything in international law to prevent some of those rights being lodged with one possessor, and some with another. Sovereignty has always been regarded as divisible.... It may perhaps be worth observing that according to the more precise language of modern publicists, 'sovereignty' is divisible, but independence is not. Although the expression 'partial independence' may be popularly used, it is technically

[1] *Report of the Indian States Committee*, 1928–29, p 27.

incorrect. Accordingly, there may be found in India every shade and variety of sovereignty, but there is only one independent sovereign—The British Government"

In the case of *Duff Development Company, Ltd.* v. *Government of Kelantan and another*,[1] Lord Finlay has made the following observations: "The question put was as to the status of the ruler of Kelantan. It is obvious that for sovereignty there must be a certain amount of independence, but it is not in the least necessary that for sovereignty there should be complete independence. It is quite consistent with sovereignty that the sovereign may in certain respects be dependent upon another power, the control, for instance, of foreign affairs may be completely in the hands of a protecting power, and there may be agreements or treaties which limit the powers of the Sovereign even in internal affairs without entailing a loss of the position of a sovereign power. In the present case it is obvious that the Sultan of Kelantan is to a great extent in the hands of His Majesty's Government. We were asked to say that it is for the Court and for this House in its judicial capacity to decide whether these restrictions were such that the Sultan had ceased to be a sovereign. We have no power to enter into any such inquiry. The reply of the Colonial Office to Master Jelf on October 9, 1922, states that Kelantan is an independent State in the Malay Peninsula and that the Sultan is the sovereign ruler, that His Majesty's Government does not exercise or claim any rights of sovereignty or jurisdiction over Kelantan and that the Sultan makes laws, dispenses justice through Courts, and generally speaking, exercises without question the usual attributes of sovereignty." It is possible to contend on the basis of the observations made by Lord Finlay that the Indian States, though they have parted with, in favour of the British Government, the control over foreign affairs and also agreed to the imposition of restrictions even in regard to certain aspects of their own internal affairs, can, nevertheless, lay claim to be sovereign.

It is clear, that in view of the fact, that the Indian States have parted with their external sovereignties, they occupy no place in international relations. International law governs the relations of political communities which come under the category of independent Sovereign States. But though international law takes no note of the existence of the Indian States, there is no reason why certain aspects of international law should not be applied to determine the rights and liabilities of the British Crown and the Indian States as between themselves.

[1] (1924) A C. 797, p. 814.

After all even international law is nothing more than a code of rules based upon considerations of morality and fair play and it is in no sense positive law emanating from an authority who has powers to enforce it. As Lord Sankey, L.C., has observed in the case of *The Piracy Jure Gentium—In re.*[1] " It must be remembered that in the strict sense, international law still has no legislature, no executive and no judiciary, though in a certain sense there is now an international judiciary in the Hague Tribunal and attempts are being made by the League of Nations to draw up codes of international law. Speaking generally, in embarking upon international law, their Lordships are to a great extent in the realm of opinion and in estimating the value of opinion it is permissible not only to seek a consensus of views, but to select what appears to be the better views upon the question." Hall in his well-known book on International Law (7th Edition, p. 1) states : " International law consists in certain rules of conduct which modern civilized States regard as being binding on them in their relations with one another with a force comparable in nature and degree to that binding the conscientious person to obey the laws of his country, and which they also regard as being enforceable by appropriate means in case of infringement."

The Indian States are obviously not independent Sovereign States. But it may reasonably be contended on the authority of the observations made by Lord Finlay in the case already referred to, *Duff Development Company, Ltd.* v. *Government of Kelantan and another*,[2] that they are sovereign political communities. As we shall see in the course of this chapter, a large number of the Indian States have and do exercise internal sovereignty in almost full measure. It would not of course be correct to say that, even in the case of the biggest of these States, their internal sovereignty is complete. But for all practical purposes we may regard these States as possessing full sovereign powers within their territories. They exercise plenary civil and criminal jurisdiction. They enact their own laws and impose their own taxes. They, in fact, exercise all those powers, which civilized Governments all the world over exercise in regard to persons and things in their territories. Here again it is necessary to sound a note of caution ; because, as we shall see some time later, either by express consent or otherwise, inroads have been made even into their internal sovereignties by the British Government. But in view of the

[1] (1934), A C. 586, p. 588.
[2] (1924) A C. 797.

fact that to all intents and purposes these Indian States are sovereign within their territories, there is sound reason for applying principles of international law in regard to a large part of the relationship regulating the conduct of the British Government towards the Indian States. As we have already noticed, the principles of international law, in the last resort, depend for their due fulfilment and observance upon the moral sense of political communities. The code of rules comprehended under the term international law has been evolved during a long course of years, as rules which should govern the conduct of independent sovereign communities in their dealings with one another. The Indian States, organized as they are for political ends, and exercising as they do a large part of the attributes of Sovereignty, are entitled reasonably to insist that certain aspects of international law should be applicable to the relationship existing between them and the British Government. But unfortunately opinion on this point is sharply divided

The Government of India in their resolution dated August 21, 1891, in the Manipur case, definitely maintained that " the principles of international law have no bearing upon the relations between the Government of India as representing the Queen Empress on the one hand and the Native States under the Suzerainty of Her Majesty on the other." Westlake, the well-known international jurist also expresses a similar view. He says, " the Native Princes who acknowledge the Imperial Majesty of the United Kingdom have no international existence. That their dominions are contrasted with the dominions of the Queen, that their subjects are contrasted with the subjects of the Queen, are niceties of speech handed down from other days and now devoid of international significance, though their preservation may be convenient for purposes internal to the Empire ; in other words for Constitutional purposes."

On the other hand Sir Henry Maine stated in an unpublished note, " that if European principles are to be applied to the interpretation of the relations between the Indian Government and the Native Chiefs, they must rather be the principles of the law of nations than those of English Municipal Law."[1] Again Wheaton, the well-known writer on international law, states that the Indian States " enjoy and exercise under the sanction of the British Government the functions and attributes of internal sovereignty, but they are bound to receive the Resident or Agent appointed by the Viceroy, and the degree of internal

[1] Quoted by Mr. Evans in the course of his arguments as amicus curiae in the case of *Lachmi Narain* Vs *Raja Partab Singh*, 2 Allahabad 1.

sovereignty is determined in each case not merely by treaty, but also by usage, and is always subject to the paramount power of the Indian Government. The Indian Government has formally declared that the principles of international law have no bearing upon the relations between itself and the Native States under the Suzerainty of the King, and it is clear that the Native Princes of India have no international status in the sense in which it is used in this volume. Their future place in the Indian Empire has been much discussed, and is in 1929 under examination But for purposes other than those involving public international relationships and more especially with regard to matters falling within the sphere of private international jurisprudence, these Native States of India are considered separate political communities possessing an independent civil, criminal and fiscal jurisdiction."[1] The view taken by Sir Henry Maine and Wheaton on this question appears to me to be reasonable and in accord with the facts.

In *Gurdayal Singh v Rajah of Faridkot*,[2] the Privy Council applying a rule of private international law have held that the judgment passed in absentem by a Court established by the State of Faridkot, a Native State in subordinate alliance with His Majesty, in a personal action against a defendant who was not a subject of that State and who had not submitted himself to the jurisdiction of that Court is a nullity and cannot form the basis of an action in a British Indian Court. In the case of *Statham v. Statham*,[3] the principle of international law that a foreign sovereign cannot be sued in the Court of any Country has been applied to the case of an Indian Ruling Prince. This was an action for divorce and a Ruling Prince of India had been cited as a co-respondent. Following the rule of international law above mentioned, the name of that Ruling Prince was directed to be struck out by the presiding judge, Bargrave Deane, J.

In the resolving of difficult questions which arise as between the British Government and the Indian States in their public capacity—which is the province of public international law—and in regard also to the problems which crop up with reference to the extent of jurisdiction to be assumed by Municipal tribunals—British as well as Indian State tribunals—in regard to parties or subject matters connected with foreign countries, Indian States also being considered as foreign countries in

[1] *Wheaton's International Law.* Vol I, 6th Edition. Edited by A Berriedale Keith, p 105.

[2] 1894, A C 670, =22 Cal 222 [3] 1912, P.D. 92.

relation to British India and *vice versa*—which is the province of private international law or as it is sometimes put "the conflict of laws"—the rules which are generally observed by independent Sovereign communities will, I think, have to be applied as useful and persuasive analogies

We have already observed that the Indian States have surrendered in favour of the British Government, either expressly or impliedly their external sovereignties As a consequence of this position, they have no international life whatever As Sir William Lee-Warner has put it, "They have absolutely surrendered their rights of negotiation, confederacy and legation, and since they are partners in the benefits secured by international and interstatal action of the British Government, they must fulfil the obligations attached to the rights derived from such action."[1] Certain consequences flow from this position and some of the more important of these will be referred to

For international purposes, no distinction is made between Indian State territory and British Indian territory. The subjects of Indian States, in the eye of international law, are placed in the same category as British subjects. When the Indian State subjects go out of India into a foreign country, they are entitled to all the privileges and the security that an ordinary British subject enjoys

The British Government as the authority "responsible for the defence of both British India and the Indian States," has, "the final voice in all matters connected with defence, including establishments, war material, communications, etc." As the Indian States Committee have observed the paramount power "must defend both these separate parts of India against foes, domestic or foreign. It owes this duty to all Indian States alike. Some of the States contribute in different ways to the cost of this defence by the payment of tribute, by the assignment of lands, by the maintenance of Indian States forces All the States rallied to the defence of the Empire during the Great War, and put all their resources at the disposal of the Government. But whether or not a State makes a contribution to the cost of defence, the paramount power is under a duty to protect the States. It follows from this duty of protection, first, that the British Government is bound to do everything really necessary for the common defence of the States; secondly, that the States should co-operate by

[1] Sir William Lee-Warner: *The Native States of India, Second Edition*, p. 220

permitting everything to be done that the British Government determines to be necessary for the efficient discharge of that duty ; thirdly, that they should co-operate by abstaining from every course of action that may be declared dangerous to the common safety or the safety of other States."[1] The problem of equalizing the cost of defence among the federating units and the readjustments necessary in the existing position, has assumed importance in view of the establishment of a federation. Some aspects of this question are considered in the chapter dealing with Federal Finance.

Now we shall consider how far the Indian States can be regarded as Sovereign in all their internal affairs. There are a few preliminary observations to be made in this connection. Even in the case of a State like Hyderabad, it is difficult, I think, to contend that its internal sovereignty is complete. I shall have occasion to deal with this aspect of the matter a little later. As Indian States possess varying degrees of internal sovereignty, it would be wrong to put all of them in the same category. To a large extent, an examination of the provisions of the treaties, engagements, and sannads will clarify their respective positions in regard to this matter. But it would be a mistake to consider that these documents alone are sufficient to elucidate their exact constitutional position. For, constitutional usage and other factors since these treaties, engagements and sannads were concluded, have profoundly modified the position of the Indian States as originally enunciated in these documents. Again, the British Government claims a kind of " residuary jurisdiction " over the Indian States even apart from the provisions of treaties and other engagements concluded with them, a jurisdiction which the Butler Committee compendiously described in the now famous aphorism the paramountcy of the British Crown is paramount. Whether usage and paramountcy can by themselves be sources of legal rights and obligations may in theory be a rather debatable and is certainly an interesting question. But, whatever may be argued from a theroretical standpoint, there could be no doubt whatever that in practice, usage and political practice have modified and sometimes clearly departed from the texts of the treaty provisions.

With regard to the range of sovereign powers exercised by the Indian States in their internal affairs, attempts have sometimes been made to classify them into a number of groups, depending upon the quantum of sovereign powers they are

[1] *The Report of the Indian States Committee*, 1928–29, pp. 27–28.

supposed to be in possession of But it is difficult, indeed, to devise a system of classification which can bring into a number of compartmentalized groups States possessing equal or almost equal sovereign powers. But certain general observations may perhaps be made. With regard to some States, their internal sovereignties have been guaranteed by the British Government in treaties entered into with them. For instance, Article 10 of the treaty with Indore of 1818 states that " the British Government hereby declares that it has no manner of concern with any of the Maharaja's children, relatives, dependants, subjects or servants with respect to whom the Maharaja is absolute " In treaties concluded with Udaipur, Jaipur, Jodhpur, Bikanir, Bhopal and certain other important States, a provision like this finds a place : " The Maharaja and his heirs and successors shall be absolute rulers of their own country and British jurisdiction shall not be introduced into that principality." But in the case of Baroda for instance, the internal Sovereignty is not guaranteed in such unrestricted terms For, Article 5 of the treaty of 1802 with the Gaikwar states " that there shall be true friendship and good understanding between the Honourable the East India Company and the State of Ananda Rao Gaikwar, in pursuance of which the Company will grant the said Chief its countenance and protection in all his public concerns, according to justice and as may appear to be for the good of the country, respecting which he is also to listen to advice." In 1802, the Ruler of Baroda gave the following undertaking : " Should I myself, or my successors, commit anything improper and unjust, the English Government shall interfere and see, in either case, that it is settled according to equity and reason."[1] These stipulations were confirmed by Article 1 of the treaty of April 21, 1805, with the Gaikwar. The Sannad granted to the Ruler of Mandi on March 9, 1846, places the ruler of that principality in a position of vassalage to the British Government. A portion of the Sannad states that the British Government is at liberty " to remove from the Guddee of Mundee any one who may prove to be of worthless character and incapable of properly conducting the administration of the State " and to appoint another heir of the Rajah who is capable of administering the affairs of the State to succeed him. In the case of the Behar and Orissa States, Clause 3 of the Sannads of 1915 granted to them runs as follows : " You shall conform in all matters concerning the preservation of law and order and the administration of justice

[1] Article 10 of *Malsa Kaunt* of July 29, 1802.

generally, within the limits of your State, to the instructions issued from time to time for your guidance by the Lieutenant Governor of Behar and Orissa in Council." These provisions selected from treaties and sannads relating to some of the States show how widely they differ in regard to their sovereign powers.

While dealing with the question of the applicability of rules of international law to Indian States, I had occasion to point out, that even allowing for the powers expressly ceded in favour of the British Government or assumed by it, even apart from such express cession, a fairly large number of the Indian States possessed and exercised almost full sovereign powers internally. These States enact their own laws. They exercise plenary civil and criminal jurisdiction over persons and things in their territories. The decisions of the highest tribunals of the State are final; and no appeals lie against their decision to any Court beyond their territories. They impose taxes to finance their administrations The maritime States impose customs duties on specified classes of goods entering and leaving their ports. Fifteen of the Indian States maintain their own postal systems. About twenty States mint coins, though in the case of several of these the coins are of lower denominations only. Hyderabad possesses a paper currency in addition to a mint, the face value of the notes in circulation being over nine crores [1] These facts clearly establish the proposition that a number of the Indian States exercise most of the powers which modern governments all the world over exercise in their own territories But, even so, the internal sovereignty of even a State like Hyderabad, cannot be said to be complete The considerations which impel me to say so are set out in the paragraphs that follow.

The British Government has in virtue of its position as paramount power claimed and exercised the right to settle successions, constitute regencies, to make arrangements for the education and training of minor ruling Princes, to intervene in cases of gross misrule, even to depose Ruling Princes in extreme cases and to settle various disputes that may arise as between the States inter se or as between the States and the British Indian provinces or the Central Government. By far the most important of the powers exercised by the British Government in relation to the Indian States, even apart from and quite independently of treaty provisions is the right to interfere in the affairs of an Indian State when the ruler of it is guilty of gross misgovernment in relation to his subjects. The

[1] *The Indian States Enquiry Committee, Financial,* 1932, p. 141.

rulers of the Indian States are guaranteed protection from both internal and external dangers and enemies by the British Government. Having regard to this privilege of protection, there is an obligation incurred by the rulers to maintain a reasonable standard of administration within their territories. If the Ruler of an Indian State under the cover of protection afforded to him by the British Government, were permitted to tyrannize over his subjects, the position would become intolerable. In such an event the British Government intervenes as a matter of primary duty which it owes to the subjects of the Indian State to set matters right. In the Baroda case the Viceroy stated in the course of a communication to the Gaekwar: "It has never been the wish of the British Government to interfere in the details of the Baroda administration, nor is it my desire to do so now. The immediate responsibility for the Government of the State rests, and must continue to rest, upon the Gaekwar for the time being. He has been acknowledged as the Sovereign of Baroda, and he is responsible for exercising his Sovereign powers with proper regard to his duties and obligations alike to the British Government and to his subjects. If these obligations be not fulfilled, if gross misgovernment be permitted, if substantial justice be not done to the subjects of the Baroda State, if life and property be not protected, or if the general welfare of the country and people be persistently neglected, the British Government will assuredly intervene in the manner which in its judgment may be best calculated to remove these evils and to secure good Government." Again so recently as 1926, Lord Reading as Viceroy in a communication to His Exalted Highness the Nizam on the Berar question stated that "the internal, no less than the external, security which the Ruling Princes enjoy is due ultimately to the protecting power of the British Government, and where Imperial interests are concerned, or the general welfare of the people of a State is seriously and grievously affected by the action of its Government, it is with the paramount power that the ultimate responsibility of taking remedial action, if necessary, must lie."

The Indian States Committee writing in February 1929, stated: "In the last ten years the paramount power has interfered actively in the administration of individual States in only eighteen cases. In nine of these interference was due to maladministration; in four to gross extravagance or grave financial embarrassment. The remaining five cases were due to miscellaneous causes. In only three cases has the ruler been deprived of his powers." It is clear that the British Govern-

ment has interfered in the internal affairs of Indian States on several occasions. Perhaps in a good number of these instances it is well that it did so. And this right is, as has been already emphasized, exercised by the British Government in its capacity of paramount power, in the larger interests of the subjects of the Indian States, but quite independently of provisions of treaties and some times even in derogation of them Of course, when all the Indian State Rulers become constitutional Sovereigns, the necessity for interference by the British Government in the internal affairs of Indian States will not arise.

Having regard to the facts above mentioned which apply to all States, big or small, it would, I think, be difficult—if not impossible—to contend that the States possess even internal sovereignty in full measure While I say this I am not considering instances of States in whose cases even under the treaty itself the British Government has reserved large powers to intervene in internal affairs. But, even apart from these specific provisions, the fact that the paramount power intervenes in cases of misgovernment, disputed successions and other important matters shows that the States do not possess even internal sovereignty in full measure.

We shall now consider the extent and nature of the extra-territorial jurisdictions exercised by the British Government in the territories of the Indian States. These come under five categories, viz. (1) Cantonment jurisdiction. (2) Jurisdiction over Civil Stations in the territories of Indian States. (3) Railway Jurisdiction (4) Jurisdiction over the premises occupied by the Resident or Political Agent. (5) Personal jurisdiction over British subjects.

Whenever the British Government forms a Cantonment in the territories of an Indian State and stations military forces thereon, the State concerned is required to surrender jurisdiction over all persons and things within that area. The extent of jurisdiction so surrendered must be gathered from instruments executed at the time when the State agrees to hand over territory proposed to be formed into a Cantonment into British hands. But speaking broadly, while the laws and the jurisdiction of the State are supplanted by British laws and jurisdiction, the sovereignty of the State continues to exist, though in the background, over that area The laws enacted for these areas are promulgated under the authority of the Foreign Jurisdiction Act, 1890. The same considerations apply to Civil Stations created out of Indian State territories for

special purposes and placed under the administration of the British Government.[1]

In the case of strategic railways and other non-strategic railways which are main lines passing through Indian State territory both civil and criminal jurisdictions have been ceded by the Indian States in favour of the British Government The object is to prevent the inconvenience that is likely to result from the break of gauge in jurisdictions. In order to safeguard the interests of the travelling public and those of trade, the necessity of preserving in the hands of a single authority both civil and criminal jurisdictions is obvious. "The Bombay Baroda and Central India Railway main line, for instance, crosses no less than thirty-eight frontiers between Delhi and Bombay."[2] If both civil and criminal jurisdictions are not retained in the hands of a single authority, but exercised by the various States through whose territories the railway line passes, the trading as well as the travelling public are bound to be affected seriously owing to the conflict of jurisdictions. Serious administrative difficulties are also bound to arise in that event. For these reasons the British Government have entered into agreements with the Indian States in such cases, for the cession in their favour of civil and criminal jurisdictions over main railway tracks, station yards and other areas appurtenant to these. The extent of the jurisdiction so ceded must be ascertained with reference to the documents which have come into existence in that connection. The Privy Council have held in the case of *Muhammad Yusuf-ud-Din* v. *The Queen Empress*[3] that the arrest of a Hyderabad subject on railway land in the Hyderabad State under the authority of a warrant issued by a British Indian Magistrate for an offence committed in British India and not on the railway or in any way connected with the administration of the railway, was illegal. Lord Halsbury who delivered the judgment of the Judicial Committee observed: "Their Lordships are of opinion that the railway territory has never become part of British India, and is still part of the dominions of the Nizam. The authority therefore to execute any criminal process must be derived in some way or another from the Sovereign of that territory, and the only authority relied on here is the authority given in the correspondence which constitutes the cession by the Nizam of jurisdiction to the British Government. It is important to observe that the

[1] See *Papiah Naidu* v. *Rajah of Ramanad*, 59 Cal., 439.
[2] *Report of the Indian States Committee*, 1928–29, p. 46.

notification upon which the learned judges in India appear to have relied could itself give no such authority. Even if, in more extensive terms than in fact are included in the notification, it had purported to give jurisdiction, as the stream can rise no higher than the source, that notification can only give authority to the extent to which the Sovereign of the territory has permitted the British Government to make that notification."

The home and premises occupied by the Resident or Agent in an Indian State are also regarded as British territory.

The extra-territorial jurisdiction exercised by the British Government over European British subjects with respect to offences committed by them in Indian State territory requires careful examination. It is true that in the case of a State like Mysore, under Article 16 of the treaty of 1913 (this article is an exact reproduction of Article 17 of the Instrument of Transfer of 1881) the Maharaja of Mysore has agreed that "plenary criminal jurisdiction over European British subjects" in his territories "shall continue to be vested in the Governor-General in Council" and that he the Maharaja "shall exercise only such jurisdiction in respect to European British subjects as may from time to time be delegated to him by the Governor-General in Council." Where the authority for the exercise of such jurisdiction is based upon the express consent of the ruler, there is no doubt that although the position itself is extremely anomalous, there is nothing illegal or strange about it. But it is contended that the British Government has a right to exercise extra-territorial jurisdiction over European British subjects even without the consent of the local Sovereign in respect of offences committed in his territory. As a matter of fact, there are instances in which such jurisdiction has been assumed even as against the protests of the local Sovereign. The case of Bhopal provides an example of the assumption of such jurisdiction even in the teeth of a specific treaty provision which prevents the exercise of such jurisdiction. The Article of the Bhopal Treaty of 1818, which pertains to this matter, provides that the ruler shall be the absolute ruler of his own country and that British jurisdiction shall not be introduced into that principality. When in the year 1863 the representative of the British Government claimed to exercise jurisdiction over British subjects resident in Bhopal, the ruler made a strong protest and invoked the provision of his treaty which stated that British jurisdiction would not be introduced into that State at all.[1] But the Government of India overruled his

[1] D. K Sen, *The Indian States*, p 99

contention on the plea that the provision referred to had in view the authority of the ruler of Bhopal over his own subjects within his own territory, and that it did not provide any ground for the State to claim jurisdiction over British subjects. There could be no doubt whatever, as Sirdar D. K. Sen has pointed out, while discussing this question, that according to the principles of international law and also having regard to the language of that treaty provision, the position taken up by the British Government in this matter was clearly indefensible.[1]

The right of a country to take cognisance of offences committed by persons within its territory, whether the offenders happen to be its subjects or not, is a very well-established principle of the law of nations. As Lord Chief Justice Cockburn has observed in *R.* v. *Keyn*,[2] " no proposition of law can be more incontestable or more universally admitted than that, according to the general law of nations, a foreigner though criminally responsible to the law of a nation not his own, for acts done by him while within the limits of its territory, cannot be made responsible to its law for acts done beyond such limits." Criminal law is essentially territorial in its character. A person, though he may not be a subject of the country in which he happens to be resident, either temporarily or permanently, enjoys the protection of the Sovereign of that country. In fact, even a foreigner owes allegiance, though temporary, to the Sovereign of the place so long as he is resident therein, this allegiance being correlative to the protection which he enjoys at the hands of that Sovereign. If he commits breach of the penal laws of that country, it is well-recognized that it is that country that has the primary right to punish him for that infringement. In fact the law of extradition is based upon this principle. Pollock B. in the case of *Queen* v. *Ganz*[3] has put the position very lucidly in the following words : " Whatever rights, civil or otherwise, a man may have which may be affected by his domicile, it is and must be perfectly clear by the law of all nations that each person who is within the jurisdiction of the particular country in which he commits a crime is subject to that jurisdiction ; otherwise the criminal law could not be administered according to any civilized method. That has been the law from very far back, it is recognized by the earliest writers upon law, it has been adopted again and again in treaties and dealings between this country and other countries, and is to be found stated in all the text books on the subject,

[1] D. K. Sen, *The Indian States*, pp. 99–110.
[2] (1876) 2 Ex. D. 63.
[3] (1882) L R 9 Q B.D. 93, p. 100.

and in all the cases in which the matter has been discussed."

I think it is perfectly clear that the British Government cannot make out even a plausible case for the general exercise of any extra-territorial jurisdiction in regard to offences committed by European British subjects, within the territories of the Indian Princes. That a treaty should recognize a ruler as the absolute sovereign in his territories and at the same time an inroad should be made into that sovereignty by an extra-territorial jurisdiction of this kind, even without the express consent of the ruler concerned and even in spite of his protest, cannot, it is submitted, be considered a tenable position, however one looks at it. As the principle involved in the exercise of criminal jurisdiction in regard to offences committed within the limits of a particular country is as already explained, based upon the principle that crime is essentially territorial in character, it is only right that even in regard to States, which have expressly assented to the surrender of jurisdiction over European British subjects in favour of the British Government, this extra-territorial jurisdiction should immediately cease. The exercise of such jurisdiction is the relic of a past age and implies a distrust of the fairness and competency of Indian State tribunals Professor Berriedale Keith states that " the powers of extra-territorial jurisdiction exercised by the Crown at the present day are historically closely connected with the privileges first granted in 1583 by the Sultan of Turkey to the British Levant Company, under which that body was permitted a measure of self-government, and the right of exercising jurisdiction over British subjects sojourning in the Ottoman Dominions "[1]

The relationship existing between the Indian States and the British Government is primarily a relationship between the States and the British Crown and not the Government of India. But the Crown in England is a Constitutional Institution, as the Sovereign for the time being functions in regard to political matters only upon the advice of his ministers. The agency through which the Crown may exercise its functions with regard to the Indian States may be the Secretary of State or the Viceroy or any other duly constituted authority. Professor Berriedale Keith also observes that the relations of the Native States, however conducted, are essentially relations with the British Crown and not with the Government of India.[2]

[1] Keith, *The Constitution, Administration and Laws of the British Empire*, 1924, p. 307.

[2] Keith, *The Constitution, Administration and Laws of the British Empire*, 1924, p 260

This fact has received statutory recognition in the Government of India Act, 1935, Sections 2 and 3, which separate the offices of the Governor-General and His Majesty's representative for the exercise of the functions of the Crown in relation to Indian States, though the two offices may be held by the same individual.

Now I shall try to sum up the constitutional position of the Indian States. The Indian States are protected principalities, subject to the Suzreainty of the British Crown, and enjoying varying degrees of internal sovereignty Their relationship to the British Crown is regulated partly by formal treaties, engagements or sannads which may exist in any particular case and partly by political usage All of them have surrendered their external sovereignty to the British Crown and consequently, they have no place in international life But within the British Empire, several of the Indian States are considered as sovereign political communities. It is submitted that although the relationship existing between the Indian States *vis-à-vis* the British Crown strictly speaking, falls beyond the purview of both international and municipal law, yet it has to be regulated in accordance with the principles of international law, as the States have in fact been recognized in the constitutional laws of the British Empire as sovereign communities. These principles drawn from the law of nations, to the extent to which they are applicable, furnish arguments and useful analogies in the consideration of any questions of difficulty that might arise as between the British Crown and any Indian State.

So far we have discussed the pre-federation position of the Indian States Such of the Indian States as agree to accept the Federation, will, no doubt, have to part with some of their existing sovereign powers in favour of the Crown, so that the Crown might in its turn place them at the disposal of the Federation to be exercised by the various federal organs The new Federation will be an organic union of the autonomous British Indian Provinces and the Federated States. The position which the Federated States will occupy in the Indian Federation is, doubtless, an interesting theme. It presents a number of aspects and these are considered in their appropriate places in the future chapters.

CHAPTER IV

FEDERALISM: AND THE NATURE OF INDIAN FEDERALISM

We find, in the modern world, many countries functioning under a federal form of government. A system of government, which has been found flexible enough to afford a satisfactory basis for the political organization of communities presenting such diversities of situation, historical development and outlook, as Switzerland, Australia, the United States of America and Canada, must undoubtedly have merits of its own. Nobody can or would reasonably expect such a political institution fashioned to meet varying human needs and circumstances, to display the same unalterable features, wherever it may be found. But a federal State, though exhibiting variations appropriate to the particular environment, possesses certain characteristics, which may be termed fundamental, which distinguish it sharply from another form of polity known as the unitary State A federation must also be distinguished from a confederation, which though allied to a federation is nevertheless very different from it.

A confederation involves a loose alliance between a number of Sovereign political communities for certain common ends. The States under a confederation continue to preserve their sovereignty as well as their individuality, though they band themselves together for certain common purposes For the fulfilment of these common purposes, they agree upon joint consultation and action, but there is never the creation of a distinct Central State. But a federation involves the emergence of a new State out of the federal union of the erstwhile separate States. The central Government which is brought into existence as a result of the federation of States, is invested with effective power over all the citizens living within the federation, in regard to certain matters of common interest. But in the case of a confederation, no separate central Government comes into existence at all. The following extract taken from *Modern Political Constitutions*, by C. F. Strong, pp. 98-99, brings out the essential differences between a federation and a confederation: "There are two German words which in their compounding help us to grasp the difference between a so-called confederation and a true

federation—*Staat*, meaning State, and *Bund*, meaning league. The Germanic Confederation, as it existed from 1815 to 1866, was always spoken of by the Germans as the *Bund*, and the Diet at Frankfort, which was its only central organ, was, in effect, nothing more than an assembly of ambassadors of the various States of the league. Such a league of States the Germans called a *Staatenbund*, where the emphasis is laid on the plurality of States A *Staatenbund* has not, as a rule, proved for long satisfactory to its members, which have, in the course of time, either returned to their former isolation or knit themselves more closely together into a real union. This real union the Germans call a *Bundesstaat*, in which, it will be observed, the word Staat becomes singular. It is, in fact, not a federation of States (*Staatenbund*), but a federal State (*Bundesstaat*). Such an organization is based upon, first, a treaty among the federating units, and then upon a federal constitution accepted directly or indirectly by their citizens." The States who desire a federal union, enter into a compact or arrangement agreeing to unite for certain common purposes, into a new community, while for other purposes they retain their own separate existence and powers. In fact the division of Sovereign powers of Government between the federal Government and the States is one of the leading features of federalism The word federal, is itself derived from the latin *Foedus*, which means a treaty.

A Unitary State is distinguished by the fact that there is only one sovereign central authority in it There is no place in a Unitary State for more than one supreme law-making body, though it is open to the central government to delegate some of its functions, to subordinate authorities, which it might bring into existence. A federal State, on the other hand, is " a form of government in which Sovereignty, or political power, is divided between the central and local governments, so that each of them within its own sphere is independent of the other. The distribution of powers between the local and central governments may vary to any extent ; but the fundamental idea is always that of the two-fold Sovereignty and the independence of each government within its own sphere."[1] It may be observed that the division of powers which exists in a federal State presents no analogy to the division of functions between the central authority and a local authority in a Unitary State. The

[1] Sir Robert Garran, quoted at p 230 of the *Report of the Royal Commission on the Australian Constitution.*

local authority is a creation of the central authority and exercises only those functions which may be delegated to it. The range of powers and functions with which a local authority may be invested, is liable to be altered from time to time, at the unrestricted discretion of the central authority ; indeed, the local authority may even be abolished by the central authority. But these conditions have no application to a federal State. A Constituent State in a federation neither owes its existence to, nor does it exercise its authority on the sufferance of, the federal Government. Each government is supreme within its allotted sphere ; and both are alike subject to and controlled by the constitution which is the Sovereign.

Two conditions are essential to the formation of a federal State. The first condition is, the existence of " a body of countries such as the cantons of Switzerland, the Colonies of America, or the provinces of Canada, so closely connected by locality, by history, by race, or the like, as to be capable of bearing, in the eyes of their inhabitants, an impress of common nationality "[1] The second condition is, the existence of a desire among these States for union, though not for unity, for if they desired unity they would then be prepared to lose their individuality and thus become a unitary instead of a federal State. In fact, federation is the only way in which two conflicting loyalties, the wider loyalty of nationalism could be reconciled with the narrower loyalty to one's own state. This reconciliation takes place by means of the division of the powers of government as between the central organism and the federating States. With these preliminary observations we might proceed to enumerate the essential features of a federal polity

A typical federal State requires the existence of three fundamental characteristics. They are (1) the supremacy of the constitution, (2) the division of powers, (3) the special position of the judiciary as the guardian and interpreter of the constitution.

A federal State comes into being as a result of the agreement arrived at between a number of autonomous States to combine together to establish over themselves a new government to which they have parted, out of their own free will, with a part of the powers they were hitherto in possession of. The constitution embodies the terms of the compact whereby the constituent States bring into existence a central State ; and it governs the future relations between the Federation and its

[1] Dicey, *The Law of the Constitution*, eighth edition, p. 137.

units. After the federation is established, the central as well as the State Governments, exercise their respective executive, legislative and judicial powers, in accordance with the provisions of the constitution.

Three important consequences flow from the fact of the supremacy of the constitution

The first consequence is, that the constitution must necessarily be a written one, in order to avoid doubts and difficulties as to the respective spheres of authority of the federating States and the central government in the future. The second consequence is that the acts of all governmental agents must conform to the provisions of the constitution; and to the extent to which they transgress these provisions, their acts would become void. The third consequence is, that the Constitution becomes a rigid instrument. It stands to reason that the process of amending the provisions of the Constitution should be hedged in by conditions, as the Constitution represents the terms of the compact or treaty, arrived at after deliberation among the federating units, who, while prepared to surrender some of their powers in favour of the central government are anxious that the residue of powers, remaining after such cession, should not be whittled down except under conditions which they have themselves agreed to in the Constitution. The Constitution of the United States furnishes an example of what a rigid Constitution would be like, while the Constitution of Great Britain shows how a flexible Constitution would behave. Article V of the Constitution of the United States runs thus: "The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two-thirds of the several States, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three-fourths of the several States, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate." This provision which defines the conditions under which the Constitution of the United States may be amended, shows, how

elaborate and difficult is the procedure laid down to that end. Now, this may be contrasted with the easy facility with which even laws, which in other Constitutions may be termed fundamental, may be altered in Great Britain. The ordinary process of law-making, namely, the House of Commons acting in collaboration with the House of Lords and the King, can change any law, whether fundamental or not.

The second leading feature of a federal Constitution is the distribution of governmental powers as between a central government having full authority in certain matters over the whole area of the federation, and a number of State governments exercising authority in certain other matters within the limits of their States In the distribution of powers, great divergences may exist as between one Constitution and another. The general rule is, that matters of national importance like defence, coinage and currency, and external affairs, are committed to the care of the central government ; while matters of local importance come within the competence of the States. Some of the factors which decide the details of the allocation of powers are the peculiar needs of the federating communities, the necessity of compromise between conflicting views, and the general outlook of the people who federate. In effecting the distribution, the Constitution may adopt one of two courses It may either enumerate the powers of the federal authority, leaving the balance over to the States ; or it may define what powers the federating units shall have, leaving the balance over to the federal authority. This balance or residue is known as " the residue of powers." The Australian and United States Constitutions adopt the first method, while Canada furnishes an example of the second. In the case of Canada, the Constitution defines the powers of the provinces, leaving the remainder to the Dominion Government It is true that a list of twenty-nine subjects is set out in Section 91 of the British North America Act, 1867, as coming within the exclusive legislative competence of the Dominion Government, but the section makes it clear that the enumeration so made in no way bars the right of the Dominion Parliament to legislate upon all matters not exclusively assigned to the legislatures of the provinces.

The third leading characteristic of a federal Constitution is the special position assigned to the Judiciary under it. In view of the fact that the Constitution is a contract or treaty in which the contracting parties reduce to writing the terms of their union, there must be some agency to uphold the

Constitution and to keep the various governments within the limits marked out for them. This agency is the federal Court ; and it is the function of this tribunal to resolve conflicts that might arise between the federal and State governments or the State governments *inter se*. It also pronounces on the constitutionality of the legislative Acts of the various legislatures. For these reasons, a Federal Court is generally described as the guardian and interpreter of the Constitution.

One or two general observations may now be made with regard to the federal form of government. It is obvious that much of the simplicity which is associated with the working of a Unitary form of Government can hardly be expected of a federal polity. The whole mechanism of a federal State functions in a legal atmosphere. The validity of every legislative and administrative act is open to challenge in a Court of Law. This results in a great deal of uncertainty in vital matters. And this cannot certainly be in the best interests of the country Again, a number of legislatures and civil services, operating side by side, not only mean a larger outlay on their maintenance but also a certain amount of overlapping of the activities of governments. But with all these defects, it may be the only practicable form of government in a certain set of circumstances. Especially in a country, large in point of size and with a variety of economic conditions and pronounced local traits among the peoples of the different areas in it, a federation is the only form of polity which can bring the country under a fairly effective form of government. In conditions such as those mentioned above, an attempt to set up a unitary form of government might well prove disastrous The federal State also connotes the existence of a dual citizenship, citizenship of the province and that of the federal State. Sometimes the citizen of a federal State is apt to find himself between two conflicting loyalties, the loyalty to his own State and loyalty to the Central Government. But in spite of all these shortcomings, a federal polity has worked satisfactorily in many parts of the world. The United States of America, Canada, Australia and Switzerland and many other countries have done well under a federal form of government.

Now, we shall proceed to consider some of the dominant features of the federalism which the new Constitutional arrangements will bring into existence in India. The first thing that strikes anybody who studies Indian federalism is,

that the federal organism which will begin to function shortly is not the creation of the Indian people It is true that in the fashioning of the new Constitution certain prominent British Indians, and Rulers of some of the Indian States or their representatives were called into consultation by the British Government. But it cannot be claimed that the new Constitution represents the views of the majority of the Indian people, whether of British India or the Indian States. As a matter of fact, the new Constitution does not even carry out the recommendations of the British Indian delegation to the Joint Select Committee on several important points. In other parts of the world, a federal State has come into existence as a result of the compact arrived at by the peoples of the federating units It is the people of the federating units that have determined the nature and powers of the new federal State. The preamble to the Constitution of the United States of America, which runs thus · " We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America," shows that the sanction for the federal union of the States was derived from their people. When self-governing British Colonies like the States of Australia or the provinces of Canada have formed themselves into a federal union, it is true that the sanction of an Imperial Parliament was necessary to legalize that union , but the principle holds good even in these cases that the essential features of the Constitution under which the new federal State was being created was determined by the people of the federating units themselves. In Australia, the terms of federal union were discussed at numerous conferences and conventions extending over a number of years. In the year 1899, the draft Constitution, which had been evolved as a result of these deliberations, was submitted to the electors of the Colonies of New South Wales, Victoria, South Australia, Tasmania and Queensland. At the Referendum the electors by a majority approved of the draft Constitution under which the federal union had to take place. The Legislatures of the five Colonies thereupon passed Addresses to the Queen, praying that the Constitution might be passed into law by the Imperial Parliament. This draft Constitution, in which certain minor amendments were made by the Imperial authorities with the approval of the Colonial delegates, was

passed into law as the Commonwealth of Australia Constitution Act, 1900. The preamble to this Act is interesting, for the reason, that it specifically mentions the fact that it was the people of Australia that had agreed to unite in one indissoluble Federal Commonwealth under the provisions of the Constitution established by the Act. The preamble reads thus: "Whereas the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on the blessings of Almighty God, have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established And whereas it is expedient to provide for the admission into the Commonwealth of other Australasian Colonies and possessions of the Queen, Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords spiritual and Temporal, and Commons, in this Parliament assembled, and by the authority of the same, as follows." The British North America Act, 1867, is primarily based upon the resolutions passed at the Quebec Conference of 1864. On December 4, 1866, the delegates of Canada, Nova Scotia and New Brunswick met in conference at the Westminster Palace Hotel, London, in order to revise the Quebec resolutions. It is interesting to note that Lord Monck, the Governor-General, and Lord Carnarvon, the Colonial Secretary, attended the conference at its later stages. The Bill for presentation to Parliament was drawn up by the members of this conference in consultation with the Imperial authorities. As Professor Kennedy has pointed out: "The Bill passed practically as presented, and it can thus be considered the product of Canadian Statesmanship."[1] I have considered it necessary to delve a little into past history in an endeavour to show that the Commonwealth of Australia Constitution Act, 1900, and the British North America Act, 1867, are solely the products of Australian and Canadian Statesmanship respectively, and that they had the sanction of the peoples of the countries for whose benefit they were enacted. The same thing cannot be said of the new Constitution which India will have.

As the Federal Structure Committee of the First Round Table Conference in their interim report have pointed out, the process of Federation will involve the creation of a new State which will derive its powers:

(*a*) in part from the powers which the States will agree to

[1] W. P. M. Kennedy, *The Constitution of Canada* (1931), p. 315.

concede to the Crown, to be placed at the disposal of the new Federation ; and

(*b*) in part from the transfer to it of such of the powers of the Central Indian Government (and also it may be of the provincial Governments) as may be agreed to be necessary for the purposes of the Federation.[1]

The new constitutional arrangements have for their objective the creation of an organic union between the British Indian Provinces and such of the Indian States as agree to accept Federation The British Indian Provinces, hitherto formed parts of a unitary State. They were not autonomous communities directly linked to the British Crown. The sanction of an Imperial Statute was, therefore, necessary, to enable them to enter the Federation as autonomous Provinces The Government of India Act, 1935, which embodies the outlines of the Federal polity to be established in India, is the means by which British India will enter the new Federation.

But the Indian States who are Sovereign communities, not amenable to the legislative authority of the British Parliament, could not be brought into the Federation, except by the employment of a device which would be in accord with their constitutional position. The cession of powers in favour of the Federal organism, so far as the Indian States are concerned, will take place through the medium of Instruments of Accession executed by their Rulers, in favour of His Majesty and their acceptance by him. This method of obtaining the accession of the Indian States to the Federation was inevitable in view of their constitutional position. Not only has this method of entry of a unit into a federation no parallel in any other federal system, but it also involves a special feature in respect of the basis of the Federation. Elsewhere, the terms of the federal union which are settled by the peoples of the federating units are embodied in a single written instrument, which is of paramount authority. Of course, where the federating communities are not independent political communities, but self-governing British Colonies under the British Crown, the terms of the federal compact arranged by the peoples of the Colonies, are embodied in an Imperial Statute in order to legalize the compact. But in all such cases there is only one governing instrument. So far as India is concerned the position will be entirely different.

[1] *Indian Round Table Conference*, November 12, 1930, to January 19, 1931, Vol. I. The Federal Structure Committee, p. 644.

The Government of India Act, 1935, will, no doubt, be the Instrument, which will determine the respective powers of the Federation and the British Indian Provinces so far as British India is concerned. But in the case of every Federated State, the extent of the powers exercisable by the various Federal organs in relation to it will have to be ascertained by construing the Instrument of Accession of that State along with the Government of India Act, 1935 There will, therefore, be a multiplicity of constitutional documents. This is a feature peculiar to the Indian Federation

The general rule in the case of other federations is, that the Federal Government will have an identical range of powers over all the constituent units. But the same rule will not apply to the Indian Federation. So far as the British Indian Provinces are concerned, that principle will certainly hold good. But, it is contemplated, that there may be variations in the extent of the authority exercisable by the Federal organs, from one State and another Though, perhaps, the range of variation permissible in the exercise of federal powers in the Indian States will, in the larger interests of the Federation, be presumably confined to narrow limits ; that there will be variation is undoubted.

The Indian States as Sovereign communities, with independent powers of legislation, will continue to exercise all their original powers, except those which are specifically ceded by them to the Federation under their Instruments of Accession The position in this respect, so far as the British Indian Provinces are concerned, will be rather different. The Government of India Act, 1935, makes an elaborate distribution of governmental powers between the Federation and the Provinces, and the powers exercisable by the Provinces of British India are determined by the terms of the Act. The details of the scheme of distribution are considered in a later chapter.

Certain important activities of the Federal Government, like defence and external affairs, will be under the exclusive control of the Governor-General. The Ministers responsible to the Federal Legislature will have no voice in these matters.

The number of units which the Indian Federation will comprise is bound to create a record, being far in excess of the number of constituent units in other existing Federations. Another striking feature of the Indian Federation is, that the disparity among the federating units, in regard to their areas, populations, resources and systems of internal government, will

be very much more pronounced in India than in other Federations.

Though the Indian Federation will present features which have no parallel in other federal systems, it will nevertheless share some of the essential features of a federal polity, as for example, the division of powers, the Federal Court as the guardian and interpreter of the Constitution, and the supremacy of the Constitution, though that Constitution will not be found in one single instrument as in the case of other Federations, but will have to be sought in a number of them.

CHAPTER V

INTERPRETING THE CONSTITUTION

I. *The Immunity of Instrumentalities*

In the interpretation of the federal compact embodied in the Constitution of the United States of America, the Supreme Court of the United States has formulated and applied a principle which is now well-known to all constitutional lawyers as "the Doctrine of the Immunity of Instrumentalities." This doctrine was accepted as a fundamental rule of interpretation to be applied to the Commonwealth of Australia Constitution Act, 1900, right up to the year 1920, when, in that well-known case of *Amalgamated Society of Engineers* v. *Adelaide Steamship Co., Ltd*,[1] the Australian High Court ruled that the doctrine of immunity of instrumentalities so far as it rested on the principle of mutual non-interference should no longer be permitted to sustain any contention arising under the Constitution In construing the provisions of the British North America Act, 1867, the Privy Council have maintained that any issue arising under the Act must be determined solely with reference to the actual language of any provision or provisions of the Act applying to it, and that no extraneous principle like the doctrine of "implied prohibitions" should have any influence in the decision of that issue. For reasons which I shall mention hereafter, it seems most probable, and I might even venture to say, almost certain, that both the Federal Court and the Privy Council will take the view that the doctrine of immunity of instrumentalities, has no application to the construction of the Government of India Act, 1935, at any rate so far as the Federation and the British Indian Provinces are concerned. But one cannot feel so very certain as to what view these courts are likely to take upon the application of this doctrine so far as the Federation and the Federated States are concerned, when the Instrument of Accession of any State is construed along with the Constitution Act. I shall deal with this question later, though at this point I might say that the more reasonable view to take is that the doctrine above referred to cannot be called into aid even in regard to the decision of a constitutional dispute

[1] (1920) 28 C.L.R. 129

to which a Federated State happens to be a party. The reasons which support this view, will be mentioned later. Whatever may be the view which will ultimately prevail upon this question, it seems very probable that this problem will present itself for consideration in constitutional disputes sooner or later. Apart from the theoretical interest which a study of this doctrine undoubtedly holds, it would seem that an examination of this doctrine, however brief, would be necessary in view of possibility of problems of this character arising under the new Constitution.

This doctrine was first formulated in the United States by the great American Judge, Marshall, C.J., in his famous judgment in *McCulloch* v. *Maryland*.[1] In this case the Supreme Court held that the incorporation of the Bank of the United States was within the implied power of the Congress, and that it was not competent for the States to levy a tax on the note issue of the Bank. The main ground of that decision was that the Bank's operations were in substance the operations of the Federal Government itself, and to allow the States to tax those operations would be inconsistent with and be a serious infraction of the supremacy of the Federal Government, in those matters that belonged to it under the Constitution. It was observed in that case: "that the power to tax involves the power to destroy, that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance, in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied."[2]

The doctrine may be stated in the following terms: When a federal constitution provides for the operation of quasi-sovereign governments within the same territory, every power of each separate government must, of necessity, be construed as limited and restricted so as not to impair the independence of the other; one of the implied limitations being the prohibition on the States taxing the agencies by which the Federal Government carries on its functions; while similarly the Federal Government is precluded from taxing the agencies of the States' Governments; the principle of implied prohibition of all control by one government over the operations of the other being applicable, whether such control is sought to be exercised by way of taxation or

[1] 4 Wheaton 316 = 4 L. Ed. 579. [2] 4 L. Ed. 579, p 607

regulative legislation. The doctrine is based upon the principle that it is implied in the consensual transaction by which the federal union is created, that the quasi-sovereign governments which are established under the Constitution should so function that each of them will respect the independence of the other in its own sphere, and not attempt to fetter, control or interfere with the free exercise of the legislative or executive functions of the other.

In *Buffington* v. *Day*[1] where it was decided that the Congress of the United States could not impose a tax upon the salary of a Judicial Officer of a State, Nelson J. observed as follows : " It is admitted that there is no express provision in the constitution that prohibits the General Government from taxing the means and instrumentalities of the States, nor is there any prohibiting the States from taxing the means and instrumentalities of that Government. In both cases the exemption rests upon necessary implication and is upheld by the great law of self preservation ; as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can only exist at the mercy of that government." It must not, however, be supposed that full play is given to this principle in all cases. Even in the United States of America where the doctrine is an established rule of interpretation of the constitution, certain limitations have been recognized on the application of this rule. It may, perhaps, be useful to consider some of the important limitations to this doctrine.

It is interesting to note that the doctrine is held as applicable only to governmental agencies in *stricto sensu* and not to trading activities. In the case of *South Carolina* v. *United States*,[2] it has been held that while the Federal Government in the United States may do nothing by taxation in any form to prevent the full discharge by any State of its governmental functions, yet, whenever a State engages in a business of a private character, that business is not withdrawn from the taxing power of the Federal Government. The State of South Carolina took under its exclusive control the business of selling intoxicating liquors and established shops for the wholesale and retail sale of liquors. The United States sought to recover the license fees prescribed by the internal revenue Acts for dealers in intoxicating liquors. The important question which arose for consideration in the

[1] 11 Wallace 113 = 20 L Ed., p. 122, p. 126.
[2] 199 U S. 437 = 50 L.Ed., 261.

case was, whether persons who were selling liquors as agents of the State of South Carolina, were relieved from liability for internal revenue by the fact that they had no interest in the property of the business but were simply the agents of the State which in the exercise of its Sovereign power, had taken charge of the business of selling liquor. The Court decided by a majority that the rule of exemption of state agencies and instrumentalities from national taxation were limited to those of a strictly governmental character, and did not extend to those used by the State in carrying on business of a private character. It is interesting to observe that three learned judges of the Supreme Court dissented from this view. Mr. Justice White (with whom Justice Peckham and Justice McKenna concurred) in delivering the dissenting judgment stated, that in his view the tax was not leviable as the State of South Carolina had complete and absolute power over the sale of liquor and that the business being a state instrumentality is immune from national taxation. But the distinction drawn between governmental agencies in *stricto sensu* and ordinary business enterprises which happen to be conducted by a state government in the case above referred to, has now become firmly established See for instance *Flint* v. *Stone Tracy Co.* [1], *Federated Engine Drivers' and Firemen's Association* v. *Broken Hill Proprietary Co* ,[2] *Australian Workers' Union* v. *Adelaide Milling Co.*[3]

Professor Harrison Moore in his treatise on *The Constitution of the Commonwealth of Australia* (Second edition) has discussed the limitations placed on the application of this principle, in the chapter dealing with immunity of instrumentalities. The following observations made by him, pp. 430–433, indicate some of the limitations recognized on the application of this doctrine : " The application of the principle in favour of the states is less simple, and less extensive. There it would appear that the doctrine of exemption is limited to the operations which are carried on on behalf of the Government itself, including of course all its local agencies, such as municipalities,[4] and it does not embrace the protection of private rights enjoyed by individuals merely because those rights are created by State and not by Federal law. The implied restraint must, of course, be read

[1] 220 U S. 107 = 55 L Ed , 389.
[2] (1911) 12 C L R , 398.
[3] (1919) 26 C L R , 460.
[4] *U S* v *Railroad Co* (1873) 17 Wall, 322

consistently with the Constitution itself, and that constitution clearly imports that a federal authority which may override State laws, may also override rights which are created by those laws. This limitation—which hardly appears to require authority—was emphatically asserted by the Supreme Court of the United States in *Knowlton* v. *Moore*,[1] where it was held that an inheritance tax was within the power of the Congress, though the right of succession is a privilege conferred by State law; the burden was not cast upon the power of the State to regulate successions More striking is the earlier decision in *Veazie Bank* v. *Fenno*[2] a case which differs from *McCulloch* v. *Maryland* only in that the Banks were chartered by the States and issuing notes under State authority, and the tax on the note issue was imposed by the Federal Government; the converse case, therefore, to which the principle might have been deemed immediately applicable. It was held however that the tax was *intra vires*, and the case is the more interesting because the tax was destructive in its incidence and purpose—'the power to tax is the power to destroy.' . The case of *Veazie Bank* v. *Fenno* above referred to, depends in part at any rate upon the principle that the doctrine of immunity, being based upon necessity, must be limited by necessity; and if the effective exercise of some power committed to the federal authority would be impaired by the immunity of the State, even the activities of the State Government itself in the execution of its functions may equally with the acts of private individuals be controlled by the federal law. There are some federal powers which from their nature essentially demand the uniform observance of the rules which they establish. The Federal tax on the State note issue was sustained in *Veazie Bank* v *Fenno* as an essential part of the means chosen by Congress to regulate currency; and 'currency' is amongst the power of the Commonwealth Parliament mentioned by the High Court to illustrate the rule in question. Weights and measures, immigration, quarantine, are other such cases.[3] So in the United States it was held that navigation laws established by Congress were obligatory upon vessels employed in the police service of the State;[4] and

[1] (1899) 178 U S 41 See especially pp 58–9

[2] 8 Wall, 533, 547.

[3] Per Griffith C J in the *State Railway Servants' case*, 4 C L R , 488 at p 536; and *A-G* for *New South Wales* v *Collector of Customs*, 5 C L R , 818.

[4] *Oyster Steamers of Maryland*, 31 Fed Rep 763 , *Governor Robert McLean* v. *U.S* 35 Fed Rep. 926.

upon the same principle laws of the Commonwealth under their powers over 'light-houses, lightships, beacons and buoys,' can recognize no exception of the States from their operations."

Now we may pass on to consider some of the Australian and Canadian cases which have arisen in connection with the application of this doctrine.

The earliest case to arise in Australia in connection with the application of this doctrine was the *Wollaston's case.*[1] The State of Victoria sought to impose income-tax on the salary of a federal officer, called Wollaston, who resided and performed most of his federal duties in that State. An objection was raised that he was not liable to be assessed to income-tax by the State on the principle that he, as a federal officer, was immune from the taxing laws of the State. The Supreme Court of Victoria refused to apply this doctrine and held that the officer was liable to pay the State income-tax. In *D'Emden* v *Pedder*,[2] the question of the application of this doctrine came up for consideration before the High Court of Australia for the first time. There was a Tasmanian Statute which required that every receipt for sums of money over £5 and under £50 should bear a duty stamp of 2d., and the issue that had to be decided was whether a federal officer, while executing a receipt for his salary under the terms of the Federal Audit Act, was liable to use the State stamp on the receipt or not. The High Court of Australia decided that inasmuch as the operation of such a provision of State law on the acts of the Commonwealth officers would be an interference with the performance by the federal officers of their functions, such law could not be held to be operative so far as the stamping of the receipts of federal officers were concerned. Griffith, C.J in that case observed as follows: "It must . . . be taken to be of the essence of the Constitution that the Commonwealth is entitled within the ambit of its authority, to exercise its legislative and executive functions in absolute freedom, and without any interference or control whatever except that prescribed by the Constitution itself. . . . It follows that when a State attempts to give to its legislative or executive authority an operation which, if valid, would fetter, control, or interfere with the free exercise of the legislative or executive power of the Commonwealth, the attempt, unless expressly authorized by the Constitution, is to that extent invalid and inoperative." The question of the liability of Federal

[1] (1902) 28 V L R 357 [2] (1904) 1 C L.R 91.

officials to be assessed to State income-tax in respect of their official salaries came before the High Court of Australia in *Deakin* v. *Webb*.[1] The High Court followed the principle which it had laid down in *D'Emden* v. *Pedder*, and ruled that the salary of a federal officer was not liable to the payment of State income-tax. The State of Victoria which had lost the case did not rest content with this ruling. It again sought to tax the salary of a federal officer called Outrim, who resided and received his official salary in that State. The Supreme Court of Victoria, following the decision of the High Court of Australia, decided against the State But an appeal was preferred from the State direct to the Privy Council In *Webb* v. *Outrim*,[2] the Privy Council reversed the decision of the Supreme Court of Victoria, and held that the salary of the federal officer was assessable to income-tax imposed by the State of Victoria. The decision is important for the reason, that, the Privy Council refused to read into the Australian Constitution, any doctrine of implied prohibitions. The Lord Chancellor, the Earl of Halsbury, in deciding that case stated that in view of the fact that no restriction on the power of the Victorian legislature in regard to the taxing of the salary of a federal officer had been expressly enacted by the Commonwealth of Australia Constitution Act, it was not proper to call into aid any doctrine like the immunity of instrumentalities to curtail the powers of the Victorian legislature. Then came the case of *Baxter* v. *Commissioners of Taxation*.[3] The Income Tax Commissioner of New South Wales sought to tax the salary of a federal officer residing in that State The High Court of Australia by a majority refused to follow the decision of the Privy Council and reiterated their earlier view that the salary of a federal officer was not liable to be assessed to State income-tax. The High Court refused to grant leave to appeal to the Privy Council, and the Privy Council, on an application made to it for special leave to appeal, also refused leave on two grounds, firstly because " before the petitions could be heard by their Lordships an Act of the Commonwealth was passed expressly authorizing States to impose taxation of the kind in question, so that the controversy cannot be raised again," and secondly because the sum in dispute in the case was inconsiderable.[4]

Apart from the cases above mentioned, there have been several other cases in Australia which illustrate the application

[1] (1904) 1 C L R 585 [2] (1907) A C 81 [3] (1907) 4 C L R 1087.
[4] *Commissioners of Taxation for New South Wales* v *Baxter* (1908) A.C 214.

of this doctrine in Australia. In the case of *Federated Amalgamated Government Railway, etc. Association* v. *New South Wales Railway Traffic Employees' Association*[1] known as *the Railway Servants' case*, it was held that the Victoria State Railway, as a state instrumentality was not bound by the Commonwealth Conciliation and Arbitration Act. Similarly in *Federated Engine Drivers' and Firemen's Association* v. *Broken Hill Proprietory Co*[2] it was held that the Board of Water Supply and Sewerage, Sydney, was a State instrumentality and not bound by an industrial award under the Commonwealth Arbitration Act. All these cases were decided before the year 1920 when in an important case to be referred to presently, the High Court of Australia, after a change in the personnel of that Court, abandoned the doctrine of the reciprocal immunity of instrumentalities, and ruled that the Constitution Act must be interpreted as an ordinary Statute and that legislation passed by the Commonwealth Parliament under any of the powers granted to it was as much binding upon the States as upon any individual.

The case in which that doctrine was abandoned was *Amalgamated Society of Engineers* v. *Adelaide Steamship Co., Ltd.*[3] In this case the Amalgamated Society of Engineers claimed an award in the Commonwealth Industrial Arbitration Court against a number of respondents including, in addition to the Adelaide Steamship Company, the Government of the State of Western Australia, acting through various agencies, namely, the State Engineering Works at Freemantle and the State Saw Mills at Perth. The important question that arose for consideration was whether the governmental activities of the State of Western Australia were immune from federal legislation enacted by the Commonwealth Parliament with reference to " Industrial disputes," a matter on which that legislature was fully competent to legislate under Section 51 (XXXV) of the Commonwealth of Australia Constitution Act. In view of the fact that the

that the doctrine of immunity of instrumentalities could not have any application in the circumstances of the case. This principle, as already mentioned, has been well-established

[1] 4 C L R 488
[2] (1911) 12 C L R 398
[3] (1920) 28 C.L.R 129.

both in the United States and in Australia.[1] The High Court, however, made use of the occasion afforded by this case to examine the doctrine at great length and decided that the doctrine of immunity of instrumentalities so far as it rests on implication drawn from what is called the principle of necessity had no application to the Australian Constitution. They ruled that the Australian Constitution must be expounded and given effect to in accordance with its own terms, finding the intention from the language employed, and that the doctrine of implied prohibition can no longer be permitted to sustain a contention. " The great instrument of Government " is to be permitted to speak with its own voice " clear of any qualifications which the people of the Commonwealth or, at their request, the Imperial Parliament have not thought fit to express, and clear of any questions of expediency or political exigency."[2] The High Court also overruled their early decision in *Railway Servants' case*[3] already cited, holding that " Railways not only can be, but have been and are at the present time, privately owned and operated. They do not stand in any different position, so far as regards the legislative authority of the Commonwealth under Pl. XXXV from that occupied by the trading concerns of Western Australia."

We may now pass in review some of the important Canadian cases in which the doctrine has been considered As I have already observed in the opening paragraph of this chapter the Privy Council have consistently refused to read any rule of implied prohibition, into the construction of the British North America Act, 1867.

The application of this doctrine to the British North America Act, 1867, was considered by the Privy Council in the important Canadian case of *Bank of Toronto* v. *Lambe*.[4] The Quebec legislature in 1882 had passed a statute entitled " An Act to impose certain direct taxes on certain commercial corporations," whereby, *inter alia*, provision was made for the levying of a tax on banks which were carrying on business within the Province, the tax leviable varying with the paid-up capital and the number of offices of the bank. The appellant bank which had been incorporated in the year 1855 by an

[1] See *South Carolina* v *United States* 199 U S 437 = 50 L Ed 261 ; *Australian Workers' Union* v *Adelaide Milling Co* (1919) 26 C L R 460

[2] Per Knox C J , Isaacs, Rich and Starke J J in the same case at p 142 ; cited by Dr. Donald Kerr, *The Law of the Australian Constitution*, p. 44

[3] 4 C.L R 488

[4] (1887), 12 App Cas 575

Act of the then Parliament of Canada, had its principal place of business at Toronto, but had established an agency at Montreal in the Province of Quebec. Under head (2) of Section 92 of the British North America Act, 1867, the provinces have the power to impose direct taxes within the province for provincial purposes. The bank resisted the payment of the tax on two grounds, namely, that (*a*) it was not a direct tax, and (*b*) that even if it were a direct tax the payment may be made so heavy that it may crush the bank out of existence and thereby nullify the power of the Dominion to incorporate banks. The American doctrine of "implied prohibition" was invoked by the bank to sustain the contention that it was immune from taxation, as the power to tax involves the power to destroy. The Privy Council rejected these contentions. It held that the tax was a direct tax, that while exercising its powers the provincial legislature of Quebec was Sovereign within its ambit, and that the American doctrine of implied prohibition could not be read into the British North America Act. Lord Hobhouse delivering the judgment of the Privy Council has observed at pp. 586–587, as follows :—

"Then, it is suggested that the legislature may lay on taxes so heavy as to crush a bank out of existence, and so to nullify the power of parliament to erect banks. But their Lordships cannot conceive that when the Imperial Parliament conferred wide powers of local self-government on great countries such as Quebec, it intended to limit them on the speculation that they would be used in an injurious manner. People who are trusted with the great power of making laws for property and civil rights may well be trusted to levy taxes There are obvious reasons for confining their power to direct taxes and licences, because the power of indirect taxation would be felt all over the Dominion. But whatever power falls within the legitimate meaning of classes 2 and 9, is, in their Lordships' judgment, what the Imperial Parliament intended to give ; and to place a limit on it because the power may be used unwisely, as all powers may, would be an error, and would lead to insuperable difficulties, in the construction of the Federation Act. Their Lordships have been invited to take a very wide range on this part of the case, and to apply to the construction of the Federation Act the principles laid down for the United States by Chief Justice Marshall. Everyone would gladly accept the guidance of that great judge in a parallel case. But he was dealing with the Constitution of the

United States. Under that Constitution, as their Lordships understand, each State may make a law for itself, uncontrolled by the federal power, and subject only to the limits placed by law on the range of subjects within its jurisdiction. In such a constitution Chief Justice Marshall found one of those limits at the point at which the action of the State legislature came into conflict with the power vested in Congress. The appellant invokes that principle to support the conclusion that the Federation Act must be construed as to allow no power to the provincial legislatures under Section 92, which may by possibility, and if exercised in some extravagant way, interfere with the objects of the Dominion in exercising their powers under Section 91. It is quite impossible to argue from the one case to the other. Their Lordships have to construe the express words of an Act of Parliament which makes an elaborate distribution of the whole field of legislative authority between two legislative bodies, and at the same time provides for the federated provinces a carefully balanced constitution, under which no one of the party can pass laws for itself except under the control of the Governor-General. And the question they have to answer is whether the one body or the other has power to make a given law. If they find on the due construction of the Act a legislative power falls within Section 92, it would be quite wrong of them to deny its existence because by some possibility it may be abused, or may limit the range which otherwise would be open to the Dominion Parliament."

In *Abbott* v. *City of St. John*,[1] a customs officer of the Federal Government objected to the assessment of his income made by the City of Saint John, New Brunswick, acting under powers derived from the legislature of that province, under its exclusive power over "Municipal Institutions in the Province." The Supreme Court of Canada decided that the assessment of the income was rightly made.

In *Forbes* v. *Attorney-General for Manitoba*,[2] it was held that the appellant who was a Dominion Civil Servant employed as a meat inspector in the Health of Animals Branch of the Dominion Department of Agriculture, and who was resident in the province of Manitoba and performed his official duties there, was rightly assessed under the Special Income Tax Act, 1933, of Manitoba, which, *inter alia*, imposed a tax of two per cent. on the wages of every employee in the province.

[1] (1908) 40 S C R. 597. [2] (1937) A.C. 260.

In *Caron* v. *The King*[1], it was decided that the salary of a minister of the government of a province was rightly assessed and taxed under the Dominion Income War Tax Act. This case is the converse of *Abbott* v. *City of Saint John*. The Privy Council approved of the principle laid down by the Supreme Court of Canada in that case, and held that the same reasons held good in this case also. The income-tax was validly imposed under Section 91, head (3) of the Act and it did not discriminate.

The Privy Council have laid down that it is not open to the Provincial legislatures in Canada to impair or sterilize the status and essential capacities of a Company incorporated under a Dominion Statute. In *John Deere Plow Co.* v. *Wharton*[2] the appellant company had been incorporated under the provisions of the Companies Act of the Dominion. Under the Companies Act enacted by the Province of British Columbia it had been provided that federal companies should be licensed or registered under the Act as a condition precedent to the carrying on of business in the province or for taking legal proceedings in the courts The Privy Council ruled that inasmuch as the effect of these provisions was to strike at the root of the capacities which the Dominion companies had obtained by the very fact of incorporation, those provisions were *ultra vires* of the province. The same principle has been enunciated by the Privy Council in the case of *Great West Saddlery Co.* v. *The King*[3] ; and *Attorney-General for Manitoba* v. *Attorney-General for Canada*[4]

Now, the question which we have to ask ourselves is, whether this doctrine has any application to the interpretation of the Indian Constitution ? The question really embraces two separate problems. The first problem is, are we or are we not, to read the principle of implied prohibitions into the Government of India Act, 1935, when any question arises as to the extent of the powers possessed by the Federation or the Provinces under the scheme of distribution of powers embodied in the Act, when the Federation and a Province, or their agencies or instrumentalities, are involved in any dispute ? The second problem is, whether the same principle of mutual non-interference of the governmental activities of each other, apart from any express provision, can be taken to be an implied condition of the relationship existing between the Federation and a Federated State, with respect to the exercise by them of their respective powers.

[1] (1924) A C. 999
[2] (1915) A C 330
[3] (1921) 2 A C. 91
[4] (1929) A C. 260

With regard to the first problem, it is submitted that no rule of "implied prohibition" can be read into the Government of India Act, 1935, for the following reasons:

(1) It must be remembered that the Provinces who now form the Constituent Units of the Federation, so far as the British Indian side of the Federation is concerned, had no independent existence prior to the Federation, but were merely parts of a unitary State. The transaction which resulted in the framing of the Government of India Act, 1935, can in no sense be termed a consensual arrangement between the British Indian Provinces whereby they agreed to form a federal union defining the manner in which the governmental powers should be exercised by themselves and the new Federal Government thereafter. On the other hand, the Government of India Act, 1935, is no more than an Imperial Statute which embodies a scheme of Federation whereby an elaborate distribution of Governmental powers is made between the Federation and the Provinces, not as a ratification of an arrangement arrived at between the peoples of the British Indian Provinces, but as a method by which the future administration of the country should proceed. It is an Act of the Imperial Parliament passed in the exercise of its undoubted powers. It neither embodies a contract nor a treaty. The doctrine of immunity of instrumentalities is based upon the principle, that when independent communities agree to establish a federal union defining the extent of the powers to be exercised by the new federal government, and reserving to themselves the balance of powers not delegated to the new government, it must be implied as a part of the federal compact, that the quasi-sovereign governments established by the constitution, should so exercise their powers as to respect their mutual independence and so as not to interfere or fetter the exercise of the authority of one another. But no such principle can be read into the Government of India Act, 1935, for the reason that there is not only no federal compact in this case, but that the manner of the exercise of their powers by the various governments, provincial and federal, are defined in the Act itself. When any question arises as to the power of a federal or a provincial government, it must be decided solely with reference to the text of the Act, paying due regard, no doubt, to any limitations that may have been prescribed in the Act itself.

(2) Even the British North America Act, 1867, which was based on the original Quebec resolutions of 1864, as

revised by the Conference of delegates of the different provinces who assembled in London in 1866, has been interpreted by the Privy Council primarily as a statute without importing into it any rule of construction based on the theory of implied prohibition. As we have already noticed, the Privy Council, in *Bank of Toronto* v. *Lambe*[1] laid down this principle in the most unequivocal terms. If anything, the case for applying this principle laid down in the Canadian case to the construction of the Government of India Act, 1935, is stronger, as the Act is primarily the handiwork of Parliament and is not based upon any agreed scheme formulated by the people of the British Indian Provinces. Moreover, even in the case of the Commonwealth of Australia Constitution Act, 1900, which is based on the draft constitution approved at a referendum submitted to the electors of the Colonies of New South Wales, Victoria, South Australia, Tasmania, and Queensland, has been interpreted ever since the case of *Amalgamated Society of Engineers* v. *The Adelaide Steamship Co., Ltd.*[2] on the basis of what appears on the face of the instrument, and without regard to any theory of "implied prohibition."

(3) In this connection, it is important to notice the two provisions embodied in Sections 154 and 155 of the Government of India Act, 1935, which deal with the exemption of federal property from provincial taxation and provincial property and incomes from Federal taxation, within certain limits. This is a clear indication that the framers of the Act had in mind the problem of the taxation of governmental agencies and properties belonging to one government by another government, and also provided immunity from such taxation within certain limits. All these points lead to the inference that no limitations not expressly provided for in the Act itself can be permitted to curtail the powers which the Federation and the Provinces are to have under the Government of India Act, 1935.

The second problem raises considerations slightly different from those applicable to the first problem. The Indian States are not amenable to the legislative authority of the Imperial Parliament. It follows, therefore, that the Government of India Act, 1935, by itself, cannot, obviously, have any operation so far as the States are concerned. When the States join the Structure of Federation outlined in the Government of India Act, 1935, they do so out of their own

[1] (1887) 12 App. Cas. 175. [2] (1920) 28 C L.R. 129.

volition and subject to any reservations they might impose in the Instruments of Accession executed by them. There is also one vital difference between the British Indian Provinces and the States. The Provinces exercise only such powers as are given to them under the Constitution Act. The States on the other hand, as Sovereign entities, possess powers quite independently of the Constitution Act. They will continue to exercise their original powers even after Federation, making allowance, no doubt, for the powers which they will have ceded in favour of the Federation. The States will, therefore, have independent powers of legislation like the States of the American Union. In view of these considerations, a contention may be raised that the principles governing the relationship of the Federation and the Federated States under the new constitutional arrangements, must be those applicable to quasi-sovereign governments established by a Federal compact like the Constitution of the United States of America. One of the important principles applicable to the construction of the constitution of the United States is that of mutual non-interference of the governmental activities of one another. Would a similar doctrine be applicable, even here, so far as the Federation and the Federated States are concerned? It is submitted that the answer should be in the negative, for reasons to be mentioned presently.

It is, no doubt, true, as already pointed out, that the Federated States cannot be placed on a par with the Provinces. The States unlike the Provinces are quasi-sovereign communities, and possess independent powers of legislation. Moreover, they join the Federation by their own consensual acts. But the existence of all these facts would not, it is submitted, be sufficient by themselves to read into the mutual relationship of the Federation and a Federated State, any limitations on the exercise of their respective powers, apart from those limitations which are expressly provided for in the Instrument of Accession and the Government of India Act, 1935, itself. It is clear that many of the States, when entering the federal framework outlined in the Act, will impose limitations on the exercise by the Federation of its powers in those States. The Act itself under Sections 154 and 155 has prescribed the degree of immunity to be enjoyed by the Federation from the taxing laws of a Federated State and a Federated State from the taxing laws of the Federation.

Having regard to these factors, it is reasonable to hold that no limitations on the exercise by the Federation or the

Federated States of their powers should be permitted beyond what is provided for in the Instruments of Accession or the Constitution Act itself. Any limitations not so expressly reserved, must be ruled out of consideration. It would seem, therefore, that any general application of the theory of mutual non-interference cannot be permitted to curtail their respective powers.

Even assuming that the doctrine of mutual non-interference with the operations of each other is held to apply so far as the Federation and a Federated State are concerned—an assumption which, for reasons already stated, appears to be untenable—it is clear that, the incidence of federal laws enacted in pursuance of some of the federal powers which are vested in the Federation to secure a uniformity in the operation of laws framed in relation to those federal subjects, will fall as much upon the citizens of the Federated States as on the Federated States themselves Such laws will apply not only to the citizens of the Federated States but also to the States, their agencies and instrumentalities. Among laws of this character may be mentioned those enacted with reference to cheques, bills of exchange and promissory notes, port quarantine, and navigation laws. In the United States it has been held that navigation laws established by Congress were obligatory upon vessels employed in the police service of the States [1] It will be noticed that item thirty-five of the Federal Legislative List relates to " Regulation of labour and safety in mines and oil fields." Laws enacted under this power by the Federal Legislature will, unless there is any stipulation to the contrary in the Instrument of Accession of the State, apply to mines and oil fields controlled by a Federated State also, firstly, for the reason, that the power is vested in the Federal legislature so that it might enact laws with respect to these matters in order to secure uniformity in the conditions of labour and in standards of safety to be enforced in mines and oilfields throughout the Federation ; and secondly, for the reason that even the principle of immunity of instrumentalities cannot apply to a state activity such as the exploitation of a mine or oilfield by the State as it would be a trading operation and not a governmental function. If the doctrine of immunity of instrumentalities has no application, then all these considerations will not

[1] See *Oyster Steamers of Maryland*, 31 Fed Rep. 763 *Governor Robert McLean* v. *U S* 35 Fed Rep 926, cited in W. H. Moore, *The Constitution of the Commonwealth of Australia*, p 432

arise. Laws enacted by the Federal Legislature in regard to all matters in respect of which a State has federated will apply as much to the State, its agencies and instrumentalities, as to the citizens of that State, subject, of course, to any limitations which the State may have expressly stipulated for in its Instrument of Accession.

There is one other matter of considerable importance which needs to be mentioned. Supposing there are federal officers stationed in a Federated State to perform federal functions. Are such officers liable to pay the State income-tax in respect of their official salaries? I am assuming for the purpose of illustration, that the State in question has an income-tax law providing for the levy of a tax on the income of persons ordinarily residing in or engaged in the carrying of any business or occupation in State territory, that the State has not federated with respect to income-tax, and that there is nothing in the Instrument of Accession of the State to show that the State has expressly contracted out of its right to levy income-tax on the salary of federal officers. That a State in the exercise of its sovereign powers is competent to enact a general income-tax law of this character is undoubted. If so, the salaries of federal officers would be liable to be assessed to State income-tax on the principle of decisions like *Webb* v *Outrim*[1] and *Caron* v. *The King*.[2] I have already given reasons for the view that no principle like the doctrine of the immunity of instrumentalities should be called in aid to curtail the otherwise competent powers of the Federated States. If this view is sound, then the salaries of federal officers would be liable to the assessment of State income-tax. If, however, the view should be taken that the doctrine of "implied prohibition" is to be applied, then federal salaries would be immune from State taxation on the principle of cases like *Deakin* v. *Webb*[3] and *Baxter* v. *Commissioners of Taxation*.[4]

II. *Certain Canons of Construction*

The Government of India Act, 1935, is a Statute of the Imperial Parliament. The cardinal rule applied for the construction of an Act of Parliament is, that it should be construed according to the intention of Parliament as

[1] (1907) A C 81
[2] (1924) A C 999
[3] (1904) 1 C L R 585
[4] (1907) 4 C.L.R. 1087.

expressed in the Act itself. In *Tasmania* v. *Commonwealth*,[1] Chief Justice Griffith of the Australian High Court, observed as follows: " I do not think that it can be too strongly stated that our duty interpreting a Statute is to administer the law according to the intention expressed in the Statute itself. In this respect the Constitution differs in no way from any Act of the Commonwealth or of a State."

A Constitution Act, like the Government of India Act, 1935, must on all occasions be interpreted in a large, liberal and comprehensive spirit, considering the fact that large powers are conferred in very few words. Especially is this rule of construction to be borne in mind when dealing with the distribution of powers between the Federal and Provincial legislatures under the Act. This principle has been laid down in the clearest terms by the Judicial Committee of the Privy Council with reference to the British North America Act, 1867, in *Edwards* v. *Attorney-General for Canada*[2]: " Their Lordships do not conceive it to be the duty of this Board—it is certainly not their desire—to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation so that the Dominion to a great extent, but within certain fixed limits, may be mistress in her own house, as the Provinces to a great extent, but within certain fixed limits, are mistresses in theirs. 'The Privy Council, indeed, has laid down that Courts of law must treat the Provisions of the British North America Act by the same methods of construction and exposition which they apply to other statutes. But there are statutes and statutes , and the strict construction deemed proper in the case, for example, of a penal or taxing statute, or one passed to regulate the affairs of an English parish, would be often subversive of Parliament's real intent if applied to an Act passed to ensure the peace, order and good government of a British Colony': see Clement's Canadian Constitution, Edition 3, p. 347. The learned author of that treatise quotes from the argument of Mr. Mowat and Mr. Edward Blake before the Privy Council in *St. Catherine's Milling and Lumbar Co.* v. *The Queen*[3]: 'That Act should be on all occasions interpreted in a large, liberal and comprehensive spirit, considering the magnitude of the objects with which it purports to deal in very few words.' With that their Lordships agree, but as was said by the Lord

[1] (1904) 1 C L.R. 329.
[2] (1930) A.C 124, p. 136
[3] (1888) 14 A C 46, p. 50

Chancellor in *Brophy* v. *Attorney-General of Manitoba*,[1] the question is not what may be supposed to have been intended, but what has been said " (per Lord Sankey, L.C).

This rule of construction that a constitution Act must be interpreted in a broad and liberal spirit has been reiterated by the Privy Council in two recent cases: *British Coal Corporation* v. *The King*,[2] and *James* v. *Commonwealth of Australia*.[3] In the latter case, Lord Wright, M.R , has observed as follows : " It is true that a Constitution must not be construed in any narrow and pedantic sense. The words used are necessarily general, and their full import and true meaning can often only be appreciated when considered, as the years go on, in relation to the viscissitudes of fact which from time to time emerge. It is not that the meaning of the words changes, but the changing circumstances illustrate and illuminate the full import of that meaning. It has been said that ' in interpreting a constituent or organic Statute such as the Act (i.e., the British North America Act), that construction most beneficial to the widest possible amplitude of its powers must be adopted ': *British Coal Corporation* v. *The King*."

In *Direct United States Cable Co.* v. *Anglo-American Telegraph Co.*,[4] Lord Blackburn stated as follows: " The tribunal that has to construe an Act of a Legislature, or indeed any other document, has to determine the intention as expressed by the words used. And in order to understand those words it is material to inquire what is the subject matter with respect to which they are used, and the object in view."

In *Salomon* v. *Salomon and Co.*[5] Lord Watson said. "' Intention of the Legislature ' is a common but very slippery phrase, which, properly understood, may signify anything from intention embodied in positive enactment to speculative opinion as to what the legislature probably would have meant, although there has been an omission to enact it. In a Court of Law or Equity, what the Legislature intended to be done or not to be done can only be legitimately ascertained from what it has chosen to enact, either in express words or by reasonable and necessary implication."

When the language of the enactment is clear, the Court is bound to give effect to it even though the Court is satisfied that the Legislature did not contemplate the actual result of

[1] (1895) A C. 202, p 216
[2] (1935) A C. 500, p. 518.
[3] (1936) A C. 578, p. 614
[4] (1877) 2 App Cas. 394, p 412.
[5] (1897) A C. 22, p 38

the language employed. Lord Herschell in *Cox* v. *Hakes*,[1] has stated as follows: "It is not easy to exaggerate the magnitude of this change; nevertheless, it must be admitted that, if the language of the Legislature, interpreted according to the recognized canons of construction, involves this result, your Lordships must frankly yield to it, even if you should be satisfied that it was not in the contemplation of the Legislature."

A Statute may be construed contrary to its literal meaning when a literal construction would result in an absurdity or inconsistency, and the words are capable of another construction which will carry out the manifest intention. In *Ex parte Walton*: *In re levy*[2] Jessel, M.R., stated as follows: "This appeal raises a very important question with regard to the proper construction of Section 23 of the Bankruptcy Act, 1869. Before considering the exact words of the section I should like to say a word or two as to the rules which are binding on all courts in regard to the construction of Statutes as well as all other instruments. Whatever may have been the case in times past, in modern times those rules have become perfectly well settled. They have become much more limited as regards the power of the Courts, and at the same time so well recognized as to be binding on this Court and all other Courts. To show what those rules are, I will cite from the last case on the subject in the House of Lords, *Caledonian Railway Company* v. *North British Railway Company*,[3] which was decided in February, 1881; consequently it is not only the last decision, but a very recent case. It was an appeal from the Court of Session in Scotland, but it is an authority in England, the rules on this subject being the same in Scotland as in England. The appellant there contended that the literal construction ought to be given to a section of an Act of Parliament, though it appeared that that construction would defeat the object of the Act as shewn by the preamble. That contention, however, did not prevail. And Lord Selbourne laid down the rule of construction in these words[4]: 'The more literal construction ought not to prevail, if (as the court below has thought) it is opposed to the intentions of the Legislature, as apparent by the Statute; and if the words are sufficiently flexible to admit of some other construction by which that intention will be better effectuated.' And in the same case Lord Blackburn quoted

[1] (1890) 15 A C. 506, p. 528
[2] (1881) 17 Ch D. 746, pp. 750–751.
[3] 6 App. Cas. 114.
[4] 6 App Cas. 122.

with approval that which Lord Wensleydale called the golden rule for construing all written engagements, and which he stated thus in *Grey* v. *Pearson*[1]: 'I have been long and deeply impressed with the wisdom of the rule, now, I believe, universally adopted, at least in the courts of law in Westminster Hall, that in construing wills, and indeed Statutes, and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no further.'"

Extraneous circumstances like the history of an enactment are sometimes permitted in the construction of a Statute, though the inference to be drawn from that history may be very slight indeed. In *Herron* v. *Rathmines and Rathgar Improvement Commissioners*,[2] Lord Halsbury said: "Now, though I proceed upon the view that all negotiation previous to the Act or the original form of the Bill must be dismissed, yet it is quite true that the subject matter with which the legislature was dealing and the facts existing at the time with respect to which the legislature was legislating, are legitimate topics to consider in ascertaining what was the object and purpose of the legislature in passing the Act they did" Farwell, L.J., in *Rex* v. *West Riding County Council*[3] observed that "The mischief sought to be cured by the Act and the aim and object of the Act must be sought in the Act itself. Although it may, perhaps, be legitimate to call history in aid to show what facts existed to bring about a statute, the inferences to be drawn therefrom are accordingly slight, as is pointed out by Bramwell, B. in *Attorney-General* v. *Sillem*."[4]

In a recent case, *Edwards* v. *Attorney-General for Canada*[5] the Privy Council, in order to ascertain whether the word "persons" in Section 24 of the British North America Act, 1867, included women or not, called into aid extraneous circumstances such as previous legislation and decided cases bearing upon the matter under consideration.

It is not permissible, as a general rule, in construing the meaning of an obscure enactment to refer to the debates which took place in Parliament when the Statute was under consideration. As Willes, J. has observed in *Millar* v.

[1] 6 H L C 61, 106.
[2] (1892) A C. 498, p 502.
[3] (1906) 2 K.B. 676, p 716.
[4] (1863) 2 H. and C 431, p. 531.
[5] (1930) A.C. 124.

Taylor[1]; " The sense and meaning of an Act of Parliament must be collected from what it says when passed into law, and not from the history of changes it underwent in the House where it took its rise. That history is not known to the other House or to the Sovereign." In *Administrator-General of Bengal* v. *Premlal Mullick*[2] Lord Watson, in delivering the judgment of the Privy Council stated : " Their Lordships observe that the two learned judges who constituted the majority in the Appellate Court, although they do not base their judgment upon them, refer to the proceedings of the legislature in the passing of the Act of 1874 as legitimate aids in the construction of Section 31. Their Lordships think it right to express their dissent from that proposition. The same reasons which exclude these considerations when the clauses of an Act of the British Legislature are under construction, are equally cogent in the case of an Indian Statute." In an early Australian case *Sydney Municipal Council* v. *Commonwealth*[3] the High Court of Australia refused to permit citation of the debates in the Federal Convention which drafted the Commonwealth Constitution, on the basis of which the Imperial Parliament enacted the Constitution Act, to be used in the interpretation of the Act. But this rule, that recourse cannot be had to debates in the Legislature, to ascertain the meaning of a doubtful Act, has sometimes been departed from. The authority of such cases, is, however, doubtful.[4] In *South Eastern Railway* v. *The Railway Commissioners*,[5] Cockburn, C.J., referred to the speech of the minister on the introduction of the Railway Canal and Traffic Act. In *Amalgamated Society of Engineers* v. *Adelaide Steamship Co., Ltd.*,[6] Lord Haldane's speech in the House of Commons on the introduction of the Commonwealth of Australia Constitution Act was cited.

III. *The Instruments of Accession*

Under Section 6 of the Government of India Act, 1935, a State will be deemed to have acceded to the Federation, if His Majesty has signified his acceptance of an Instrument

[1] (1769) 4 Burr 2303, 2332 cited in Craies on *Statute Law* (4th Edition), p 122

[2] 22 Cal 788, p 799

[3] (1904) 1 C L.R 208, p 213.

[4] See *Craies on Statute Law*, 4th Edition, p 121 , Note Y.

[5] (1880) 5 Q B.D. 217, 236

[6] 28 C L R. 129, p 147.

of Accession executed by the Ruler thereof, whereby the Ruler for himself, his heirs and successors, declares that he accedes to the Federation as established under the Act, subject to any limitations and reservations which may be specified in that Instrument. So far as any particular Federated State is concerned, the extent of the powers exercisable by the various federal organs, will have to be ascertained with reference to the provisions of the Government of India Act, 1935, read in conjunction with the Instrument of Accession of the State In fact, the paramount constitutional document so far as a Federated State is concerned, will be, the Act upon which is grafted the Instrument of Accession of that State. The two together will, indeed, become parts of but one document. Although departures from the federal scheme as embodied in the Act will be permitted in the case of individual states though within a narrow range, yet, as Section 6 of the Act makes it clear, the Federating States will in substance "accede to the Federation as established under the Act" Now, in construing the terms of a Statute, or for that matter any written document, as we have already seen, the intention must be gathered from the actual language employed, without calling into aid extraneous evidence regarding such intention. Preparatory documents are ruled out. Where the intention as expressed in the language of the Statute is clear, the Courts have no option but to give effect to it, though the framers of the Act might have had a different object in view. If, as I have said, the Instrument of Accession becomes grafted on to the Act, and both together become one fundamental document, the rule of construction that applies to one part of it, namely, the Act, must equally apply to the other part, namely, the Instrument of Accession. If this conclusion is correct, then the provisions of the Instrument of Accession must be construed in accordance with their language and quite independently of extraneous matters. The intention must be ascertained with reference to the actual wording of the provision of the Instrument of Accession, involved in any particular case. The preparatory documents which may throw light upon any disputed provision in an Instrument of Accession, are, it is submitted, ruled out.

Now, the Instrument of Accession is no doubt a document which comes into existence as between the Ruler of a State and His Majesty. But we must have regard to the object with which such an Instrument is executed, in order to

ascertain the nature of that document. The cession of powers by the Ruler of State in favour of the Federation takes place through the medium of His Majesty. His Majesty acts, as it were, as a channel through which the powers of the Ruler of a State flow into the reservoir of federal powers. If the cession of powers had taken place in favour of His Majesty alone, then the document by which that cession took place, might have been called a treaty. But, the powers are in reality ceded by the Rulers in favour of the Federation, though with their consent. So far as the federal sphere is concerned, the States will become merged in the new federal organism, in the creation of which they have themselves taken a prominent part. It is submitted that in view of these considerations, an Instrument of Accession cannot be regarded as a "treaty" in any international sense. It is just an ordinary document, which comes into existence during the course of the establishment of the Federation and will have to be interpreted accordingly. What view the Privy Council will take as to the character of this Instrument of Accession, it is not possible to say. But I have, however, ventured to express my opinion regarding it.

In the English Case of *Porter* v. *Freudenberg*,[1] Reading, C.J., in interpreting article 23 (h) of the Hague Convention of 1907 observed: "that the text of the paragraph must, of course, be interpreted by us as it now stands in the ratified convention, and the intention of its proposer is immaterial. . . ." That is the rule of construction adopted by an English Court in the interpretation of a provision of an international arrangement. But, it should not be supposed that this rule has been applied by other courts in the interpretation of international treaties. For instance, in a recent case decided by the Supreme Court of the United States, *Factor* v. *Laubenheimer*,[2] Stone, J., while construing the provisions of the extradition treaty with Great Britain of 1842 as supplemented by the Convention of 1899, observed as follows: "In ascertaining the meaning of a treaty we may look beyond its written words to the negotiations and diplomatic correspondence of the contracting parties relating to the subject-matter, and to their own practical construction of it." In the case of *Amodu Tijani* v. *The Secretary, South Nigeria*[3] Lord Haldane who had to interpret the treaty of cession by which

[1] (1915) 1 K B 857, p 870
[2] (1933) 290 U S 276 = 78 L Ed 315, pp 324–325.
[3] (1921) 2 A C 399, pp 406–407.

the King of the Island of Lagos ceded to the British Crown the port and Island of Lagos, referred to the debate in the House of Commons in 1862, which indicated the interpretation put upon the treaty by the British Government. These cases show that extrinsic evidence has been admitted to ascertain the intention of the parties in construing the provisions of an international treaty.

It is submitted, that an Instrument of Accession cannot be regarded as a treaty in the international sense, for the reason already mentioned. The provisions of an Instrument of Accession, it is submitted, have to be construed with reference to the actual language employed, and without having recourse to any documents which may have come into existence preparatory to its execution, and which may possibly throw light upon any of the disputed provisions.

CHAPTER VI

THE FEDERATION OF INDIA

THE process by which the Federation of India is established will differ, in many essential respects, from that by which Federations in other parts of the world have come into existence. When independent political communities desire to organize themselves into a Federal State, they determine by mutual negotiation the essential features of the federal constitution which they wish to form. The Federal State, in such a case, comes into existence as a result of the terms of the union, arranged by the constituent states as amongst themselves, out of their own volition. If these communities, though autonomous, are subject to the British Crown, then the process involved in setting up a federal constitution becomes a little more complicated. It is not sufficient if these communities settle the terms of their union as amongst themselves. In order that the federal union may become legally effective, it is necessary that the terms of their compact must be embodied in an Act of the Imperial Parliament. In both these cases, however, there is one common feature, namely, that the federal constitution, in substance, represents the details of the compact arranged between the federating communities in the process of setting up a new central government over themselves, in whose favour they have parted with a portion of their erstwhile powers and functions.

But the conditions under which a Federation consisting of British Indian Provinces and the Indian States could be established, involved different considerations altogether. The British Indian Provinces were not autonomous communities directly linked to the British Crown, as the Australian States, for instance, were before they formed themselves into the Federal Commonwealth of Australia They formed parts of a unitary system and were subject to both the administrative as well as the legislative control of the Government of India ; and the authority which they exercised had been devolved upon them under the devolution rules framed under Section 45 A of the consolidated Government of India Act. The method of creating a Federation, so far as British India was concerned, therefore involved, a process of breaking up the unitary State into a number of autonomous British Indian Provinces and then

building them up together in a constitutional framework, which demarcated the respective spheres of activity of the central government and the Federating Provinces. And this was done by means of an Act of the Imperial Parliament.

But the Federation that is in contemplation, is not a Federation of autonomous British Indian provinces alone It is proposed that an All-India Federation, embracing the Indian States also, should be set up. The Government of India Act, 1935, enacts a constitution wherein provision has been made for the setting up of a federal state consisting of autonomous British Indian provinces and the Indian States. The Act, which is of course binding on British India has, by itself, no effect, so far as the Indian States are concerned

The Act, however, " will provide the machinery whereby the Indian States may severally accept that constitution and thus become part of the Federation, not because the Act is an Act of Parliament, but because it embodies a Constitution to which they have by their own volition acceded "[1] The mode by which the Ruler of a State can signify his acceptance of the Federation, with all its implications is, by executing a document known as the Instrument of Accession. This Instrument has to be accepted by His Majesty before the State concerned can be deemed to have become a constituent unit of the Federation. By executing such an Instrument, the Ruler accepts as binding upon his State the Constitution as a whole, subject to any conditions or reservations that he may stipulate in that document. The idea is, that items 1 to 47 in the Federal Legislative List (List I of Schedule seven) should form a basic list of subjects to which the States who wish to join the Federation will be asked to conform. It is, however, true that within these forty-seven subjects, certain variations arising either from the peculiar circumstances of a State or because certain treaty rights are intended to be preserved intact by a State, may be permitted. That is the reason why Sub-section (2) of Section 6 has been enacted. That section will enable a " Ruler in his Instrument of Accession to exclude the power of the Federal Legislature to make laws for his State with respect to some of the items in the Federal Legislative list and to attach conditions and limitations to his acceptance of others , and since by Clause 8 (of the Bill which is now Section 8 of the Act) the executive authority of the Federation is correlated to the legislative power,

[1] *Correspondence relating to a meeting of States' Rulers held at Bombay, to consider the Draft Bill and the Secretary of States' Despatch in that connection,* Cmd. 4843, p. 33.

it follows (and indeed it is expressly so provided) that the Ruler can to the same extent exclude the exercise of the executive authority in his State or qualify it by corresponding conditions or limitations."[1] Though the Act provides that such variations may be permitted in the case of any particular State, it is clear, that when the question of the acceptance of any particular Instrument of Accession by His Majesty comes up for consideration, it has to be judged on its own merits. If for instance a State desires to make large reservations or restrictions in the exercise of the powers of federal organs in relation to it, which would be incompatible with the scheme of Federation outlined in the Act, it is open to His Majesty not to accept the Instrument of Accession of such State. That is clear from Subsection (4) of Section 6. As a matter of fact, it is extremely anomalous that in a federation, the powers of the federal organs should differ as between one constituent unit and another. Such an anomaly would be entirely indefensible, but for the fact that the conditions in India are without precedent, and present no parallel to those which obtain in other federations, where it is a general rule for the central government to exercise an identical range of powers over all the constituent units.

5. (1) It shall be lawful for His Majesty, if an address in that behalf has been presented to him by each House of Parliament and if the condition hereinafter mentioned is satisfied, to declare by Proclamation that as from the day therein appointed there shall be united in a Federation under the Crown, by the name of the Federation of India—

(*a*) the Provinces hereinafter called Governors' Provinces; and

(*b*) the Indian States which have acceded or may thereafter accede to the Federation; and in the Federation so established there shall be included the Provinces hereinafter called Chief Commissioners' Provinces.

(2) The condition referred to is that States—

(*a*) the Rulers whereof will, in accordance with the provisions contained in Part II of the First Schedule to this Act, be entitled to choose not less than fifty-two members of the Council of State; and

(*b*) the aggregate population whereof, as ascertained in accordance with the said provisions, amounts to at least one-half of the total population of the States as so ascertained, have acceded to the Federation.

The Indian Federation will consist of (1) British India con-

[1] *Ibid.*, Cmd. 4843, p. 33

sisting of the Governors' Provinces and the Chief Commissioners' Provinces, and (2) such of the Indian States as have acceded or may accede to the Federation. It is necessary that the following conditions must be satisfied before the Federation can be brought into existence. Rulers of States entitled to not less than one half of the seats, set apart for the States in the Council of State and representing, on the aggregate, one half of the population of all the States, must agree to accede to the scheme of Federation as outlined in the Act by executing Instruments of Accession which have been accepted by His Majesty. Afterwards each House of Parliament must present an address to His Majesty, that a Federation may be established Upon such Address, it shall be lawful for His Majesty to declare by proclamation that as from the day appointed therein, a Federation consisting of the units above mentioned, and to be known as the Federation of India be established.

6. (1) A State shall be deemed to have acceded to the Federation if His Majesty has signified his acceptance of an Instrument of Accession executed by the Ruler thereof, whereby the Ruler for himself, his heirs and successors—

(*a*) declares that he accedes to the Federation as established under this Act, with the intent that His Majesty the King, the Governor-General of India, the Federal Legislature, the Federal Court and any other Federal authority established for the purposes of the Federation shall, by virtue of his Instrument of Accession, but subject always to the terms thereof, and for the purposes only of the Federation, exercise in relation to his State such functions as may be vested in them by or under this Act ; and

(*b*) assumes the obligation of ensuring that due effect is given within his State to the provisions of this Act so far as they are applicable therein by virtue of his Instrument of Accession :

Provided that an Instrument of Accession may be executed conditionally on the establishment of the Federation on or before a specified date, and in that case the State shall not be deemed to have acceded to the Federation if the Federation is not established until after that date.

(2) An Instrument of Accession shall specify the matters which the Ruler accepts as matters with respect to which the Federal Legislature may make laws for his State, and the limitations, if any, to which the power of the Federal Legislature to make laws for his State, and the exercise of the executive authority of the Federation in his State, are respectively to be subject.

(3) A Ruler may, by a supplementary Instrument executed

by him and accepted by His Majesty, vary the Instrument of Accession of his State by extending the functions which by virtue of that Instrument are exercisable by His Majesty or any Federal Authority in relation to his State.

(4) Nothing in this section shall be construed as requiring His Majesty to accept any Instrument of Accession or supplementary Instrument unless he considers it proper so to do, or as empowering His Majesty to accept any such Instrument if it appears to him that the terms thereof are inconsistent with the scheme of Federation embodied in this Act :

Provided that after the establishment of the Federation, if any Instrument has in fact been accepted by His Majesty, the validity of that Instrument or of any of its provisions shall not be called in question and the provisions of this Act shall, in relation to the State, have effect subject to the provisions of the Instrument.

(5) It shall be a term of every Instrument of Accession that the provisions of this Act mentioned in the Second Schedule thereto may, without affecting the accession of the State, be amended by or by authority of Parliament, but no such amendment shall, unless it is accepted by the Ruler in a supplementary Instrument, be construed as extending the functions which by virtue of the Instrument are exercisable by His Majesty or any Federal Authority in relation to the State.

(6) An Instrument of Accession or supplementary Instrument shall not be valid unless it is executed by the Ruler himself, but, subject as aforesaid, references in this Act to the Ruler of a State include reference to any persons for the time being exercising the powers of the Ruler of the State, whether by reason of the Ruler's minority or for any other reason.

(7) After the establishment of the Federation the request of a Ruler that his State may be admitted to the Federation shall be transmitted to His Majesty through the Governor-General, and after the expiration of twenty years from the establishment of the Federation the Governor-General shall not transmit to His Majesty any such request until there has been presented to him by each Chamber of the Federal Legislature, for submission to His Majesty, an address praying that His Majesty may be pleased to admit the State into the Federation.

(8) In this Act a State which has acceded to the Federation is referred to as a Federated State, and the Instrument by virtue of which a State has so acceded, construed together with any supplementary Instrument executed under this section, is referred to as the Instrument of Accession of that State.

(9) As soon as may be after any Instrument of Accession or supplementary Instrument has been accepted by His Majesty under this section, copies of the Instrument and of His Majesty's Acceptance thereof shall be laid before Parliament, and all courts shall take judicial notice of every such Instrument and Acceptance.

This Section deals with the Instruments of Accession to be executed by the Rulers of those States who wish to enter the Federation.

So far as the British Indian (Governors') Provinces are concerned, the range of the legislative and executive powers exercisable by the Central Government will be identical in all the Provinces ; and this has to be ascertained with reference to the provisions of the Act. In the case of the Indian States, however, the Act, by Sub-section 2 of Section 6, makes provision for reservations from and limitations upon, the exercise of legislative as well as executive authority of the Federation, by means of the terms embodied in the Instruments of Accession to be executed by them It has already been pointed out, in the opening paragraphs of this chapter, that items 1 to 47 in the Federal Legislative List, will be the items with respect to which the States will be called upon to federate, though individual variations within that list may in particular cases be accepted by the Crown. In determining the extent of the Federal Legislative and Executive authority in the case of a particular State, the Instrument of Accession must be read in conjunction with the provisions of the Act. Two other provisions of the Act may be referred to in this context. Section 101 provides that nothing in the Act shall be construed as empowering the Federal Legislature to make laws for a Federated State otherwise than in accordance with the Instrument of Accession of that State and any limitations contained therein. Sub-section (1) of Section 125 provides that notwithstanding anything in the Act, agreements may, and if provision has been made in that behalf by the Instrument of Accession of the State, shall be made between the Governor-General and the Ruler of a Federated State for the exercise by the Ruler or his officers of functions in relation to the administration in his State of any law of the Federal Legislature which applies therein.

Sub-section 3 contemplates that by a supplementary Instrument executed by the Ruler of a State and accepted by His Majesty, the Instrument of Accession already executed by that Ruler may be varied so as to extend the functions which by the earlier Instrument are already being exercised by His Majesty

or any Federal authority in relation to that State. It is important to notice the significance of the word "extend" which occurs in this sub-section. It is submitted that it is not open to the Ruler of State, having regard to the terms of this sub-section, by means of a supplementary Instrument, to withdraw his acceptance of any Federal subject or add fresh qualifications or limitations thereto after he has once declared his acceptance of those subjects, subject to particular qualifications by executing the first Instrument of Accession. Any variation must be in the nature of extending the sphere of operation of the Federation, either by accepting further subjects or by withdrawing the qualifications or restrictions subject to which a particular subject has already been accepted.

The object of enacting Sub-section (5) may be mentioned. As Sir Donald Somervell, the Solicitor-General, pointed out in the House of Commons during the discussion of this clause in the Committee stage: "The States will only agree to federate in a structure which, within limits, is definite and certain and obviously we could not completely alter the structure afterwards. The purpose of this clause is to lay down those matters which can be altered without being regarded as fundamental or as impinging on the Instrument of Accession. We think the clause is adequately drafted and is in the best terms for that purpose. If the structure were to be altered in fundamental respects, of course the States would clearly have the right to say, 'This is not the Federation to which we acceded'"[1] In the second schedule to the Act, are set out the provisions of the Act, which could be amended, without affecting the accession of the States to the Federation. If alterations to the Act in other respects are to be made, the consent of the States will become necessary. But supposing Parliament on its own responsibility were to amend the Act in a way which might give room for the contention that it affects the accession of a State to the Federation, what is the remedy which the State would have in such a case? The Act itself contains no provision whereby that matter could be agitated. It becomes a political issue. It will no doubt be open to a State to address the Crown in the matter and find a way out. Where the structure of the Federation is altered fundamentally without its consent, the State would, in theory, have the right to walk out of the Federation on the ground that that was not the Federation to which it had acceded. But this would be an extreme case, and as a practical

proposition the only approach to a solution would be by way of negotiation with the Crown. It is, however, only reasonable to expect, that when fundamental changes are made in the Constitution, the previous consent of the States would be secured.

One other matter of importance may also be mentioned It is submitted that a State which has entered the Federation has no right to secede from it. The accession of a State to the Federation is perpetual. The Act contains no provision by which a State after its accession to the Federation can withdraw from it. In fact, Section 5 (1) of the Act speaks of the British Indian Provinces and the Indian States who agree to federate as becoming united in a Federation under the Crown, as from the day prescribed in the proclamation establishing the Federation. That union is presumably to last for all time ; and there can be no question of that union being dissolved at the will of any one or more of the constituent units. These observations have, however, to be read along with that already made, that fundamental alterations in the structure of the Constitution require the previous consent of the Federated States.

CHAPTER VII

THE FEDERAL EXECUTIVE

THROUGHOUT the British Empire, with but one notable exception, the executive governments are conducted in the name of the King. The Governor, or the Governor-General as the case may be, carries on the administration, as the local representative of His Majesty. In December 1936, the Irish Free State abolished the office of Governor-General and eliminated the King from all the internal affairs of its government The King will only function in certain aspects of the external affairs of the Irish Free State, such as the appointment of its diplomatic and consular representatives and the conclusion of international agreements. These radical changes were carried out by two Acts of the Saorstát Eireann, Constitution (Amendment No. 27) Act, 1936, and Executive Authority (External Relations) Act, 1936. The provision formerly contained in Article 51 of the Constitution of the Irish Free State Act, 1922, that " the Executive Authority of the Irish Free State (Saorstát Eireann) is hereby declared to be vested in the King, and shall be exercisable, in accordance with the law, practice and constitutional usage governing the exercise of the Executive Authority in the case of the Dominion of Canada, by the Representative of the Crown," has been deleted by the first Act mentioned above. The Executive Council now exercises the executive power and authority of the Irish Free State. The Executive Authority (External Relations) Act, 1936, while providing that the diplomatic and consular representatives of the Saorstát Eireann shall be appointed by or on the authority of the Executive Council, and that every international agreement concluded on behalf of the Saorstát Eireann shall be concluded by or on the authority of the Executive Council, enacts by Section 3, Subsection (1) that " so long as Saorstát Eireann is associated with the following nations, that is to say, Australia, Canada, Great Britain, New Zealand and South Africa, and so long as the King recognized by those nations as the symbol of their co-operation continues to act on behalf of each of those nations (on the advice of the several Governments thereof) for the purposes of the appointment of diplomatic and consular representatives and the conclusion of international agreements, the King so recognized may, and is hereby authorized to, act on behalf of Saorstát

Eireann for the like purposes as and when advised by the Executive Council so to do "[1]

The principle that the executive governments of the various parts of the Empire are carried on in the name of the King has been recognized and embodied in all the other Dominion Constitutions. For instance, Section 61 of the Commonwealth of Australia Constitution Act, 1900, enacts that " the executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative and extends to the execution and maintenance of the Constitution and the laws of the Commonwealth." Following these precedents, Section 7 of the Government of India Act, 1935, enacts that the executive authority of the Federal Government shall be exercised on behalf of His Majesty by the Governor-General either directly or through officers subordinate to him. But, as we shall see, there are fundamental differences in the manner in which the Crown's representative in the Dominion conducts the administration, as compared to the way in which the Governor-General of India will run the Federal Government, under the provisions of the Government of India Act, 1935.

In the case of a Dominion, it is now well established, beyond cavil or controversy, that in all matters pertaining to the administration of its government, the Governor-General has to follow scrupulously the advice tendered to him by the Crown's ministers responsible to the Legislature. At the present day it is no more thinkable that a Crown's representative in a self-governing Dominion can disregard the advice given by the ministers of the Crown in that Dominion, than that the King in England can brush aside the advice of the English Cabinet. As in England, so in the Dominions, this is a matter of constitutional convention.

No Dominion Constitution, except that of the Irish Free State, expressly provides that the executive should be responsible to the Legislature. Article 51 of the Constitution of the Irish Free State Act, 1922, definitely enacts that the Executive Council shall be responsible to Dáil Eireann.[2] The principle of ministerial responsibility to the legislature, though regulated by convention in other Dominion Constitutions, is as firmly established as any statutory provision. The British North America Act, 1867, and the Commonwealth of Australia Constitution Act, 1900, to take only two Dominion Constitutions

[1] See Postscript for later developments in the Irish Constitution

[2] Article 28 Section 4 (1) of the new Irish Constitution also provides that the Government shall be responsible to Dáil Eireann For further details see Postscript

for purposes of illustration, merely provide for a Council to aid and advise the Governor-General in the government of the country. The Canadian Act calls that body the Queen's Privy Council for Canada while the Australian Act describes it as the Federal Executive Council. As to what should be the exact relationship between the Governor-General and the Executive Council, the Acts nowhere provide. As Professor Kennedy has pointed out, the Privy Council in Canada is a purely honorary body, while the Executive Government of the Dominion is carried on by a cabinet of ministers drawn from the political party which is in power.[1] In Australia, the ministers who are appointed by the Governor-General to administer the Commonwealth departments, are, as a matter of fact, persons who belong to the party in power. The Federal Executive Council, as this cabinet of ministers is called, is in essence a parliamentary cabinet, which holds office only so long as it enjoys the confidence of the legislature. Neither in Canada, nor in Australia, could the Governor-General override the Crown's ministers, without precipitating a constitutional crisis of the first magnitude.

Such a constitutional crisis, indeed, did occur in Canada in 1926. Mr. Mackenzie King, the Prime Minister of Canada, wanted the Governor-General, Lord Byng, to dissolve the Parliament. But Lord Byng, contrary to British constitutional practice governing this matter, refused to grant a dissolution, asserting his right to grant or withhold a dissolution, as a matter within his personal discretion The attitude adopted by Lord Byng caused widespread comment as marking a serious inroad into the autonomy of the Dominion to order its affairs in the manner which to it seemed best. It is even said that this episode was one of the important factors which influenced the Imperial Conference, which met in 1926, to undertake an examination of the constitutional position of the Dominions in the British Empire. The Inter-Imperial Relations Committee, which was appointed by the Imperial Conference of 1926, to investigate into important questions on the agenda affecting inter-imperial relations, in the course of its report declared that : " the Governor-General of a Dominion is the representative of the Crown, holding in all essential respects the same position in relation to the administration of public affairs in the Dominions as is held by His Majesty the King in Great Britain, and that he is not the representative or agent of His Majesty's Government in Great Britain or of any depart-

[1] Kennedy. *The Constitution of Canada* (1931), pp. 380–381.

ment of that Government."[1] From this declaration, it follows that the Governor-General, like the King in Great Britain, must accept the advice of the Crown's ministers in the Dominion. The ministerial advice extends over the whole field of administration; and there is no part of it wherefrom that advice is excluded. The Dominion Constitutions do not, as in the case of the Indian Act, reserve any departments for the Governor-General to administer on his own responsibility and without reference to the ministers. In all the Dominions the responsibility for the entire administration is borne by the ministers responsible to the legislature, and the Governor-General like the King in England, is only the constitutional head of the government.

With this background relating to the exercise of the executive power under the Dominion Constitutions, we may proceed briefly to examine the essential features of the Federal executive for which provision has been made in the Government of India Act, 1935, as also the manner in which that executive is likely to function in practice. The Act makes provision for a council of ministers, to aid and advise the Governor General in the exercise of his functions, except in so far as he is by or under the Act required to act in his discretion. It is laid down by the Act that the functions of the Governor-General with respect to defence, external affairs, ecclesiastical affairs, and the administration of tribal areas, should be exercised in his discretion. These are the reserved departments which the Governor-General administers on his own responsibility with the help of counsellors, not exceeding three in number, the ministers having no constitutional right to tender advice to him in regard to these spheres of administration. With regard to matters, other than those coming under the category of reserved departments, the Governor-General has, normally, to act on the advice of the ministers, who are responsible to the legislature. But even in regard to this sphere, wherein the ministers have the constitutional right to tender advice, the Governor-General may dissent from the advice so tendered and act contrary thereto, in the exercise of his individual judgment, if any of the special responsibilities described in Section 12 of the Act are involved. These special responsibilities, as we shall hereafter see, impinge upon almost every important activity of government; and one may legitimately say that the responsibility of the ministerial executive to the legislature, even over a limited field of administration, is not complete as the advice of the ministers is always liable to be set aside, in the exercise of the reserve power of the

[1] *Imperial Conference*, 1926, *Summary of Proceedings* Cmd 2768; p. 16.

Governor-General, above referred to. How, indeed, these powers will work in actual practice is a matter which the future alone can determine. From the foregoing facts it is obvious that the federal executive in India differs in many respects from that in the Dominions.

There are one or two other matters bearing upon the nature of the federal executive, which, though they are not dealt with in the Act itself, require consideration in view of their great importance.

In the matter of the selection of ministers who are to advise the Governor-General, it was contemplated by the Joint Parliamentary Committee that the Instrument of Instructions which was proposed to be issued to him on his appointment, should direct that he should appoint as ministers those persons who will best be in a position collectively to command the confidence of the legislature The object of making such a provision was to provide a constitutional method of evolving in India a system of responsible government.

The experience of federations in other parts of the world has generally been that in the selection of the federal executive, regional, racial and similar factors are given due consideration. Canada, which is not unlike India in many respects, furnishes an example of the tendency of giving proper recognition to the diverse elements which make up national life in the selection of the national executive Theoretically speaking, it may well be argued that this method of selection necessarily limits the choice of ministers ; a very desirable and competent person may have to yield place to a person, not so very desirable or competent, but representative of an important interest or community. But as in many other fields of human activity, the spirit of compromise and adjustment must have full play in politics so that things may move in an orderly manner and friction be reduced to a minimum. In the formation of the future Indian federal executive it is clear that a convention will have to be recognized, according due representation to the Indian States and important minority communities. The observations of Professor Kennedy in regard to the conventions governing the constitution of a federal ministry in Canada are particularly instructive, and with modifications may be equally applicable to Indian conditions. He observes as follows: " In relation to the informal or real executive, the cabinet, we may note certain conventions which have almost the force of constitutional law. The Prime Minister of Canada is not free as is the Prime Minister of the United Kingdom. The ' fathers of federation ' in truth failed in the type of second chamber

which they created, and, as we have seen, the federal idea was not realized in the national legislature. As a consequence, the federal cabinet has assumed, from the first cabinet of the dominion until to-day, a federal aspect. Thus a condition has prevailed and developed which was foretold in 1865 as a necessary outcome of the lack of a real federal principle in the organization of the senate. Nor has convention stopped there. The French Canadians, Anglo-Saxons in Quebec, and Roman Catholics in other provinces have more or less established claims to representation in the federal cabinet which has become since 1867 a reflection of provincial or territorial, religious and racial groupings. In other words, the executive government, specially placed in power in the interests of the nation as a whole, is generally a balancing of interests which calls for political legerdemain of the most skilled order. A prime minister may find himself forced to choose a colleague because he is the sole supporter of his party in some province or group of provinces, although his claim to cabinet office is merely the uniqueness of his position. He may find himself forced to select some one on account of his race or religion who brings to the council chamber neither executive experience nor political wisdom, neither national outlook nor the capacity for it. A federal cabinet may thus become a strange and fortuitous Noah's Ark; and Macdonald lived to declare that men must be chosen on the basis of capacity alone. However guileless his intentions, neither he nor his successors shook off his own initial type of cabinet organization, until to-day no prime minister, no party could afford even to attempt change. The federal cabinet is a compromise, a blending; and for better or for worse we appear likely to continue to tolerate a national executive which is only national in name and is held together merely by the ties of office. The amazing thing is the high average of success which we have achieved. Indeed, it may be that the common statement that we were the first to succeed in combining federalism and parliamentary government has only been proved true because we have been forced to federalize the national cabinet."[1]

Section 3 (1) of the Act enacts that the Governor-General of India is to be appointed by His Majesty by a Commission under the Royal Sign Manual; and that he is to have (*a*) all such powers and duties as are conferred or imposed on him by or under the Act, and (*b*) such other powers of His Majesty, not being powers connected with the exercise of the functions of the

[1] W. P. M. Kennedy, *Essays in Constitutional Law*, pp. 99–101.

Crown in its relations with Indian States, as His Majesty may be pleased to assign to him. In view of the provision made by Section 3 (1) of the Act for the office of Governor-General, that office has been constituted by Letters Patent of March 5, 1937, passed under the Great Seal of the Realm The Marquess of Linlithgow has been appointed as the Governor-General of India and the Crown's representative by a Commission dated March 8, 1937, issued under the Royal Sign Manual and Signet. The Letters Patent which constitute the office of Governor-General, authorizes and empowers the Governor-General, in the name and on behalf of His Majesty, to grant to any offender convicted in the exercise of its criminal jurisdiction by any Court of Justice, within the territories in India, belonging to His Majesty, a pardon, either free or subject to such lawful conditions as to him seem fit, and also delegates to him authority and power to grant in the name or on behalf of His Majesty, Commissions in the Naval Forces, Indian Land Forces, and Indian Air Force, of His Majesty.

The Governor-General will, as the head of the Federal Executive, be in supreme command of the Military, Naval and Air Forces in India The Act makes provision by Section 2, for the appointment by a warrant under the Royal Sign Manual, of a Commander-in-Chief of His Majesty's forces in India.

The Governor-General has been provided with an Instrument of Instructions, suited to the transitional pre-federation period, issued on March 8, 1937, under the Royal Sign Manual and Signet. Section 13 of the Act defines the procedure to be followed in issuing the Instrument of Instructions to the Governor-General. In view of the importance of this document I propose to deal with it separately a little later

The Act draws a distinction between the office of Governor-General, the head of the Federal Executive and that of the Crown's representative in relation to the States. The Crown's representative for the States will hereafter exercise, with respect to such of the States as may not enter the Federation, all those powers of the Crown hitherto exercised in relation to all the States, as also such of the powers of paramountcy in relation to States who may join the Federation, as lie outside the ambit of the federal field. Normally the two offices of the Governor-General and the Crown's representative will be filled by one and the same person. I have already quoted one part of Section 3 which deals with the office and functions of the Governor-General. The other part of this section, namely, Sub-section (2) of Section 3 provides that His Majesty's repre-

sentative for the exercise of the functions of the Crown in its relations with Indian States is appointed by His Majesty by a Commission under the Royal Sign Manual, and that he has all such powers and duties in connection with the exercise of those functions (not being powers or duties conferred or imposed by or under the Act on the Governor-General) as His Majesty may be pleased to assign to him. In pursuance of the provision made by Section 3 (2) of the Act providing for the office of Crown's representative, that office has been constituted by Letters Patent of March 5, 1937, passed under the Great Seal of the Realm. By a Commission dated March 8, 1937, issued under the Royal Sign Manual and Signet, the Marquess of Linlithgow has been appointed to hold the office of Crown's representative in addition to the office of Governor-General.

7. (1) Subject to the provisions of this Act, the executive authority of the Federation shall be exercised on behalf of His Majesty by the Governor-General, either directly or through officers subordinate to him, but nothing in this section shall prevent the Federal Legislature from conferring functions upon subordinate authorities, or be deemed to transfer to the Governor-General any functions conferred by any existing Indian law on any court, judge or officer, or on any local or other authority.

(2) References in this Act to the functions of the Governor-General shall be construed as references to his powers and duties in the exercise of the executive authority of the Federation and to any other powers and duties conferred or imposed on him as Governor-General by or under this Act, other than powers exercisable by him by reason that they have been assigned to him by His Majesty under Part I of this Act.

(3) The provisions of the Third Schedule to this Act shall have effect with respect to the salary and allowances of the Governor-General and the provision to be made for enabling him to discharge conveniently and with dignity the duties of his office.

8. (1) Subject to the provisions of this Act, the executive authority of the Federation extends—

(*a*) to the matters with respect to which the Federal Legislature has power to make laws ;

(*b*) to the raising in British India on behalf of His Majesty of naval, military and air forces and to the governance of His Majesty's forces borne on the Indian establishment ;

(*c*) to the exercise of such rights, authority and jurisdiction as are exercisable by His Majesty by treaty, grant, usage, sufferance, or otherwise in and in relation to the tribal areas :

Provided that—

(i) the said authority does not, save as expressly provided in this Act, extend in any Province to matters with respect to which the Provincial Legislature has power to make laws ;

(ii) the said authority does not, save as expressly provided in this Act, extend in any Federated State save to matters with respect to which the Federal Legislature has power to make laws for that State, and the exercise thereof in each State shall be subject to such limitations, if any, as may be specified in the Instrument of Accession of the State ;

(iii) the said authority does not extend to the enlistment or enrolment in any forces raised in India of any person unless he is either a subject of His Majesty or a native of India or of territories adjacent to India , and

(iv) commissions in any such force shall be granted by His Majesty save in so far as he may be pleased to delegate that power by virtue of the provisions of Part I of this Act or otherwise.

(2) The executive authority of a Ruler of a Federated State shall, notwithstanding anything in this section, continue to be exercisable in that State with respect to matters with respect to which the Federal Legislature has power to make laws for that State except in so far as the executive authority of the Federation becomes exercisable in the State to the exclusion of the executive authority of the Ruler by virtue of a Federal law.

The functions of the Governor-General with respect to defence and ecclesiastical affairs, external affairs, except the relations between the federation and any part of His Majesty's dominions, are to be exercised by him in his discretion. The functions pertaining to the tribal areas are also to be similarly exercised. The Governor-General is to have the assistance of counsellors, not exceeding three in number, in the task of administration of these departments. These counsellors are appointed by the Governor-General, their salaries and conditions of service being prescribed by His Majesty in Council. These provisions are contained in Section 11. Though the final decisions, with regard to these reserved departments, are to be taken by the Governor-General, and the ministry has no constitutional right to tender advice in regard to them, it is intended, however, that the Governor-General should " invite the collaboration of the Federal ministry to the widest extent compatible with the preservation of his own responsibility," even in regard to these departments. The Joint Select Committee have observed that " when the question arises of lending Indian personnel of the

defence forces for service outside India on occasions which in the Governor-General's decision do not involve the defence of India in the broadest sense, he should not agree to lend such personnel, without consultation with the federal ministry."[1] Though it is proposed that the Governor-General's Instrument of Instructions should formally recognize the fact, that the defence of India must to an increasing extent be the concern of the Indian people, and not of the United Kingdom alone, there is no provision in the Act for completing the process of Indianization of the Army within a definite period of time, after which Indians should undertake the full responsibility for their country's defence

Section 11 excludes from the category of external affairs, which is a reserved subject, the relations between the Federation and any part of His Majesty's dominions. The relations of India with foreign countries alone will come within the ambit of the reserved subject. The negotiation of trade or commercial agreements with foreign countries will, however, be the primary concern of the Federal ministry. As the Joint Select Committee have observed : " It was urged before us that the making of commercial or trade agreements with foreign countries was essentially a matter for which the future minister for commerce should be responsible rather than the Governor-General. In the United Kingdom, however, all agreements with foreign countries are made through the Foreign Office. Any other arrangement would lead to grave inconvenience ; but when a trade or commercial agreement is negotiated, the Foreign Office consult and co-operate with the Board of Trade, whose officials necessarily take part in any decision which precede the agreement. We assume that similar arrangements will be adopted in India, and that the department of external affairs will maintain a close contact with the department of Trade or Commerce ; but we are clear that agreements of any kind with a foreign country must be made by the Governor-General, even if on the merits of a trade or commercial issue he is guided by the advice of the appropriate minister."[2]

There is to be a council of ministers, not exceeding ten in number, to aid and advise the Governor-General in the exercise of his functions, except in so far as he is required by or under the Act to exercise his functions or any of them in his discretion. The Governor-General also retains the power to override his ministers, in the exercise of his individual judgment, in any

[1] *J P C Report*, Vol. I, p 100.
[2] *J P.C. Report*, Vol I, p. 102.

case where he is, by or under the provisions of the Act, competent to do so. The Act also provides that in regard to all cases, where the Governor-General is required to act in his discretion or in his individual judgment, the decision of the Governor-General in his discretion, is to be final and that no court of law can challenge the validity of anything done by him in the exercise of such discretionary powers (Section 9). The ministers of the Governor-General are to be chosen and summoned by him, and sworn as members of the council. They are to hold office during his pleasure. A minister who for a period of six consecutive months is not a member of either chamber of the Federal Legislature, must at the expiration of the period cease to be a minister (Section 10).

12. (1) In the exercise of his functions the Governor-General shall have the following special responsibilities, that is to say—

(*a*) the prevention of any grave menace to the peace or tranquillity of India or any part thereof ;

(*b*) the safeguarding of the financial stability and credit of the Federal Government ;

(*c*) the safeguarding of the legitimate interests of minorities ;

(*d*) the securing to, and to the dependants of, persons who are or have been members of the public services of any rights provided or preserved for them by or under this Act and the safeguarding of their legitimate interests ,

(*e*) the securing in the sphere of executive action of the purposes which the provisions of Chapter III of Part V of this Act are designed to secure in relation to legislation ;

(*f*) the prevention of action which would subject goods of United Kingdom or Burmese origin imported into India to discriminatory or penal treatment ;

(*g*) the protection of the rights of any Indian State and the rights and dignity of the Ruler thereof ; and

(*h*) the securing that the due discharge of his functions with respect to matters with respect to which he is by or under this Act required to act in his discretion, or to exercise his individual judgment, is not prejudiced or impeded by any course of action taken with respect to any other matter.

(2) If and in so far as any special responsibility of the Governor-General is involved, he shall in the exercise of his functions exercise his individual judgment as to the action to be taken.

This is one of the important provisions of the Act. That the categories of responsibility enumerated in the section cover important fields of administration cannot be seriously disputed ; indeed, there are few activities of government which cannot be

drawn into the wide net of special responsibilities, so broad and elusive is the wording of this section. Sub-section (2) of Section 12 lays down that in so far as any special responsibility of the Governor-General is involved, he shall in the exercise of his functions exercise his individual judgment as to the action to be taken. The Governor-General is armed with extensive legislative, financial and other powers to implement the action which he wishes to take in the discharge of his functions relating to his special responsibilities. He may promulgate ordinances; he may even issue legislative enactments on his own responsibility if he deems that such action is called for (Sections 43 and 44). He may direct the inclusion in the Finance Bill of any sums he may consider necessary for the fulfilment of his special responsibilities. If the Chambers have not assented to any demand for a grant or have assented subject to a reduction of the amount specified therein, the Governor-General may, if in his opinion the refusal or reduction would affect the due discharge of any of his special responsibilities, include in the Authenticated schedule specifying the grants sanctioned for the administration, such additional amount of the rejected demand, or the reduction as the case may be, as appears to him necessary in order to enable him to discharge that responsibility (Sections 33 and 35) He may also direct that the discussion of any Bill introduced or proposed to be introduced in the Federal Legislature be stopped on the ground that such discussion would affect the discharge of his special responsibility for the prevention of any grave menace to the peace or tranquillity of a province (Section 40 (2)).

These provisions certainly whittle down, in great measure, the responsibility which the ministers possess in regard to the administration of those departments which are committed to their care, that is to say departments other than those reserved for the administration of the Governor-General.

We might now proceed to examine the clauses in some detail.

(1) As to Clause (*a*) it is contemplated that the action which the Governor-General might take may not necessarily be restricted to cases in which the menace arises from subversive movements or activities tending to crimes of violence. In view of the fact that the Governor-General is vested with the exclusive responsibility for defence, as the Joint Select Committee have pointed out, it is open to him to override the advice of the ministers in their own sphere, when the peace or tranquillity of India, or any part thereof is threatened.[1]

[1] *J.P.C. Report*, Vol I, p 94.

(ii) Though finance will be one of the subjects to be administered by the Federal ministry, the Governor-General will have a special responsibility for the safeguarding of the financial stability and credit of the Federation. As to what exactly is contemplated by this provision, it may, perhaps, be useful to quote the following observations from the second report of the Federal Structure Committee : " as it is a fundamental condition of the success of the new constitution that no room should be left for doubts as to the ability of India to maintain her financial stability and credit, both at home and abroad," it is necessary, " to reserve to the Governor-General in regard to budgetary arrangements and borrowing such essential powers as would enable him to intervene if methods were being pursued which would in his opinion seriously prejudice the credit of India in the money markets of the world "[1] The Act provides that the Governor-General may, after consulting his ministers, appoint a financial adviser. In the appointment of the first occupant of the office of financial adviser, it is open to the Governor-General to act upon his own responsibility. One of the main functions of this officer will be to advise the Governor-General in regard to his special responsibility for safeguarding the financial stability and credit of the Federation The services of this officer may also be made use of by the Federal ministry in regard to any financial matter. These are provided for by Section 15 of the Act.

(iii) The minorities referred to in Clause (*c*) are racial and religious minorities As the Joint Select Committee have pointed out, it is certainly not intended by the term minority to denote a minority in a political sense , nor is it contemplated that the special responsibility of the Governor or Governor-General in regard to this matter, should be employed for the purpose of blocking measures of social or economic reform, on the ground that they are resisted by a group of persons who might claim to be regarded as a minority.[2]

(iv) The British Indian delegation in their memorandum to the Joint Select Committee wanted a clear definition of the term " legitimate interests " and also expressed the view that the special responsibility should be restricted to the rights and privileges guaranteed under the constitution. The Joint Select Committee, however, considered that the idea of the White Paper was to guarantee to the members of the public services not only legal rights but also equitable treatment, which did not

[1] Cited in *J P C Report*, Vol I, p. 94
[2] *J P C. Report*, Vol. I, pp 45 and 95.

lend itself to a more exact definition ; and therefore, the words " legitimate interests " were properly employed in the White Paper. Clause (*d*) follows the view expressed by the Joint Select Committee.[1]

(v) Chapter III of Part V makes certain provisions with regard to commercial, fiscal and professional discriminations. Clause (*e*) is intended to prevent administrative discrimination in any of the matters, in respect of which provision against legislative discrimination is made by the Act.

(vi) With respect to Clause (*f*) the following observations of the Joint Select Committee may be reproduced here . " It should be made clear that the imposition of this special responsibility upon the Governor-General is not intended to affect the competence of his Government and of the Indian Legislature to develop their own fiscal and economic policy ; that they will possess complete freedom to negotiate agreements with the United Kingdom or other countries for the securing of mutual tariff concessions ; and that it will be his duty to intervene in tariff policy or in the negotiation or variation of tariff agreements only if in his opinion the intention of the policy contemplated is to subject trade between the United Kingdom and India to restrictions conceived, not in the economic interests of India but with the object of injuring the interests of the United Kingdom. It should further be made clear that the ' discriminatory or penal treatment ' covered by this special responsibility includes both direct discrimination (whether by means of differential tariff rates or by means of differential restrictions on imports) and indirect discrimination by means of differential treatment of various types of products ; and that the Governor-General's special responsibility could also be used to prevent the imposition of prohibitory tariffs or restrictions, if he were satisfied that such measures were proposed with the intention already described. In all these respects, the words would cover measures which, though not discriminatory or penal in form, would be so in fact."[2]

(vii) The rights which are referred to in Clause (*g*) are rights enjoyed by a State in matters not covered by its Instrument of Accession, which may be prejudiced by administrative or legislative action in British India. The special responsibility will come into operation when "there is a conflict between rights arising under the Constitution Act and those enjoyed by a State outside the federal sphere." As the Joint Select

[1] *J P.C Report*, Vol I, pp 45 and 95
[2] *J P.C. Report*, Vol I, pp. 205–206.

Committee observe: "it may be necessary for the Governor-General to deal with such a conflict not only in his capacity as the executive head of the Federation but also in his capacity as the representative of the Crown in its relation with the States; but this special responsibility must necessarily arise in the first capacity only, his action in the second capacity being untouched in any way by the Constitution Act."[1]

(viii) Clause (*h*) refers to any action which the Governor-General may have to take with reference to a reserved department like defence, even though such action trenches upon the sphere of the ministers.

Section 14 provides that in so far as the Governor-General is by or under the Act required to act in his discretion or to exercise his individual judgment, he is to be under the general control of the Secretary of State and comply with such directions as may be issued by him. It is also enacted that the validity of anything done by the Governor-General shall not be called into question on the ground that it was done otherwise than in accordance with the provisions of this section

13. (1) The Secretary of State shall lay before Parliament the draft of any Instrument of Instructions (including any Instrument amending or revoking an Instrument previously issued) which it is proposed to recommend His Majesty to issue to the Governor-General, and no further proceedings shall be taken in relation thereto except in pursuance of an address presented to His Majesty by both Houses of Parliament praying that the Instrument may be issued

(2) The validity of anything done by the Governor-General shall not be called in question on the ground that it was done otherwise than in accordance with any Instrument of Instructions issued to him.

Lord Hailsham, L C , while speaking in the House of Lords when this section was under consideration at the Committee stage of the India Bill, observed as follows: "When we come to the Instrument of Instructions, which is the document we are dealing with here, I think I am right in saying that we are introducing in this Bill an unprecedented concession to the control of Parliament So far as I know, the Instrument of Instructions, which has always existed with regard to all the Dominions in the old days and the Colonies, and with regard to India to-day, is essentially a prerogative matter which has been decided by the Executive of the day, and which has never been submitted to Parliament at all. Having regard to the import-

[1] *J P C. Report*, Vol I, p. 95.

ance of the Instrument of Instructions under this Constitution, to the novelty of some of the points which will arise, and to the part which it plays in the proposed new Constitution, the Government have thought it right in this clause to ask Parliament to undertake a responsibility which it has hitherto never imagined it would be called upon to discharge. Parliament has been asked to come into consultation with regard to the Instrument of Instructions, but the Instrument of Instructions still remains a document which has to be sent under the prerogative on the advice of the executive and is essentially an executive matter."[1]

The Instrument of Instructions issued hitherto to the King's representative in the Colonies and Dominions has always been a prerogative Instrument; it has never come under the control or scrutiny of Parliament But the Act, contrary to precedents in this matter, makes a change in this respect. The object of providing the Governor-General or a Governor with instructions is to guide him in the discharge of the functions which are committed to him under the Act. For instance, it is intended that the Instrument of Instructions to be issued to the Governor-General should deal, among other matters, with the way in which the special responsibilities have to be exercised, the problem of Indianization of the army, and the encouragement of joint consultation between himself, his ministers and counsellors The Instructions contained in the Instrument will, however, have to be within the framework of the Act, and not travel beyond its limits. Though the Instrument of instructions will have a statutory basis, it will, nevertheless, retain its essential character as a prerogative document.

Section 16 provides that the Governor-General shall appoint a person, who is qualified to be appointed a judge of the Federal Court, to be Advocate-General of the Federation. It will be the duty of the Advocate-General to give advice to the federal government upon such legal matters, and to perform such other duties of a legal character, as may be referred or assigned to him by the Governor-General. In the performance of his duties, he is to have right of audience in all courts in British India, and, in a case in which federal interests are concerned, in all courts in any Federated State. The Advocate-General will hold office during the pleasure of the Governor-General and receive such remuneration as the Governor-General may determine.

[1] *Official Report. House of Lords*, July 2, 1935. Vol 97, column 1067.

CHAPTER VIII

THE FEDERAL LEGISLATURE

THE problems which arise in connection with the constitution and powers of the Upper and Lower Houses in both unitary and federal Constitutions are always of a difficult and complex character. The Constitutions of the various countries of the world have solved these problems, each in its own way, though, it is important to recognize that the solutions of some of these problems are strikingly similar. Interesting as these problems are, it is not necessary to deal with them here. But one outstanding fact pertaining to the Indian Federal Legislature requires special mention. It is almost a universal rule, in Federal Constitutions, to adopt the method of direct election for the Lower House, the members of the Lower House are returned by the people voting directly in territorial Constituencies. In fact, the system of direct election for the Indian Legislative Assembly has been in force under the Government of India Act, 1919. Contrary to these precedents, the Government of India Act, 1935, provides that the British Indian representatives on the future Federal Assembly shall be elected by the members of the Provincial Legislative Assemblies voting in electoral colleges, constituted on communal lines. This method puts back the hands of the clock of progress by many years, indeed, we are going back to the days when the indirect method of election to the Central Legislature prevailed under the Indian Councils Act of 1909 Direct election has the almost universal support of Indian opinion, the British Indian delegation in their joint memorandum to the Joint Select Committee strongly recommended it It is true, that owing to the extension of franchise under the new Constitution, the constituencies have become fairly big. Even so, the problem of the candidate getting into touch with his constituents is not so formidable as may appear at first sight. Regular motor services now daily traverse what were hitherto remote and inaccessible parts of the country which only a decade or two ago maintained but an imperfect touch with the outside world. The experience of the elections held in the early part of the year 1937 for electing candidates to the various Provincial Legislatures under the new constitution, shows that the extension of the franchise has

not prevented the electoral machinery from running smoothly. Indeed, the elections, judged from the standpoint of the workability of the new electoral machinery, must be pronounced a distinct success

To constitute the Lower House on the method of indirect election outlined in the new Act, involves two serious drawbacks. In the first place, the average citizen will be deprived of direct contact with the problems which come within the purview of the Federal Government It is true that the members of the Council of State are elected under the direct system. But the franchise for this House is extremely limited. In view of these facts, large masses of people have no means of acquiring political education in regard to problems which are vital to the nation, like defence, tariffs, railways and currency. In the second place, if the system of responsible government is to develop on proper lines in India, the bulk of the people must have an effective voice in the selection of the men who shall represent them in the Legislatures. And this influence is practically denied to large masses of the population under the new arrangements.

Even the Joint Select Committee in their report recognized that the system now proposed was in the nature of an experiment, which was open to review at some future time. Section 308 of the Government of India Act, 1935, in fact provides a machinery for revising the size, composition and the method of choice of the members of the Federal Legislature. After the lapse of ten years the Federal Legislature is empowered to pass resolutions suggesting amendments in regard to these matters for submission to His Majesty , and if such suggestions are acceptable, effect may be given to them by means of an Order in Council. Power is also reserved for His Majesty in Council to introduce changes in regard to these matters, even before the ten year period has expired, under certain conditions.

General

The Federal Legislature is to consist of His Majesty represented by the Governor-General, and two Houses, to be known respectively as the Council of State and the House of Assembly. The House of Assembly is referred to in the Act as the Federal Assembly.

The strength of the Council of State is fixed at 260 members. Of these, 156 are to represent British India and not more than

104 are to represent the Indian States. Of the 156 seats which are allotted to the representatives of British India, 150 are to be allocated to the Governors' Provinces, Chief Commissioners' Provinces and the Anglo-Indian, European and Indian Christian communities. Six seats are to be filled by persons who are to be chosen by the Governor-General in his discretion. The Council of State is to be a permanent body, not subject to dissolution, but, as near as may be, one-third of its members are to retire every three years.

The Federal Assembly is to consist of 250 members to represent British India, and not more than 125 to represent the Indian States. Every Federal Assembly, unless sooner dissolved, is to continue for five years from the date appointed for their first meeting and no longer, and the expiration of the said period of five years shall operate as a dissolution of the Assembly Section 18 provides for these matters.

Paragraph 1 of Part I of the First Schedule to the Act provides that a person shall not be qualified to be chosen as a representative of British India to fill a seat in the Federal Legislature unless he—

(*a*) is a British subject, or the Ruler or a subject of an Indian State which has acceded to the Federation ; and

(*b*) is, in the case of a seat in the Council of State, not less than thirty years of age and, in the case of a seat in the Federal Assembly, not less than twenty-five years of age , and

(*c*) possesses such, if any, of the other qualifications specified in, or prescribed under Part I of the First Schedule as may be appropriate in his case

Provided that the Ruler or a subject of an Indian State which has not acceded to the Federation—

(i) shall not be disqualified under sub-paragraph (*a*) of this paragraph to fill a seat allocated to a province if he would be eligible to be elected to the Legislative Assembly of that province ; and

(ii) in such cases as may be prescribed, shall not be disqualified under the said sub-paragraph (*a*) to fill a seat allocated to a Chief Commissioner's province.

The representatives of British India in the Council of State are to be chosen in the following manner. The Sikh and Mohammedan communities will elect their representatives by voting in territorial constituencies comprising members of those communities. The rest of the population consisting mainly of Hindus will form the general territorial electorates, and will return representatives. No person entitled to be in a

Sikh or Mohammedan electoral roll and no Anglo-Indian, European, or Indian Christian can vote at an election to fill a general seat. " Persons to fill the seats allotted to the Anglo-Indian, European and Indian Christian communities shall be chosen by the members of electoral colleges consisting of such Anglo-Indians, Europeans and Indian Christians, as the case may be, as are members of the Legislative Council of any Governor's Province or of the Legislative Assembly of any Governor's Province."[1]

The persons who are to represent the States in the Council of State are to be appointed by the Rulers of the States concerned. The problem of allocation of seats among the States, Estates and Jagirs, nearly 600 in number and of varying sizes, populations and importance, was one of difficulty. The number of seats available for distribution among these States was only 104. The principle adopted in the allocation of seats in the Council of State was to take account of the relative rank and importance of the State as indicated by the dynastic salute and other factors Hyderabad, the biggest and the most important State in India gets five seats , while Mysore, Kashmir, Gwalior and Baroda get three each. But not all States were able to secure individual representation The smaller States were therefore divided into groups, each State in the group being represented in turn For instance in Kathiawar, Radhanpur, Wankaner and Palitana, form one group. This group is entitled to one seat , the Ruler of each State being entitled to nominate a representative in turn A person will not be qualified to be appointed to represent a State in either Chamber unless he (i) is a British subject or the Ruler or a subject of an Indian State which has acceded to the Federation , and (ii) is, in the case of a seat in the Council of State, not less than thirty years of age and, in the case of seat in the Federal Assembly, not less than twenty-five years of age.

The age limit prescribed in Clause (ii) does not, however, apply to a Ruler exercising ruling powers. The Governor-General may also exempt from the operation of Clause (i) any named subject, or the subjects generally of any State, the Ruler of which is unable to join the Federation on account of minority. These provisions are made by paragraph 4 of Part II of the First Schedule to the Act.

The members of the Federal Assembly are, in the main, to be elected by the Provincial Legislatures. The Sikh and

[1] Paragraph 10 of Part I of the First Schedule.

Mohammedan representatives are to be elected by the representatives of those communities in the Provincial Legislative Assemblies voting in electoral colleges. The representatives of the Hindus will be chosen by electoral colleges consisting of such of the members of the various Provincial Legislative Assemblies as are holding general seats. The depressed classes (called the scheduled castes) are to have a certain number of seats reserved to them in some of the Provinces, out of general seats. In addition to the three communities mentioned above, the following communities and special interests are to have special seats assigned to them in the Federal Assembly, viz. (1) Europeans, (2) Indian Christians, (3) Anglo-Indians, (4) Representatives of Commerce and Industry, (5) Landholders, (6) Representatives of Labour, and (7) Women.

For the purpose of choosing persons to fill the European, Anglo-Indian or Indian Christian seats in the Federal Assembly, there shall be for British India three electoral colleges consisting respectively of such persons as hold an Anglo-Indian, a European or an Indian Christian seat in the Legislative Assembly of a Governor's Province, and the persons who are to fill the seats allotted to these communities shall be chosen by the members of the appropriate electoral college. Persons to fill the seats in the Federal Assembly assigned to representatives of commerce and industry, landholders and representatives of labour, are to be chosen :

(*a*) in the case of a seat allotted to a Province which is to be filled by a representative of Commerce and Industry, by Chambers of Commerce and similar institutions voting in such manner as may be prescribed ;

(*b*) in the case of a seat allotted to a Province which is to be filled by a landholder, by such persons voting in such territorial constituencies and in such manner as may be prescribed ;

(*c*) in the case of a seat allotted to a Province which is to be filled by a representative of labour, by such organizations, or in such constituencies, and in accordance with such manner of voting as may be prescribed ,

(*d*) in the case of one of the non-provincial seats which are to be filled by representatives of commerce and industry, by such Associated Chambers of Commerce, in the case of another such seat by such Federated Chambers of Commerce and in the case of the third such seat by such commercial bodies in Northern India, voting in each case in such manner as may be prescribed ; and

(*e*) in the case of the non-provincial seat which is to be

filled by a representative of labour, by such organizations voting in such manner as may be prescribed

The seats allotted to women in the Federal Assembly for the Governor's Provinces are to be filled up by election in the electoral colleges, constituted of such women as are members of the Legislative Assembly in the respective provinces.

The allocation of seats among the States in the Federal Assembly proceeds on the basis of population Thus Hyderabad, which has a population of nearly 14½ millions, is allotted 16 seats , Mysore with a population of 6½ millions gets 7 ; and Bahawalpur with a population of 984,000 gets 1 seat

The Chambers of the Federal Legislature are to be summoned to meet once at least in every year, and twelve months should not intervene between their last sitting in one session and the date appointed for their first sitting in the next session. The Governor-General, in his discretion, may from time to time (*a*) summon the Chambers or either Chamber to meet at such time and place as he thinks fit, (*b*) prorogue the Chambers, (*c*) dissolve the Federal Assembly. The Governor-General may address either Chamber or both Chambers assembled together. The Governor-General is empowered to send messages to either Chamber, whether with respect to a Bill then pending in the legislature or otherwise, and a Chamber receiving such message has to consider any matter therein referred to with all convenient despatch These matters are prescribed by Sections 19 and 20

Section 21 provides that every Minister, every Counsellor and the Advocate-General has the right to speak in, and otherwise to take part in the proceedings of, either Chamber, any joint sitting of the Chambers, and any Committee of the Legislature of which he may be named a member. But he shall not be entitled to vote, merely by virtue of this section.

The members of the Council of State are to choose two members of the Council to be respectively President and Deputy President of that body. The members of the Federal Assembly are similarly entitled to choose two members to be respectively Speaker and Deputy Speaker. A person holding the office of President of the Council of State or the Speaker of the Federal Assembly has to vacate that office if he ceases to be a member of the chamber over which he happens to preside He may resign his office by writing under his hand addressed to the Governor-General and he may also be removed upon a resolution passed by a majority of all the then members of the Council or Assembly, as the case may be.

These provisions are also applicable to the Deputy President and the Deputy Speaker.

All questions, at any sitting or joint sittings, of the Chambers, shall be determined by a majority of votes of the members present and voting, other than the President or Speaker or a person acting as such. The President and the Speaker, or any person who is acting as such, shall not vote in the first instance, but shall have and exercise a casting vote in the case of an equality of votes.

A Chamber of the Federal Legislature shall have power to act notwithstanding any vacancy in its membership. The validity of the proceedings in the Legislature shall not be assailed notwithstanding that it is discovered later that some person who was not entitled so to do, sat or voted or otherwise took part in such proceedings. The quorum for transacting business in the case of each Chamber is fixed at one-sixth of the strength of that Chamber.

Every member of either Chamber is required, before taking his seat, to make and subscribe before the Governor-General, or some person appointed by him, an oath in one of the forms prescribed, which the member accepts as appropriate in his case.

A person cannot be a member of both Chambers. Rules made by the Governor-General shall provide for the vacation of the person who is chosen a member of both Chambers, of his seat in one Chamber or the other If a member of either Chamber :

(*a*) becomes subject to any of the disqualifications set out in Sub-section (1) of Section 26 ; or

(*b*) by writing under his hand addressed to the Governor-General resigns his seat, his seat shall become vacant. If for sixty days a member of either Chamber is without permission of the Chamber absent from all its meetings, the Chamber may declare his seat vacant.

26. (1) A person shall be disqualified for being chosen as, and for being, a member of either Chamber—

(*a*) if he holds any office of profit under the Crown in India, other than an office declared by Act of the Federal Legislature not to disqualify its holder ;

(*b*) if he is of unsound mind and stands so declared by a competent court ;

(*c*) if he is an undischarged insolvent ;

(*d*) if, whether before or after the establishment of the Federation, he has been convicted, or has, in proceedings for

questioning the validity or regularity of an election, been found to have been guilty, of any offence or corrupt or illegal practice relating to elections which has been declared by Order in Council or by an Act of the Federal Legislature to be an offence or practice entailing disqualification for membership of the Legislature, unless such period has elapsed as may be specified in that behalf by the provisions of that Order or Act ;

(*e*) if, whether before or after the establishment of the Federation, he has been convicted of any other offence by a Court in British India or in a State which is a Federated State and sentenced to transportation or to imprisonment for not less than two years, unless a period of five years, or such less period as the Governor-General, acting in his discretion, may allow in any particular case, has elapsed since his release ;

(*f*) if, having been nominated as a candidate for the Federal or any Provincial Legislature or having acted as an election agent of any person so nominated, he has failed to lodge a return of election expenses within the time and in the manner required by any Order in Council made under this Act or by any Act of the Federal or the Provincial Legislature, unless five years have elapsed from the date by which the return ought to have been lodged or the Governor-General, acting in his discretion, has removed the disqualification :

Provided that a disqualification under Paragraph (*f*) of this sub-section shall not take effect until the expiration of one month from the date by which the return ought to have been lodged or of such longer period as the Governor-General, acting in his discretion, may in any particular case allow.

(2) A person shall not be capable of being chosen a member of either Chamber while he is serving a sentence of transportation or of imprisonment for a criminal offence.

(3) Where a person who, by virtue of a conviction or a conviction and a sentence, becomes disqualified by virtue of Paragraph (*d*) or Paragraph (*e*) of Sub-section (1) of this section is at the date of the disqualification a member of the Legislature, his seat shall, notwithstanding anything in this or the last preceding section, not become vacant by reason of the disqualification until three months have elapsed from the date thereof or, if within those three months an appeal or petition for revision is brought in respect of the conviction or the sentence, until that appeal or petition is disposed of, but during any period during which his membership is preserved by this sub-section he shall not sit or vote.

(4) For the purposes of this section a person shall not be deemed to hold an office of profit under the Crown in India by reason only that—

(*a*) he is a Minister either for the Federation or for a Province ; or

(*b*) while serving a State, he remains a member of one of the services of the Crown in India and retains all or any of his rights as such.

Under Section 27 a person who sits or votes as a member of either Chamber when he is not qualified or is disqualified for membership or when he is prohibited from so doing by the provisions of Sub-section (3) of Section 26, is liable in respect of each day he sits or votes to a penalty of five hundred rupees.

28. (1) Subject to the provisions of this Act and to the rules and standing orders regulating the procedure of the Federal Legislature, there shall be freedom of speech in the Legislature, and no member of the Legislature shall be liable to any proceedings in any court in respect of anything said or any vote given by him in the Legislature or any committee thereof, and no person shall be so liable in respect of the publication by or under the authority of either Chamber of the Legislature of any report, paper, votes or proceedings.

(2) In other respects, the privileges of members of the Chambers shall be such as may from time to time be defined by Act of the Federal Legislature and, until so defined, shall be such as were immediately before the establishment of the Federation enjoyed by members of the Indian Legislature.

(3) Nothing in any existing Indian Act, and, notwithstanding anything in the foregoing provisions of this section, nothing in this Act, shall be construed as conferring, or empowering the Federal Legislature to confer, on either Chamber or on both Chambers sitting together, or on any committee or officer of the Legislature, the status of a court, or any punitive or disciplinary powers other than a power to remove or exclude persons infringing the rules or standing orders, or otherwise behaving in a disorderly manner.

(4) Provision may be made by an Act of the Federal Legislature for the punishment, on conviction before a court, of persons who refuse to give evidence or produce documents before a committee of a Chamber when duly required by the Chairman of the committee so to do :

Provided that any such Act shall have effect subject to such rules for regulating the attendance before such committees of

persons who are, or have been, in the service of the Crown in India, and safeguarding confidential matter from disclosure, as may be made by the Governor-General exercising his individual judgment.

(5) The provisions of Sub-sections (1) and (2) of this section shall apply in relation to persons who by virtue of this Act have the right to speak in, and otherwise take part in the proceedings of, a Chamber as they apply in relation to members of the Legislature.

In England, freedom of debate in Parliament rests upon an express provision of the Bill of Rights · " That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament."[1] Clause 1 of Section 28 makes provision for freedom of debate in the Federal Legislature ; and no member is to be made liable for any proceedings in court for anything said or any vote given by him in the Legislature or in any committee thereof. But three kinds of restrictions are imposed by the Act itself on the exercise of this privilege. The first is, that no discussion shall take place in the Federal Legislature with respect to the conduct of any Judge of a Federal Court or a High Court, either in British India or a Federated State in the discharge of his duties. The second is, that if the Governor-General certifies that the discussion of a Bill introduced or proposed to be introduced in the Federal Legislature, or of any specified clause of a Bill, or of any amendment moved or proposed to be moved to a Bill, would affect the discharge of his special responsibility for the prevention of any grave menace to the peace and tranquillity of India or any part thereof, he may direct that no proceedings, or no further proceedings shall be taken, in relation to the Bill, clause or amendment (Section 40). Section 38 imposes the third category of restrictions. Under that section the Governor-General is empowered, in his discretion, to make rules, after consultation with the President or the Speaker, as the case may be,

(*a*) prohibiting the discussion of, or the asking of questions on, any matter connected wth any Indian State, other than a matter with respect to which the Federal Legislature has power to make laws for that State, unless the Governor-General in his discretion is satisfied that the matter affects Federal interests or affects a British subject, and has given his consent to the matter being discussed or the question being asked ;

[1] Cited in Keir and Lawson . *Cases in Constitutional Law*, p. 77.

(*b*) for prohibiting, save with the consent of the Governor-General, in his discretion—

(i) the discussion of, or the asking of questions on any matter connected with relations between His Majesty or the Governor-General and any foreign State or Prince ; or

(ii) the discussion, except in relation to estimates of expenditure, of, or the asking of questions on, any matter connected with the tribal areas or the administration of any excluded area ; or

(iii) the discussion of, or the asking of questions on any action taken in his discretion by the Governor-General in relation to the affairs of a province ; or

(iv) the discussion of, or the asking of questions on, the personal conduct of the Ruler of any Indian State, or of a member of the ruling family thereof.

The Act also provides that no person shall be liable to any legal proceedings in respect of the publication by or under the authority of either Chamber of the Legislature of any report, paper, votes or proceedings. But this protection will not apply to a member who may get his speech published in a newspaper. It has been held in England that where a member gets inserted in a newspaper the contents of a defamatory Parliamentary speech, he can be proceeded against for libel.[1] The same principle will doubtless apply to India also.

In view of the language of Sub-section 3 of Section 28, it is clear that neither Chamber of the Federal Legislature can claim any general power of executing decisions on matters of privilege by committing members of that Legislature, or any other individuals to imprisonment for contempt of the House, similar to what the House of Commons in England possesses. In the case of *the Sheriff of Middlesex*[2] it was decided that a Parliamentary warrant of detention for contempt could not be questioned in a court on the ground of its omission to state the grounds of that detention. Of course this decision cannot apply to India. Though a general power to punish for contempt cannot be claimed, the Chambers possess a limited power to expel any person from the House who either misbehaves or infringes the standing orders of the House. Sub-section 4 of Section 28 also provides that by an Act of the Federal Legislature, refusal to give evidence or to produce documents by a person may be made punishable in a Criminal Court.

[1] *R.V. Creevy*, 1 M and S , 273

[2] (1840) 11 A and E 273, cited in Keir and Lawson : *Cases in Constitutional Law*, p. 92.

Legislative Procedure

30. (1) Subject to the special provisions of this Part of this Act with respect to financial Bills, a Bill may originate in either Chamber.

(2) Subject to the provisions of the next succeeding section, a Bill shall not be deemed to have been passed by the Chambers of the Legislature unless it has been agreed to by both Chambers, either without amendment or with such amendments only as are agreed to by both Chambers.

(3) A Bill pending in the Legislature shall not lapse by reason of the prorogation of the Chambers.

(4) A Bill pending in the Council of State which has not been passed by the Federal Assembly shall not lapse on a dissolution of the Assembly.

(5) A Bill which is pending in the Federal Assembly or which having been passed by the Federal Assembly is pending in the Council of State shall, subject to the provisions of the next succeeding section, lapse on a dissolution of the Assembly.

31. (1) If after a Bill has been passed by one Chamber and transmitted to the other Chamber- -

(*a*) the Bill is rejected by the other Chamber ; or

(*b*) the Chambers have finally disagreed as to the amendments to be made in the Bill , or

(*c*) more than six months elapse from the date of the reception of the Bill by the other Chamber without the Bill being presented to the Governor-General for his assent,

the Governor-General may, unless the Bill has lapsed by reason of a dissolution of the Assembly, notify to the Chambers, by message if they are sitting or by public notification if they are not sitting, his intention to summon them to meet in a joint sitting for the purpose of deliberating and voting on the Bill :

Provided that, if it appears to the Governor-General that the Bill relates to finance or to any matter which affects the discharge of his functions in so far as he is by or under this Act required to act in his discretion or to exercise his individual judgment, he may so notify the Chambers notwithstanding that there has been no rejection of or final disagreement as to the Bill and notwithstanding that the said period of six months has not elapsed, if he is satisfied that there is no reasonable prospect of the Bill being presented to him for his assent without undue delay.

In reckoning any such period of six months as is referred to

in this sub-section, no account shall be taken of any time during which the Legislature is prorogued or during which both Chambers are adjourned for more than four days.

(2) Where the Governor-General has notified his intention of summoning the Chambers to meet in a joint sitting, neither Chamber shall proceed further with the Bill, but the Governor-General may at any time in the next session after the expiration of six months from the date of his notification summon the Chambers to meet in a joint sitting for the purpose specified in his notification and, if he does so, the Chambers shall meet accordingly :

Provided that, if it appears to the Governor-General that the Bill is such a Bill as is mentioned in the proviso to Sub-section (1) of this section, he may summon the Chambers to meet in a joint sitting for the purpose aforesaid at any date, whether in the same session or in the next session.

(3) The functions of the Governor-General under the provisos to the two last preceding sub-sections shall be exercised by him in his discretion.

(4) If at the joint sitting of the two Chambers the Bill, with such amendments, if any, as are agreed to in joint sitting, is passed by a majority of the total number of members of both Chambers present and voting, it shall be deemed for the purposes of this Act to have been passed by both Chambers :

Provided that at a joint sitting—

(*a*) if the Bill, having been passed by one Chamber, has not been passed by the other Chamber with amendments and returned to the Chamber in which it originated, no amendment shall be proposed to the Bill other than such amendments (if any) as are made necessary by the delay in the passage of the Bill ;

(*b*) if the Bill has been so passed and returned, only such amendments as aforesaid shall be proposed to the Bill and such other amendments as are relevant to the matters with respect to which the Chambers have not agreed,

and the decision of the person presiding as to the amendments which are admissible under this sub-section shall be final.

(5) A joint sitting may be held under this section and a Bill passed thereat notwithstanding that a dissolution of the Assembly has intervened since the Governor-General notified his intention to summon the Chambers to meet therein.

32. (1) When a Bill has been passed by the Chambers, it shall be presented to the Governor-General, and the Governor-

General shall in his discretion declare either that he assents in His Majesty's name to the Bill, or that he withholds assent therefrom, or that he reserves the Bill for the signification of His Majesty's pleasure :

Provided that the Governor-General may in his discretion return the Bill to the Chambers with a message requesting that they will reconsider the Bill or any specified provisions thereof and, in particular, will consider the desirability of introducing any such amendments as he may recommend in his message, and the Chambers shall reconsider the Bill accordingly.

(2) A Bill reserved for the signification of His Majesty's pleasure shall not become an Act of the Federal Legislature unless and until, within twelve months from the day on which it was presented to the Governor-General, the Governor-General makes known by public notification that His Majesty has assented thereto.

(3) Any Act assented to by the Governor-General may be disallowed by His Majesty within twelve months from the day of the Governor-General's assent, and where any Act is so disallowed the Governor-General shall forthwith make the disallowance known by public notification, and as from the date of the notification the Act shall become void.

Procedure in Financial Matters

33. (1) The Governor-General shall in respect of every financial year cause to be laid before both Chambers of the Federal Legislature a statement of the estimated receipts and expenditure of the Federation for that year, in this Part of this Act referred to as the " annual financial statement."

(2) The estimates of expenditure embodied in the annual financial statement shall show separately—

(*a*) the sums required to meet expenditure described by this Act as expenditure charged upon the revenues of the Federation , and

(*b*) the sums required to meet other expenditure proposed to be made from the revenues of the Federation,

and shall distinguish expenditure on revenue account from other expenditure, and indicate the sums, if any, which are included solely because the Governor-General has directed their inclusion as being necessary for the due discharge of any of his special responsibilities.

(3) The following expenditure shall be expenditure charged on the revenues of the Federation .—

(*a*) the salary and allowances of the Governor-General and other expenditure relating to his office for which provision is required to be made by Order in Council ;

(*b*) debt charges for which the Federation is liable, including interest, sinking fund charges and redemption charges, and other expenditure relating to the raising of loans and the service and redemption of debt ;

(*c*) the salaries and allowances of ministers, of counsellors, of the financial adviser, of the advocate-general, of Chief Commissioners, and of the staff of the financial adviser ;

(*d*) the salaries, allowances, and pension payable to or in respect of judges of the Federal Court, and the pensions payable to or in respect of judges of any High Court ,

(*e*) expenditure for the purpose of the discharge by the Governor-General of his functions with respect to defence and ecclesiastical affairs, his functions with respect to external affairs in so far as he is by or under this Act required in the exercise thereof to act in his discretion, his functions in or in relation to tribal areas, and his functions in relation to the administration of any territory in the direction and control of which he is under this Act required to act in his discretion : provided that the sum so charged in any year in respect of expenditure on ecclesiastical affairs shall not exceed forty-two lakhs of rupees, exclusive of pension charges ;

(*f*) the sums payable to His Majesty under this Act out of the revenues of the Federation in respect of the expenses incurred in discharging the functions of the Crown in its relations with Indian States ;

(*g*) any grants for purposes connected with the administration of any areas in a Province which are for the time being excluded areas ;

(*h*) any sums required to satisfy any judgment, decree or award of any court or arbitral tribunal ;

(*i*) any other expenditure declared by this Act or any Act of the Federal Legislature to be so charged.

(4) Any question whether any proposed expenditure falls within a class of expenditure charged on the revenues of the Federation shall be decided by the Governor-General in his discretion.

This section sets out categorically the heads of expenditure which are charged on the revenues of the Federation. Under Section 34, such heads of expenditure are not to be submitted to the vote of the Legislature. It is estimated that roughly 75 per cent. of the central revenues will be spent, without the

grants being submitted to the Legislature for approval. The bulk of the expenditure so protected, will be incurred in connection with the reserved departments and in meeting Federal debt charges. The responsibility of the executive to the Legislature in respect of these classes of expenditure is therefore clearly negatived by the terms of the Act. Though the estimates of expenditure which relate to expenditure charged upon the revenues of the Federation are not to be submitted to the vote of the Legislature, Section 34, however, lays down that discussion in either Chamber of the Legislature on any of those estimates, other than estimates coming under Paragraph (*a*) or Paragraph (*b*) of Sub-section (3) of Section 33, shall not be prevented.

Estimates, other than those charged on the revenues of the Federation, are to be submitted in the form of demands for grants to the Federal Assembly and thereafter to the Council of State, and either Chamber shall have power to assent to or to refuse to assent to any demand, or assent to any demand subject to a reduction. But it is provided, that where the Assembly have refused to assent to any demand, that demand shall not be submitted to the Council of State, unless the Governor-General so directs, and, where the Assembly have assented to a demand subject to a reduction of the amount specified therein, a demand for the reduced amount only shall be submitted to the Council of State, unless the Governor-General otherwise directs, and where, in either of the said cases, such a direction is given, the demand submitted to the Council of State shall be for such amount, not being a greater amount than that originally demanded, as may be specified in the direction. If the Chambers differ with respect to any demand the Governor-General shall summon the two Chambers to meet in a joint sitting for the purpose of deliberating and voting on the demand as to which they disagree, and the decision of a majority of the members of both Chambers present and voting shall be deemed to be the decision of both Chambers. These are laid down by Section 34.

35. (1) The Governor-General shall authenticate by his signature a schedule specifying—

(*a*) grants made by the Chambers under the last preceding section ;

(*b*) the several sums required to meet the expenditure charged on the revenues of the Federation but not exceeding, in the case of any sum, the sum shown in the statement previously laid before the Legislature :

Provided that, if the Chambers have not assented to any demand for a grant or have assented subject to a reduction of the amount specified therein, the Governor-General may, if in his opinion the refusal or reduction would affect the due discharge of any of his special responsibilities, include in the schedule such additional amount, if any, not exceeding the amount of the rejected demand or the reduction, as the case may be, as appears to him necessary in order to enable him to discharge that responsibility.

(2) The schedule so authenticated shall be laid before both Chambers but shall not be open to discussion or vote therein.

(3) Subject to the provisions of the next succeeding section, no expenditure from the revenues of the Federation shall be deemed to be duly authorized unless it is specified in the schedule so authenticated.

The authentication by the Governor-General, as the White Paper of December 1931 has pointed out, is intended to secure two objects: (1) to enable the audit authorities to deal only with a single document, as authority for all appropriations of revenue, by whatever legal procedure such appropriations have been made; (2) to ensure that the Governor-General does not make any appropriations under his special powers without the Legislature being made aware of them.

36. If in respect of any financial year further expenditure from the revenues of the Federation becomes necessary over and above the expenditure theretofore authorized for that year, the Governor-General shall cause to be laid before both Chambers of the Federal Legislature a supplementary statement showing the estimated amount of that expenditure, and the provisions of the preceding sections shall have effect in relation to that statement and that expenditure as they have effect in relation to the annual financial statement and the expenditure mentioned therein.

37. (1) A Bill or amendment making provision—

(*a*) for imposing or increasing any tax; or

(*b*) for regulating the borrowing of money or the giving of any guarantee by the Federal Government, or for amending the law with respect to any financial obligations undertaken or to be undertaken by the Federal Government; or

(*c*) for declaring any expenditure to be expenditure charged on the revenues of the Federation, or for increasing the amount of any such expenditure,

shall not be introduced or moved except on the recommendation of the Governor-General, and a Bill making

such provision shall not be introduced in the Council of State.

(2) A Bill or amendment shall not be deemed to make provision for any of the purposes aforesaid by reason only that it provides for the imposition of fines or other pecuniary penalties, or for the demand or payment of fees for licences or fees for services rendered

(3) A Bill which, if enacted and brought into operation, would involve expenditure from the revenues of the Federation shall not be passed by either Chamber unless the Governor-General has recommended to that Chamber the consideration of the Bill.

Section 34 Sub-section (4), which runs as follows: "No demand for a grant shall be made except on the recommendation of the Governor-General," may, I think, with advantage, be considered along with Section 37.

It is one of the well-recognized conventions of the British Constitution that none but the Government of the day can initiate any measure for the levy of a public tax or the expenditure of public money. No private member can sponsor a taxation Bill. All financial legislation must proceed on the initiative of the Crown, i e., of the Government of the day. The same principle applies to a motion for the increase of a financial provision proposed by the Government. As Sir Erskine May says: "The Crown demands money, the Commons grant it, and the Lords assent to the grant. But the Commons do not vote money unless it be required by the Crown, nor impose or augment taxes unless taxation be necessary for the public service, as declared by the Crown through its responsible ministers" The convention above referred to, is based upon sound common sense. It is the executive, represented by the ministry of the day, that alone has both the knowledge and the responsibility, to take the initiative in regard to taxes as well as the appropriation of public moneys. If private members are permitted to propose measures involving the levy of taxation, or the spending of public moneys, there is no doubt that it would lead to a chaotic situation. This convention of the British Constitution has been incorporated in the form of statutory provisions in the Dominion Constitutions. For instance, Section 54 of the British North America Act, 1867, provides, "It shall not be lawful for the House of Commons to adopt or pass any Vote, Resolution, Address, or Bill for the appropriation of any part of the Public Revenue, or of any tax or impost, to any purpose that has not been

first recommended to that House by Message of the Governor-General in the session in which such Vote, Resolution, Address or Bill is proposed." Section 62 of the South Africa Act, 1909, and Section 56 of the Commonwealth of Australia Constitution Act, 1900, contain similar provisions. Section 37 and Section 34, Sub-section (4) of the Government of India Act, 1935, make the recommendation of the Governor-General imperative in regard to Bills which impose or increase taxation, or which appropriate moneys from the public revenues, or which deal with the regulation of borrowing and the grant of federal guarantees, or which involve the declaration of any expenditure as expenditure charged on the revenues of the Federation and in regard to all Bills the enactment of which would involve expenditure of the Federal revenues. These provisions in the Indian Act, broadly speaking, follow the principle of executive responsibility for the initiation of financial measures, adverted to above

The proceedings in the Federal Legislature are to be conducted in the English language. But rules made by each Chamber as well as rules governing joint sittings of both Chambers shall provide that persons unacquainted, or not sufficiently acquainted with the English language may use another language. Each Chamber of the Federal Legislature is empowered to make rules for regulating the procedure and conduct of its business. But the Governor-General has been invested with power, after consultation with the President or the Speaker, as the case may be, to make rules (*a*) for regulating the procedure of and the conduct of business in either Chamber in relation to any matter which affects the discharge of his functions in so far as he is by under the Act required to act in his discretion or to exercise his individual judgment, (*b*) for securing the timely completion of financial business, (*c*) for prohibiting discussion in regard to certain matters (which have already been considered in connection with the restrictions on the freedom of discussion), and (*d*) for regulating the procedure with respect to joint sittings of, and communications between the two Chambers.

CHAPTER IX

THE GOVERNORS' PROVINCES

PRIOR to the Government of India Act, 1935, Unitary British India, excluding Burma, consisted of the following nine Governors' Provinces, namely, the Presidencies of Bengal, Madras, and Bombay, and the Provinces of the Punjab, Bihar and Orissa, the United Provinces, Assam, the Central Provinces and the North-West Frontier Province. Two new Provinces, namely, Sind and Orissa, the former carved out of the Presidency of Bombay, and the latter mainly out of the Province of Bihar and Orissa, but including also small Oriya-speaking tracts separated from the territories of Madras and the Central Provinces, were added on April 1, 1936, by Orders in Council issued under Section 289 of the Government of India Act, 1935. These eleven Governors' Provinces will be autonomous Provinces under the new constitutional dispensation. It may be mentioned here, that Section 290 of the Act creates appropriate machinery, for the creation of new Provinces, as well as to increase or diminish the areas of any Province, and to recast the boundaries of any Province, if in the future, occasion should arise for such territorial readjustments.

Before examining the provisions of the Act which deal with the executive and the Legislature in the Governors' Provinces, it would, I think, be useful briefly to examine how the structure of Government which has so far existed in the Provinces will be altered as a result of the new Constitutional changes. The " provincial subjects " which were within the competence of the Provinces after the passing of the Act of 1919, were defined by the devolution rules framed under Section 45 A of the Consolidated Government of India Act. These " provincial subjects " were divided into two groups; the first group known as the " reserved subjects " was administered by the Governor with the aid of the members of the executive council who were directly appointed by His Majesty and who were in no way responsible to the elected legislature; the second group known as the " transferred subjects " was administered by the Governor with the aid of ministers drawn from the ranks of the members of the Provincial Legislature. The Act laid down that, in relation to transferred subjects, the Governor should be guided by the advice

of his ministers, unless he saw sufficient reason to dissent from such advice. This division of the sphere of provincial administration into two compartments was familiarly known as dyarchy; though the Act itself did not employ that expression. Among the reserved subjects were included important subjects like Irrigation and Law and Order. It is, I think, unnecessary to enter into any further details about the system of government which the Act of 1919 brought into being, as I have already had occasion to deal with them at considerable length in an earlier chapter. The Government of India Act, 1935, abolishes this division of governmental functions. The Governor, under the new Act, will administer the Government on behalf of His Majesty, with the aid and advice of a Council of Ministers.

These ministers, who will be members of the Provincial Legislature, will administer all the departments coming within the ambit of the provincial administration. Subjects like Law and Order and Irrigation which under the earlier regime were excluded from the administrative competence of the ministers will also come under their care. But as we shall presently see, the ministers will not be able to make their own views prevail in all matters which will be in their charge. Their advice may in fact be overridden by the Governor in the exercise of powers given to him under the new Act

Section 52 of the Act sets out certain matters which are to be the special responsibilities of the Governor, and provides that in so far as any of these special responsibilities are involved, he is competent in the discharge of his functions to exercise his individual judgment to determine the action to be taken. Put in plain language, this provision means that it is open to the Governor to disregard the advice tendered to him by his ministers and to act in the way he deems fit, if he should be of the opinion, that to accept their advice would be inconsistent with the fulfilment of any of his special responsibilities The Act arms the Governor with extensive legislative, financial and other powers, to implement the action which he desires to take in regard to his special responsibilities. He may promulgate ordinances, he may even issue legislative enactments on his own responsibility if he considers that such action is called for (Sections 89 and 90). He may direct the inclusion in the Financial Bill of sums which he may consider necessary for the proper discharge of his special responsibilities. In case any of the demands for grants as laid before the Legislative Assembly of the Province are not assented to

by it, or assented to subject to a reduction, he is empowered, if in his opinion the refusal or reduction would affect the due discharge of his special responsibilities, include in the schedule issued under his signature specifying the amounts sanctioned for the administration, such additional amount, not exceeding the amount of the rejected demand or reduction, as appears to him necessary to enable him to discharge that special responsibility (Sections 78 and 80). He may also direct that the discussion of any Bill introduced or proposed to be introduced in the Provincial Legislature be stopped on the ground that such discussion would affect the discharge of his special responsibility for the prevention of any grave menace to the peace or tranquillity of his province (Section 86 (2)). On a reference to the list of "special responsibilities" it will be manifest that they cover practically the whole field of administration, indeed, there are few important activities of Government upon which these do not impinge

It must be observed that these special responsibilities do not represent separate departments of administration. Sir Samuel Hoare, while giving evidence before the Joint Select Committee, has pointed out that special responsibilities are "not special subjects kept out from the purview of ministers and reserved for the control of the Governor." They are, he stated, rather like "signposts or labels indicating to the Governor, and incidentally to the ministers, certain purposes the fulfilment of which the Governor is directed to secure, if necessary, by refusing to be guided by his ministers' advice, whenever he considers that the advice tendered to him would be inimical to the fulfilment of any of these purposes; and if necessary again, by calling to his aid his 'special powers' properly so-called in relation to legislation and finance."[1]

The provisions referred to already, certainly derogate from the responsibility of the ministers to the legislature. In the actual application of these provisions, unless great circumspection is exercised by the Governor, constitutional deadlocks are likely to occur.

The territory known as Berar which forms part of the dominions of His Exalted Highness the Nizam of Hyderabad, has been administered by the British Government ever since 1853. In the year 1902 the lease of this territory in favour of the British Government was made perpetual. Berar now forms a part of the Central Provinces. Section 47 of the

[1] *Secretary of States' Evidence before the Joint Select Committee*, Part I, p. 76, Q. 6435.

Government of India Act, 1935, while recognizing the Sovereignty of His Exalted Highness over Berar, alludes to the fact that it is in contemplation that an agreement shall be concluded between His Majesty and His Exalted Highness, the Nizam, whereby, notwithstanding the continuance of the Sovereignty of His Exalted Highness over Berar, the Central Provinces and Berar may be governed together as one Governor's Province under the Act. Such an agreement was concluded between His Majesty and His Exalted Highness the Nizam on October 24, 1936. Sub-section (2) of Section 52 of the Act provides that the Governor of the Central Provinces and Berar shall have a special responsibility of securing that a reasonable share of the revenues of the Province are expended in or for the benefit of Berar.

The Provincial Executive

The Governor of each of the Provinces will be appointed by His Majesty by a commission under the Royal Sign Manual. He will be provided with an Instrument of Instructions, the draft of which, like the corresponding document issued to the Governor-General, has to be approved by both Houses of Parliament (Sections 48 and 53).

The Executive authority of a Province will be exercised on behalf of His Majesty by the Governor, either directly or through officers subordinate to him. Section 49 of the Act which makes these provisions, enacts that nothing contained in it shall prevent the Federal or the Provincial Legislatures from conferring functions upon subordinate authorities, or be deemed to transfer to the Governor any functions conferred by any existing Indian law on any Court, Judge, or Officer or any local or other authority. The executive authority of each province, subject to the provisions of the Act, extends to the matters with respect to which the Legislature of the Province has power to make laws.

The Governor will exercise his powers with the aid and advice of a Council of Ministers, except in so far as he is required by the Act to exercise his functions in his discretion or in his individual judgment (Section 50). The ministers are to be chosen by and summoned by the Governor, and sworn as members of the Council. A minister who for a period of six consecutive months is not a member of the Provincial Legislature shall, at the expiration of the period, cease to be a minister (Section 51). The Instrument of Instructions lays down that

in the selection of ministers, the Governor shall select those members of the legislature who will collectively command its confidence.

52. (1) In the exercise of his functions the Governor shall have the following special responsibilities, that is to say—

(*a*) the prevention of any grave menace to the peace or tranquillity of the Province or any part thereof ;

(*b*) the safeguarding of the legitimate interests of minorities ;

(*c*) the securing to, and to the dependants of, persons who are or have been members of the public services of any rights provided or preserved for them by or under this Act, and the safeguarding of their legitimate interests ;

(*d*) the securing in the sphere of executive action of the purposes which the provisions of Chapter III of Part V of this Act are designed to secure in relation to legislation ;

(*e*) the securing of the peace and good government of areas which by or under the provisions of this Part of this Act are declared to be partially excluded areas ;

(*f*) the protection of the rights of any Indian State and the rights and dignity of the Ruler thereof ; and

(*g*) the securing of the execution of orders or directions lawfully issued to him under Part VI of this Act by the Governor-General in his discretion.

(2) The Governor of the Central Provinces and Berar shall also have the special responsibility of securing that a reasonable share of the revenues of the Province is expended in or for the benefit of Berar, the Governor of any Province which includes an excluded area shall also have the special responsibility of securing that the due discharge of his functions in respect of excluded areas is not prejudiced or impeded by any course of action taken with respect to any other matter, any Governor who is discharging any functions as agent for the Governor-General shall also have the special responsibility of securing that the due discharge of those functions is not prejudiced or impeded by any course of action taken with respect to any other matter, and the Governor of Sind shall also have the special responsibility of securing the proper administration of the Lloyd Barrage and Canals Scheme.

(3) If and in so far as any special responsibility of the Governor is involved, he shall, in the exercise of his functions, exercise his individual judgment as to the action to be taken.

It may be observed, that some of the heads of special responsibility which exist in connection with the office of the Governor-General have no counterpart in the heads of special

responsibility pertaining to the office of Governor. The Governor has no special responsibility, like the Governor-General for (*a*) the safeguarding of the financial stability and credit of his Province, (*b*) the prevention of action which would subject goods of the United Kingdom or Burmese origin imported into India to discriminatory or penal treatment, (*c*) the securing of the discharge of functions with respect to the reserved departments of the Federation.

On the other hand, there are certain important subjects in the Governor's list of special responsibilities which have no counterpart in the Governor-General's list of special responsibilities. Clause (*g*) is one such important instance. The object of this clause is to enable the Governor to give effect to the orders or directions which he may receive from the Governor-General, while the latter is exercising powers which require the co-operation of the provincial administrations, though the execution of these directions or orders may not meet with the approval of the provincial ministers. The other important heads of special responsibility, special to the Governors, are (*a*) the responsibility of the Governor of the Central Provinces for seeing that a reasonable share of the revenues of the Province are spent for the benefit of Berar, (*b*) the responsibility of the Governor of Sind for securing the proper administration of the Lloyd Barrage and Canals Scheme, (*c*) the responsibility of a provincial Governor for securing that the discharge of his functions in regard to excluded areas is not prejudiced or impeded by action taken in any other matter.

As regards the other clauses of responsibility, the observations made in regard to similar responsibilities of the Governor-General will generally apply. As to the nature and scope of these special responsibilities, attention is invited to the general observations made in the introductory part of this chapter.

Section 54 provides that in so far as the Governor is, by or under the Act required to act in his discretion or to exercise his individual judgment, he shall be under the general control of, and comply with such particular directions, if any, as he may receive from the Governor-General from time to time.

57. (1) If it appears to the Governor of a Province that the peace or tranquillity of the Province is endangered by the operations of any persons committing, or conspiring, preparing or attempting to commit, crimes of violence which, in the opinion of the Governor, are intended to overthrow the

Government as by law established, the Governor may, if he thinks that the circumstances of the case require him so to do for the purpose of combating those operations, direct that his functions shall, to such extent as may be specified in the direction, be exercised by him in his discretion and, until otherwise provided by a subsequent direction of the Governor, those functions shall to that extent be exercised by him accordingly.

(2) While any such direction is in force, the Governor may authorize an official to speak in and otherwise take part in the proceedings of the Legislature, and any official so authorized may speak and take part accordingly, in the proceedings of the Chamber or Chambers of the Legislature, any joint sitting of the Chambers, and any committee of the Legislature of which he may be named a member by the Governor, but shall not be entitled to vote.

(3) The functions of the Governor under this section shall be exercised by him in his discretion

(4) Nothing in this section affects the special responsibility of the Governor for the prevention of any grave menace to the peace or tranquillity of the Province or any part thereof

This provision was enacted, at the express suggestion of the Joint Select Committee, in order that the Governor may be armed with powers, " which will ensure that the measures taken to deal with terrorism and other activities of revolutionary conspirators, are not less efficient and unhesitating than they have been in the past." Under the powers granted to the Governor, he will be able to assume charge, to such extent as he may judge requisite, of any branch of the government which he thinks it necessary to employ for combating terrorism.

Section 58 provides that the Governors in their discretion shall make rules for securing that no records or information relating to the sources from which information regarding terrorist operations have been or may be obtained shall be disclosed to anyone, other than such persons of the provincial police as the Inspector-Generals or the Commissioners of Police may direct, or such other public officers as the Governors themselves may direct.

55. (1) The Governor of each Province shall appoint a person, being a person qualified to be appointed a judge of a High Court, to be Advocate-General for the Province.

(2) It shall be the duty of the Advocate-General to give advice to the Provincial Government upon such legal matters,

and to perform such other duties of a legal character, as may from time to time be referred or assigned to him by the Governor.

(3) The Advocate-General shall hold office during the pleasure of the Governor, and shall receive such remuneration as the Governor may determine.

(4) In exercising his powers with respect to the appointment and dismissal of the Advocate-General and with respect to the determination of his remuneration, the Governor shall exercise his individual judgment.

Provincial Legislatures

60. (1) There shall for every Province be a Provincial Legislature which shall consist of His Majesty, represented by the Governor, and—

(*a*) in the Provinces of Madras, Bombay, Bengal, the United Provinces, Bihar and Assam, two Chambers ;

(*b*) in other Provinces, one Chamber.

(2) Where there are two Chambers of a Provincial Legislature, they shall be known respectively as the Legislative Council and the Legislative Assembly, and where there is only one Chamber, the Chamber shall be known as the Legislative Assembly.

The allocation of seats in the Provincial Legislative Assemblies proceeds mainly on communal lines ; though, representation will also be provided for certain specified interests. Mohammedans, Sikhs, Indian Christians, Anglo-Indians and Europeans, will return members to the Provincial Legislative Assemblies, by voting in separate communal territorial constituencies.

As the efforts of the various communities to reach a settlement regarding the composition of the Provincial Legislatures did not prove successful, His Majesty's Government made an award on August 4, 1932, regarding the distribution of seats. The distribution of seats under the Act is mainly based on the communal award above referred to ; though certain modifications were made as a result of the decision to establish the new Province of Orissa and also as a consequence of the acceptance of the Poona Pact under which seats were reserved for the Scheduled castes (i.e. the communities formerly known as Depressed Classes), in the general seats. Under the communal award the Depressed Classes were entitled to return a specified number of representatives, in each of the Provinces, voting in

territorial electorates consisting of members of that community. This arrangement was subjected to criticism as segregating a portion of the Hindu community and thus creating an artificial barrier between two sections of it. The representatives of the Depressed Classes and the caste Hindus arrived at a new solution of the problem of separate representation for the members of the Depressed Classes. And this arrangement having been accepted by His Majesty's Government, the communal award was modified in accordance with it.

The main features of this arrangement may be summarized here. The Depressed Classes in each of the Provinces will have a number of seats reserved for them out of the general seats. As important communities like Mohammedans, Sikhs, Indian Christians, and Europeans are given separate representation, the Hindus will form the bulk of the general electorates. The members of the Depressed Classes, whose names are registered on the general electoral roll in a constituency, will first take part in a primary election held for the purpose of electing four candidates for each seat reserved for them in that constituency. Only those persons who are elected in the primary election can hold a seat so reserved in that constituency The candidate, who will finally be elected to a reserved seat, will have to be elected from the general electorate, consisting of both the caste Hindus as well as Depressed Classes.

In addition to the communal seats, there will be representation provided for certain specified interests like commerce, industry, mining and planting, landholders, labour, women, universities and backward tribes.

The composition of the several Legislative Councils mainly follows the lines adopted for the Legislative Assembly. The Councils will, however, be much smaller bodies ; and power is given to the Governor to fill up a certain number of seats by nomination in order to redress any possible inequality or to enable women to have representation on them.

It is prescribed that the Legislative Assembly of every Province unless sooner dissolved, shall continue for five years from the date appointed for their first meeting and no longer. Every Legislative Council is to be a permanent body not liable to dissolution ; and as near as may be one-third of the members thereof shall retire in every third year. A person cannot be a member of both the Federal Legislature and a Provincial Legislature. It is provided under Section 68 (2)

that if a person is chosen a member both of the Federal and of a Provincial Legislature, then, at the expiration of such period as may be prescribed in rules made by the Governor of the Province, in his individual judgment, that person's seat in the Provincial Legislature shall become vacant unless he has previously resigned his seat in the Federal Legislature.

With respect to other matters like the privileges of members, the election of the Speaker and the President, the disqualifications for membership, procedure in regard to legislative matters, and the regulation of procedure in the Provincial Legislature, the provisions relating to the Provinces are almost identical with those relating to the Federation. It would, therefore, be an unnecessary repetition, to traverse the ground already covered in the case of the Federation.

Under Section 75 a Bill which has been passed by the Provincial Legislative Assembly or, in the case of a Province having a Legislative Council, has been passed by both the Chambers, shall be presented to the Governor, and the Governor in his discretion, shall declare that (1) he either assents to the Bill, or (2) that he withholds his assent therefrom, or (3) that he reserves the Bill for the consideration of the Governor-General. Under Section 76, when a Bill is reserved by a Governor for the consideration of the Governor-General, the Governor-General may declare that he either assents in His Majesty's name to that Bill, or that he withholds assent therefrom, or that he reserves the Bill for the signification of His Majesty's pleasure. A Bill reserved for the signification of His Majesty's pleasure shall not become an Act unless and until, within twelve months from the day on which it was presented to the Governor, the Governor makes known by public notification that His Majesty has assented thereto. Under Section 77, an Act assented to by the Governor or the Governor-General may be disallowed by His Majesty, within twelve months from the date of assent, and where the Act is so disallowed, the Governor shall forthwith make the disallowance known by public notification, and as from the date of the notification the Act shall become void.

Procedure in Financial matters

78. (1) The Governor shall in respect of every financial year cause to be laid before the Chamber or Chambers of the Legislature a statement of the estimated receipts and expenditure of the Province for that year, in this Part of

this Act referred to as the "annual financial statement."

(2) The estimates of expenditure embodied in the annual financial statement shall show separately—

(*a*) the sums required to meet expenditure described by this Act as expenditure charged upon the revenues of the Province; and

(*b*) the sums required to meet other expenditure proposed to be made from the revenues of the Province,

and shall distinguish expenditure on revenue account from other expenditure and indicate the sums, if any, which are included solely because the Governor has directed their inclusion as being necessary for the due discharge of any of his special responsibilities.

(3) The following expenditure shall be expenditure charged on the revenues of each Province—

(*a*) the salary and allowances of the Governor and other expenditure relating to his office for which provision is required to be made by Order in Council;

(*b*) debt charges for which the Province is liable, including interest, sinking fund charges and redemption charges, and other expenditure relating to the raising of loans and the service and redemption of debt,

(*c*) the salaries and allowances of ministers, and of the Advocate-General,

(*d*) expenditure in respect of the salaries and allowances of judges of any High Court;

(*e*) expenditure connected with the administration of any areas which are for the time being excluded areas;

(*f*) any sums required to satisfy any judgment, decree or award of any court or arbitral tribunal;

(*g*) any other expenditure declared by this Act or any Act of the Provincial Legislature to be so charged.

(4) Any question whether any proposed expenditure falls within a class of expenditure charged on the revenues of the Province shall be decided by the Governor in his discretion.

79. (1) So much of the estimates of expenditure as relates to expenditure charged upon the revenues of a Province shall not be submitted to the vote of the Legislative Assembly, but nothing in this sub-section shall be construed as preventing the discussion in the Legislature of those estimates, other than estimates relating to expenditure referred to in Paragraph (*a*) of Sub-section (3) of the last preceding section.

(2) So much of the said estimates as relates to other expenditure shall be submitted, in the form of demands for grants, to

the Legislative Assembly, and the Legislative Assembly shall have power to assent, or to refuse to assent, to any demand, or to assent to a demand subject to a reduction of the amount specified therein.

(3) No demand for a grant shall be made except on the recommendation of the Governor.

80. (1) The Governor shall authenticate by his signature a schedule specifying—

(*a*) the grants made by the Assembly under the last preceding section ;

(*b*) the several sums required to meet the expenditure charged on the revenues of the Province but not exceeding, in the case of any sum, the sum shown in the statement previously laid before the Chamber or Chambers :

Provided that, if the Assembly have refused to assent to any demand for a grant or have assented to such a demand subject to a reduction of the amount specified therein, the Governor may, if in his opinion the refusal or reduction would affect the due discharge of any of his special responsibilities, include in the schedule such additional amount, if any, not exceeding the amount of the rejected demand or the reduction, as the case may be, as appears to him necessary in order to enable him to discharge that responsibility.

(2) The schedule so authenticated shall be laid before the Assembly but shall not be open to discussion or vote in the Legislature.

(3) Subject to the provisions of the next succeeding section, no expenditure from the revenues of the Province shall be deemed to be duly authorized unless it is specified in the schedule so authenticated

81. If in respect of any financial year further expenditure from the revenues of the Province becomes necessary over and above the expenditure theretofore authorized for that year, the Governor shall cause to be laid before the Chamber or Chambers a supplementary statement showing the estimated amount of that expenditure, and the provisions of the preceding sections shall have effect in relation to that statement and that expenditure as they have effect in relation to the annual financial statement and the expenditure mentioned therein.

82. (1) A Bill or amendment making provision—

(*a*) for imposing or increasing any tax ; or

(*b*) for regulating the borrowing of money or the giving of any guarantee by the Province, or for amending the law with

respect to any financial obligations undertaken or to be undertaken by the Province ; or

(*c*) for declaring any expenditure to be expenditure charged on the revenues of the Province, or for increasing the amount of any such expenditure,

shall not be introduced or moved except on the recommendation of the Governor, and a Bill making such provision shall not be introduced in a Legislative Council.

(2) A Bill or amendment shall not be deemed to make provision for any of the purposes aforesaid by reason only that it provides for the imposition of fines or other pecuniary penalties, or for the demand and payment of fees for licences or fees for services rendered.

(3) A Bill which, if enacted and brought into operation, would involve expenditure from the revenues of a Province shall not be passed by a Chamber of the Legislature unless the Governor has recommended to that Chamber the consideration of the Bill.

Sections 78 to 82 follow mainly upon the lines of similar provisions relating to the Federal Legislature. The comments made in regard to the provisions of the Federal Legislature would generally be applicable to the corresponding provisions of the Legislature in the Governor's Province. But, of course, there are certain variations, which are necessitated by the fact that conditions in the Provinces are somewhat different from those at the centre. For instance, in the very nature of things, in the Province no provision is made for expenditure in connection with the reserved departments, or the functions of the Crown in relation to the Indian States, as both these functions appertain to the centre. If we examine the provisions which lay down the procedure to be followed in financial matters, with reference to the Federal Legislature, in juxtaposition with the corresponding provisions concerning the Provincial Legislatures, it would seem that the annual estimates of expenditure will be submitted in the form of demands for grants only to the Provincial Assemblies and not to the Legislative Councils in Provinces, where provision is made for bicameral legislatures, while both the Federal Assembly and the Council of State will take part in the voting on the demands for grants. Section 34, Sub-section (2) provides as follows : " So much of the said estimates as relates to other expenditure shall be submitted in the form of demands for grants to the Federal Assembly and thereafter to the Council of State, and either Chamber shall have power to

assent or to refuse to assent to any demand, or to assent to a demand subject to a reduction of the amount specified therein." Section 79, Sub-section (2), on the other hand, provides: "So much of the said estimates as relates to other expenditure shall be submitted, in the form of demands for grants, to the Legislative Assembly, and the Legislative Assembly shall have the power to assent, or to refuse to assent to any demand, or to assent to a demand subject to a reduction of the amount specified therein." Moreover Section 80 (1) (*a*) speaks of the Governor authenticating by his signature a schedule specifying the grants made by the Assembly under Section 79, as also sums charged on the revenues of the Province, and other sums which either represent sums refused to be voted or reduced in any demand submitted to the Assembly. It will be noticed that there is no reference at all in Sections 79 and 80 to the Legislative Council. The inference from these circumstances appears to be that the demands for grants will have to be submitted only to the Legislative Assemblies and not to the Legislative Councils.

Even in the case of the Federal Legislature, so far as demands for grants are concerned, the Council of State does not stand on the same footing as the Federal Assembly, because the proviso to Sub-section (2) of Section 34 provides that, where the Assembly have refused to assent to a demand, that demand shall not be submitted to the Council of State, unless the Governor-General so directs, and where the Assembly have assented to a demand subject to a reduction of the amount specified therein, a demand for the reduced amount only shall be submitted to the Council of State, unless the Governor-General otherwise directs.

Section 83 of the Act is intended to secure the continuance of the grants-in-aid hitherto made by the Government for the education of the Anglo-Indian and European communities.

83 (1) If in the last complete financial year before the commencement of this Part of this Act a grant for the benefit of the Anglo-Indian and European communities or either of them was included in the grants made in any Province for education, then in each subsequent financial year, not being a year in which the Provincial Legislative Assembly otherwise resolve by a majority which includes at least three-fourths of the members of the Assembly, a grant shall be made for the benefit of the said community or communities not less in amount than the average of the grants made for its

or their benefit in the ten financial years ending on the thirty-first day of March, nineteen hundred and thirty-three :

Provided that, if in any financial year the total grant for education in the Province is less than the average of the total grants for education in the Province in the said ten financial years, then, whatever fraction the former may be of the latter, any grant made under this sub-section in that financial year for the benefit of the said community or communities, need not exceed that fraction of the average of the grants made for its or their benefit in the said ten financial years.

In computing for the purposes of this sub-section the amount of any grants, grants for capital purposes shall be included.

(2) The provisions of this section shall cease to have effect in a Province if at any time the Provincial Legislative Assembly resolve by a majority which includes at least three-fourths of the members of the Assembly that those provisions shall cease to have effect.

(3) Nothing in this section affects the special responsibility of the Governor of a Province for the safeguarding of the legitimate interests of minorities.

CHAPTER X

EXCLUDED AND PARTIALLY EXCLUDED AREAS

CERTAIN specified areas, in some of the Provinces, will be, either fully or partially, excluded from the operation of the normal Provincial administrative machinery. The totally excluded areas, according to the Government of India (Excluded and Partially Excluded Areas) Order, 1936, promulgated under Section 91, Sub-section (1) of the Government of India Act, 1935, are (1) the Laccadive Islands (including Minicoy) and the Amindivi Islands in Madras ; (2) the Chittagong Hill tracts in Bengal ; (3) Spiti and Lahaul in the Kangra District in the Punjab , (4) the North-East Frontier (Sadiya, Balipara and Lakhimpur) Tracts, the Naga Hills District, the Lushai Hills District, the North Cachar Hills sub-division of the Cachar District, in Assam ; and (5) the Upper Tanawal in the Hazara District in the North-West Frontier Province. The partially excluded areas form a formidable list and are distributed over eight of the eleven Provinces. The only three Provinces in which partially excluded areas are not to be found are Sind, the Punjab, and the North-West Frontier Province. I do not propose to give here a list of these partially excluded areas , and those who wish to know what areas are to be treated as partially excluded areas, may consult Part II of the Schedule to the Order in Council, already mentioned The principle underlying the exclusion of these areas from the ordinary channels of administration is, that the inhabitants of these tracts are either too primitive or backward to make use of them to their advantage. It must be pointed out, that although the original list of these areas was confined within reasonable limits, the areas, now actually excluded, either fully or partially, under the Order in Council, have become more numerous than what they were under the original proposal.

Though the executive authority of the Province will extend to the excluded and to the partially excluded areas, there will be a fundamental difference in the method by which that executive authority will be exercised in relation to these two types of areas. So far as the fully excluded areas are concerned, under Sub-section (3) of Section 92, the Governor will

exercise his functions in his discretion, that is to say, the Governor will be the sole authority to determine the nature and extent of the executive functions which are to be exercised in regard to them. But, with respect to the partially excluded areas, the executive functions in relation to them will be exercised by the ministers, subject to the special responsibility of the Governor under Section 52 (1) (*e*) for securing the peace and good government of those tracts.

In the matter of legislation, however, these two areas will be placed upon the same footing. The Governor is given the power to control the application of legislation, whether of the Federal or Provincial Legislature. He is competent to make such exceptions and modifications in those legislative enactments as he deems necessary, when he determines how far they should be brought into operation in the whole, or any specified part, of those areas. He is also empowered to make regulations for the peace and good government of any area which is for the time being included in an excluded or partially excluded area. These provisions are contained in Section 92, Sub-sections (1) and (2) of the Act

91. (1) In this Act the expressions " excluded area " and " partially excluded area " mean respectively such areas as His Majesty may by Order in Council declare to be excluded areas or partially excluded areas.

The Secretary of State shall lay the draft of the Order which it is proposed to recommend His Majesty to make under this Sub-section before Parliament within six months from the passing of this Act.

(2) His Majesty may at any time by order in Council—

(*a*) direct that the whole or any specified part of an excluded area shall become, or become a part of, a partially excluded area ;

(*b*) direct that the whole or any specified part of a partially excluded area shall cease to be a partially excluded area or a part of such an area ;

(*c*) alter, but only by way of rectification of boundaries, any excluded or partially excluded area ;

(*d*) on any alteration of the boundaries of a Province, or the creation of a new Province, declare any territory not previously included in any Province to be, or to form part of, an excluded area or a partially excluded area,

and any such Order may contain such incidental and consequential provisions as appear to His Majesty to be necessary and proper, but save as aforesaid the Order in Council made

under Sub-section (1) of this section shall not be varied by any subsequent Order.

92. (1) The executive authority of a Province extends to excluded and partially excluded areas therein, but notwithstanding anything in this Act, no Act of the Federal Legislature or of the Provincial Legislature, shall apply to an excluded area or a partially excluded area, unless the Governor by public notification so directs, and the Governor in giving such a direction with respect to any Act may direct that the Act shall in its application to the area, or to any specified part thereof, have effect subject to such exceptions or modifications as he thinks fit.

(2) The Governor may make regulations for the peace and good government of any area in a Province which is for the time being an excluded area, or a partially excluded area, and any regulations so made may repeal or amend any Act of the Federal Legislature or of the Provincial Legislature, or any existing Indian law, which is for the time being applicable to the area in question.

Regulations made under this sub-section shall be submitted forthwith to the Governor-General and until assented to by him in his discretion shall have no effect, and the provisions of this Part of this Act with respect to the power of His Majesty to disallow Acts shall apply in relation to any such regulations assented to by the Governor-General as they apply in relation to Acts of a Provincial Legislature assented to by him.

(3) The Governor shall, as respects any area in a Province which is for the time being an excluded area, exercise his functions in his discretion.

CHAPTER XI

THE CHIEF COMMISSIONERS' PROVINCES

THE following will be the Chief Commissioners' Provinces—

1. British Baluchistan,
2. Delhi,
3. Ajmer-Merwara,
4. Coorg,
5. The Andaman and Nicobar Islands,
6. The area known as Panth Piploda, and
7. Such other Chief Commissioners' Provinces as may be created under the Act.

A Chief Commissioner's Province will be administered by the Governor-General acting, to such extent as he thinks fit, through a Chief Commissioner, who is to be appointed by him, in his discretion. The Federal Legislature will have power to enact laws for a Chief Commissioner's Province with respect to matters enumerated in the Provincial Legislative List under Sub-section (4) of Section 100 of the Act

British Baluchistan

The Executive Authority of the Federation extends to British Baluchistan, as it extends to other Chief Commissioners' Provinces. But, no Act of the Federal Legislature will apply to British Baluchistan unless the Governor-General in his discretion by public notification so directs, and the Governor-General, in giving such a direction with respect to any Act, may direct that the Act shall, in its application to the Province or to any specified part thereof, have effect subject to such exceptions or modifications as he thinks fit. The Governor-General is also empowered, in his discretion, to make Regulations for the peace and good government of British Baluchistan, and any Regulations so made may repeal or amend any Act of the Federal Legislature or any existing Indian law which is for the time being applicable to the Province and, when promulgated by the Governor-General, shall have the same force and effect as an Act of the Federal Legislature which applies to the Province. The provisions of Part II of the Act relating to the powers of His Majesty to disallow Acts, shall apply in relation to any such Regulations

as they apply in relation to Acts of the Federal Legislature assented to by the Governor-General. The above provisions relating to British Baluchistan are contained in Section 95 of the Act.

The provisions regarding the making of Regulations by the Governor-General in relation to Baluchistan will apply with equal force to the Andaman and Nicobar Islands also.

Section 97 provides that until other provision is made by His Majesty in Council, the constitution, powers and functions of the Coorg Legislative Council, and the arrangements with respect to revenues collected in Coorg and expenses in respect of Coorg, shall continue unchanged.

The provisions of Part III of the Act with respect to police rules, crimes of violence intended to overthrow the Government, as also provisions relating to the non-disclosure of certain records and information, will apply to the Chief Commissioners' Provinces in the same way as they would in relation to the Governors' Provinces, with the substitution for references to the Governor and the Chamber or Chambers of the Provincial Legislature, of reference to the Governor-General and the Chambers of the Federal Legislature.

CHAPTER XII

LEGISLATIVE POWERS

I

WE might well commence this chapter on legislative powers with a discussion of the fundamental principles underlying the field of legislative action, namely, (1) the supremacy of the Federal and Provincial Legislatures within their respective limits, (2) the extra-territorial powers of the Federal Legislature, and (3) the incidental powers of the Federal and Provincial Legislatures. A discussion of these principles is essential for a proper understanding of the full compass of legislative competency of the machinery set up by the Government of India Act, 1935.

II. *The Supremacy of the Federal and Provincial Legislatures within their respective fields*

A long catena of authorities has established the principle that within its own limits a Colonial Legislature is supreme, and is not in any sense an agent or delegate of the Imperial Parliament. The maxim "*delegatus non potest delegare*" has no application to a Colonial Legislature. This principle is fully applicable to both the Federal as well as the Provincial Legislatures under the new Act.

The distinction between plenary and delegated powers was considered with reference to the Indian Legislature by the Privy Council in the case of *Queen* v *Burah*.[1] The Indian Legislature passed an Act (XXII of 1869) removing the Garo Hills out of the jurisdiction of the ordinary civil and criminal courts, and the law applicable thereto, and vesting the administration of civil and criminal justice in those territories in officers to be appointed by the Lieutenant-Governor of Bengal. The ninth section of the Act gave the power to the Lieutenant Governor of Bengal to extend, by means of a notification published in the *Calcutta Gazette*, all or any of the provisions of the Act, to certain adjacent hill districts. The legality of this provision was attacked in this case; but the Privy Council upheld the validity of it on the ground that the Indian Legis-

[1] (1878) 3 App Cas. 889.

lature had powers expressly limited by the Act of Parliament, and that when acting within those limits it had plenary powers as large and of the same nature as those of Parliament itself. The Privy Council observed that the provision in question was in the nature of conditional legislation and that where plenary powers of legislation exist as to particular subjects, whether in an Imperial or a Provincial Legislature, they may be exercised either conditionally or absolutely, and that in the latter case such legislature may delegate to some person or authority in whom it has confidence a limited discretion of determining the time and manner of carrying its legislation into effect and the area over which it is to operate. Lord Selborne, in delivering the judgment of their Lordships of the Privy Council, made the following observations :

" The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe these powers. But, when acting within those limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation, as large and of the same nature, as those of Parliament itself. The established Courts of Justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question ; and the only way in which they can properly do so, is by looking to the terms of the instrument, by which, affirmatively the legislative powers were created, and by which, negatively they are restricted. If what has been done is legislation, within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited (in which category would, of course, be included any Act of the Imperial Parliament at variance with it), it is not for any Court of Justice to inquire further, or to enlarge constructively those conditions and restrictions." . . .

" Where plenary powers of legislation exist as to particular subjects, whether in an Imperial or in a Provincial Legislature they may (in their Lordships' Judgment) 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 Statute 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 from time to time conferred."

In the case of *Hodge* v. *The Queen*[1] the point that arose for consideration was whether the Legislature of Ontario had the power of entrusting to a local authority, constituted of a Board of Commissioners, the power of enacting regulations for taverns under the Liquor License Act, 1877, of creating offences for the breach of those regulations, and annexing penalties thereto. The appellant, who had been convicted for breach of one of the regulations so framed, contended that the delegation of powers to the Board of Commissioners by the Ontario Legislature was not authorized by the British North America Act, 1867, and that a legislature which so delegated its powers to some other authority effaced itself, and that therefore his conviction was illegal. Sir Barnes Peacock, delivering the judgment of their Lordships of the Privy Council, rejected this contention, holding "that the powers intended to be conferred by the Act in question, when properly understood, are to make regulations in the nature of police or municipal regulations of a merely local character for the good government of taverns, etc., licensed for the sale of liquors by retail, and such as are calculated to preserve, in the municipality, peace and public decency, and repress drunkenness and disorderly and riotous conduct" He has referred to the legislative powers of the Provincial Legislatures under the British North American Act, page 132, in the following terms :

"They are in no sense delegates of or acting under any mandate from the Imperial Parliament. When the British North America Act enacted that there should be a legislature for Ontario, and that its Legislative Assembly should have exclusive authority to make laws for the Province and for provincial purposes in relation to the matters enumerated in Section 92, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by Section 92 as the Imperial Parliament, in the plenitude of its powers, possessed and could bestow. Within these limits of subjects and area the local legislature is supreme, and has the same authority as the Imperial Parliament, or the Parliament of the Dominion, would have had under like

[1] (1883) 9 App Cas. 117.

circumstances to confide to a municipal institution or body of its own creation authority to make bye-laws or resolutions as to subjects specified in the enactment, and with the object of carrying the enactment into operation and effect. It is obvious that such an authority is ancillary to legislation, and without it an attempt to provide for varying details and machinery to carry them out might become oppressive, or absolutely fail. The very full and very elaborate judgment of the Court of Appeal contains abundance of precedents for this legislation, entrusting a limited discretionary authority to others, and has many illustrations of its necessity and convenience. It was argued at the Bar that a legislature committing important regulations to agents or delegates effaces itself. That is not so. It retains its powers intact, and can, whenever it pleases, destroy the agency it has created, and set up another, or take the matter directly into its own hands. How far it shall seek the aid of subordinate agencies, and how long it shall continue them, are matters for each legislature, and not for courts of law, to decide."

These observations made with reference to a provincial legislature like the Ontario legislature under the British North America Act, are fully applicable to a provincial legislature under the Government of India Act, 1935. Applying these principles to the Legislature in a Governor's Province under the new Act, and leaving aside for the moment its powers in regard to subjects in the concurrent list, we might say, that such legislature, in relation to matters enumerated in the provincial legislative list (List II of the Seventh Schedule), exercises its powers not as an agent or delegate of the Imperial Parliament, but as an authority which has the same powers in relation to them as the Imperial Parliament could in the plentitude of its powers possessed and could bestow.

In *Powell* v. *Apollo Candle Co., Ltd.*[1] the question that arose for consideration was, whether the power vested in the Governor by Section 133 of the New South Wales Customs Regulation Act, 1879, to direct by an Order in Council, that a duty be levied on such articles as were substitutes for any known dutiable article, was a power which could be properly delegated by a Colonial Legislature. It was contended in this case, that such a delegation amounted to a delegation of authority to raise taxes, and this was beyond the competence of the Legislature of New South Wales. The Privy Council rejected the contention applying the principles enunciated in

[1] (1885) 10 App Cas 282.

the two cases already referred to, viz., *The Queen* v. *Burah* and *Hodge* v. *The Queen*, that a Colonial Legislature has plenary powers and could in particular cases delegate the power of fixing the incidence of taxation to some other authority.

The case of *The Liquidators of the Maritime Bank of Canada* v. *The Receiver-General of New Brunswick*[1] arose under the British North America Act, 1867. The Maritime Bank of Canada, which was carrying on its business in the City of St. John, in the Province of New Brunswick, went into liquidation, being unable to pay its debts. At that time, the Provincial Government happened to be a simple contract creditor of the bank for the sum of $35,000 being public moneys of the Province deposited in the name of the Receiver-General of the Province. This authority, representing the Provincial Government, claimed the right to be paid in full in preference to the other creditors, on the ground that it was a debt due to the Crown, to which the prerogative attached The liquidators of the Bank, in the interests of its unsecured creditors, contested this position on the ground that the effect of the British North America Act was to make the Government of the Dominion the only Government of Her Majesty in North America, and that the Provinces had been reduced to the rank of independent municipal institutions. The Privy Council refused to countenance this contention and upheld the claim of the Provincial Government to preferential payment, on the ground that the Provincial Governments were not subordinate to the Dominion Government, and that their status *vis-à-vis* the Dominion Government was in no way analogous to that of municipal institutions created by a central government. Lord Watson has observed, pages 441–443, as follows, in this case :

" The object of the Act was neither to weld the provinces into one, nor to subordinate provincial governments to a central authority, but to create a federal government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each province retaining its independence and autonomy. That object was accomplished by distributing, between the Dominion and the provinces, all powers executive and legislative, and all public property and revenues which had previously belonged to the provinces, so that the Dominion Government should be vested with such of these powers, property, and revenues as were necessary for the due

[1] (1892) A C. 437.

performance of its constitutional functions, and that the remainder should be retained by the Provinces for the purposes of provincial government. But, in so far as regards those matters which, by Section 92, are specially reserved for provincial legislation, the legislation of each province continues to be free from the control of the Dominion, and as supreme as it was before the passing of the Act. . . . It is clear, therefore, that the provincial legislature of New Brunswick does not occupy the subordinate position which was ascribed to it in the argument of the appellants. It derives no authority from the Government of Canada, and its status is no way analogous to that of a municipal institution, which is an authority constituted for purposes of local administration. It possesses powers, not of administration merely, but of legislation, in the strictest sense of that word ; and within the limits assigned by Section 92 of the Act of 1867, these powers are exclusive and supreme. It would require very express language, such as is not to be found in the Act of 1867, to warrant the inference that the Imperial Legislature meant to vest in the provinces of Canada the right of exercising supreme legislative powers in which the British Sovereign was to have no share."

The Government of India Act, 1935, as in the case of the British North America Act, 1867, distributes as between the Federation and the Provinces, all powers legislative and executive, as well as all public property and revenues, so that the Federation should be vested with such of these powers, property and revenues as are necessary for the due performance of its constitutional functions, while the Provinces are similarly given the powers, property and revenues necessary for the fulfilment of functions which are assigned to them. The Provincial Legislatures, while exercising their legislative functions in relation to matters which are within their competence, are in no sense delegates either of the British or of the Federal Legislature ; and their enactments are legislation in the strictest sense of the word.

The principles enunciated in these decisions, so far as they are applicable to the position and powers of the Federal and Provincial Legislatures under the Government of India Act, 1935, may be summarized as follows: (1) Both the Federal as well as the Provincial Legislatures are in no sense delegates of the Imperial Parliament ; and while exercising the powers which are within their respective competence, subject, of course, to any restrictions which the Act itself has

imposed, they have as ample and extensive an authority as the Imperial Parliament itself has. They can even entrust to bodies of their own creation, such powers as to the making of bye-laws and regulations as pertain to matters which come within the ambit of their respective legislative powers (2) Leaving aside for the moment the powers of the Federal and Provincial Legislatures in regard to matters comprised in the concurrent legislative list (this question will be dealt with later), the Federal Legislature in regard to matters coming within the purview of the federal list of subjects is supreme, while the Provincial Legislatures in relation to the subjects enumerated in the provincial legislative list are in precisely the same position. (3) The Provincial Legislatures, while exercising the powers in their competence, are in no sense delegates of the Federal Legislature and laws enacted by them are not bye-laws, but partake of the character of legislation in the strictest sense of the word.

III. *Extra-territorial Powers of the Federal Legislature*

Under Section 99 of the Government of India Act, 1935, the Federal Legislature has authority to make laws for the whole or any part of British India or for any Federated State. It is one of the recognized limitations on the authority of a colonial legislature to enact laws that, except where otherwise provided by an Act of the Imperial Parliament, it shall have no power to pass legislation so as to operate beyond the limits of the colony itself. The same principle of limitation would presumably apply to the Indian Federal Legislature which derives its powers from the Imperial Parliament. Sub-section (2) of Section 99 lays down that no Federal law shall, on the ground that it would have extra-territorial operation, be deemed to be invalid in so far it applies to the persons and matters specified therein. A detailed examination of this provision will be made later.

We may, at the outset, consider how far the territorial jurisdiction of a country extends seaward. It is a generally accepted principle of the law of nations that the territories of a State include, not only the compass of land ordinarily understood as belonging to such State, but also the portion of the sea lying along and washing its coast, up to a distance of three miles of the shore. This three-mile belt of sea, which is called the territorial waters of a country, is regarded as appendant to the mainland and within the bounds of that country.

In the case of *Lord Advocate* v. *Clyde Navigation Trustees*[1] which was a Scottish case, it was laid down that the Crown's right over the three-mile strip was proprietary and that it was not merely that of a protectorate for certain limited purposes like navigation and fishing. Lord Kyllachy in that case in considering the nature of the Crown's right in what is acknowledged to be part of the territory of the kingdom, viz., the strip or area of sea within cannon-shot or three miles of the shore, observed as follows. "Is the Crown's right in that strip of sea proprietary, like the Crown's right in the foreshore and in the land? or, is it only a protectorate for certain purposes, and particularly navigation and fishing? I am of opinion that the former is the correct view, and that there is no distinction in legal character between the Crown's right in the foreshore, in tidal and navigable rivers, and in the bed of the sea within three miles of the shore In each case it is of course a right largely qualified by public uses. In each case it is, therefore, to a large extent *extra commercium*, but none the less it is in my opinion, a proprietary right—a right which may be the subject of trespass, and which may be vindicated like other rights of property." The point that arose in that case was whether the Clyde Navigation Trustees could dispose of dredgings taken from the river Clyde by depositing them in the bed of Loch Long, a sea-water loch The Crown resisted the claim of the trustees to dispose of the dredgings in the manner aforesaid, on the ground that it was the proprietor of the bed of the loch and the bed of the sea for a distance of three miles from the coast. The Crown's contention was upheld.

In *Lord Advocate* v. *Wemyss*[2] the action was with reference to the ownership of minerals in the bed of the sea and below sea-water mark. Lord Watson dealt with this question as follows: "I see no reason to doubt that, by the law of Scotland, the solum underneath the waters of the ocean, whether within the narrow seas or from the coast outward to the three-mile limit, and also the minerals beneath it, are vested in the Crown."

The observations in the two cases above mentioned were cited with approval by Lord Shaw in delivering the judgment of their Lordships of the Privy Council in an appeal from a decision of the Madras High Court. That case was the *Secretary of State for India* v. *Chellikani Rama Rao*.[3] The dispute related to the ownership of two islands which had

[1] (1891) 19 Rettie, 174. [2] (1900) A.C. 48.
[3] 39 Mad. 617.

been formed in the bed of the sea near the mouth or delta of the river Godavari. These islands, which were situated within three miles of the mainland, were claimed by the respondents certain Zamindars, on the ground that they and their predecessors had been in possession from time immemorial. The questions that arose for consideration were whether the islands should be treated as Crown property as they were within three miles of the coast and if so whether the respondents had established adverse possession against the Crown for sixty years as required by Statute. The Privy Council held that these islands must be considered as the property of the Crown as they had been formed within the three-mile limit and that adverse possession had not been established. In this case a suggestion was made that the territory of the Crown ceases at low-water mark Lord Shaw observed as follows: " It should be added, with reference to the suggestion that the territory of the Crown ceases at low-water mark, and that the right over what extends seawards beyond that is merely of the nature of jurisdiction or the like, that there are manifest difficulties in seeing what are the grounds for this in principle There is nothing to recommend a local jurisdiction over a space of water lying above a *res nullius* As to practical results: the confusion that might be produced by having islands, emergent within the three-mile limit, to be seized by the first comer is clear beyond controversy He might be a foreign citizen, he would of course hoist the flag of his own nation, and that nation might proceed to fortify the emergent lands; in short, it is not difficult to figure the anomalies and difficulties which the abandonment of the plain ground taken by Lord Watson would involve to this and to other nations "

In view of these decisions we may proceed on the basis that the Federal Legislature is competent to enact laws both for British India and Federated States, not only in regard to the landed territory comprised in them but also to the three-mile belt of sea lying along and washing their coast The laws must, of course, be within its competence

In this context, it may be useful to refer to the Territorial Waters Jurisdiction Act (41 and 42 Vic c 73), which has been extended to India In the *Franconia case*[1] the question which arose for consideration was whether the British Courts had jurisdiction to proceed criminally against a foreigner in command of a foreign ship, who, whilst within three miles of the English coast, ran into a British ship causing loss of life.

[1] (1876) 2 Ex. D 63.

It was decided by seven out of thirteen judges who heard this case, that in the absence of a statutory enactment, it was not competent for the criminal court to assume jurisdiction over the foreigner. In view of this decision, the Act above referred to was passed. Under Section 2 of this Act, " An offence committed by a person whether he is or is not a subject of Her Majesty, on the open sea within the territorial waters of Her Majesty's dominions, is an offence within the jurisdiction of the Admiral, although it may have been committed on board or by means of a foreign ship, and the person who committed such offence may be arrested, tried and punished, accordingly." The territorial waters have been defined by this Act as follows : " The territorial waters of Her Majesty's dominions, in reference to the sea, means such part of Her Majesty's dominions, as is deemed by international law to be within the territorial sovereignty of Her Majesty ; and for the purpose of any offence declared by this Act to be within the jurisdiction of the Admiral, any part of the open sea within one marine league of the coast measured from low-water mark shall be deemed to be open sea within the territorial waters of Her Majesty's dominions."

It is interesting to observe that in the case already cited, viz., *The Secretary of State for India* v. *Chellikani Rama Rao*,[1] it was sought to be contended upon the authority of certain observations made in the *Franconia Case*, that the Crown's territory did not extend beyond the range of the rise or fall of the tide and that, therefore, the islands which had emerged in the open sea, though within the three-mile belt, could not be treated as British territory. With reference to this contention Lord Shaw observed as follows in that case : " The doubt raised upon this proposition was substantially rested on certain dicta pronounced in the case of *Reg* v. *Keyn*.[2] The Crown admitted to be the owners of the foreshore, is, so the suggestion is, bounded in its dominion of the bed of the sea by the range of the rise or fall of the tide. Crown property, does not, it is said, extend further seaward. It should not be forgotten that the *Franconia Case* had reference on its merits solely to the point as to the limits of Admiralty jurisdiction ; nothing else fell to be there decided. It was marked by an extreme conflict of judicial opinion, and the judgment of the majority of the court, was rested on the ground of there having been no jurisdiction in former times in the Admiral to try offences by foreigners on board foreign ships whether within

[1] 39 Madras 617 [2] (1876) L R. 2 Ex D. 63.

or without the limit of three miles from the shore. When, however, the actual question of the dominion as to the bed of the sea within a limited distance from our shores has been actually in issue, the doubt just mentioned has not been supported nor has the suggestion appeared to be helpful or sound." It is clear from these observations of Lord Shaw, that the decision in the *Franconia Case* is of restricted application, as the main point at issue was with reference to the limits of the Admiralty jurisdiction and not the proprietary right of the Crown. The general principle may be taken to be well established that the territory of a State does not terminate with the low-water mark but extends seaward to a distance of one marine league or three miles of the shore.

The rule regarding the limitation placed upon a Colonial Legislature to enact laws limited to its own territory is a rule, as Professor Harrison Moore has pointed out, in his treatise on *The Constitution of the Commonwealth of Australia*, second edition, page 259, "in restraint of power sanctioned not merely by the refusal of courts beyond the colony to recognize its authority, but by the refusal of the courts of the colony itself to treat the enactment as valid." Unless the Imperial Parliament has expressly authorized a colonial legislature to pass a law touching a matter, so as to have extra-territorial effect, such law is liable to be declared of no effect by the Court of that Colony itself.

The leading authority on this subject is the case of *Macleod* v. *Attorney-General for New South Wales* [1] The appellant in this case was married on July 13, 1872, at Darling Point in the Colony of New South Wales, to one Mary Manson On May 8, 1889, the appellant married at St Louis, in the State of Missouri, in the United States of America, one Mary Elizabeth Cameron, though his first wife was alive at the time He was indicted, tried, and convicted, in the Colony of New South Wales, of having committed bigamy, under the 54th Section of the Criminal Law Amendment Act of 1883. The section, so far as it is material for purposes of this case, was in these terms: " 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." The Privy Council placed a restricted meaning on the clause " wheresoever such second marriage takes place," holding that the clause had reference to a second marriage which had taken place within that Colony.

[1] (1891) A C. 455.

A wider construction on that clause would have meant, that the Colonial legislature was competent to enact a law operative beyond its territorial limits, and this, the Privy Council, pointed out, was not a correct position at all. Lord Halsbury, in that case, has observed, page 458, as follows: "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." The conviction was accordingly set aside.

It is interesting to compare this case with the English case of *The Trial of Earl Russell* [1] The facts of this case were very similar to those in Macleod's case. In Earl Russell's case an English Peer contracted a bigamous marriage in the United States of America, in contravention of the provision of an Imperial Statute, offences against the Persons Act, 1861, Section 57, which ran in these terms: "Whosoever being married shall marry any other person during the life of the former husband or wife, whether the second marriage shall have taken place in England or Ireland or elsewhere, shall be guilty of Felony." It was decided in this case that the section extends to a case where the second marriage is celebrated beyond the King's dominions The section in the Imperial Statute above referred to is almost similar to the wording of the section in the New South Wales Statute which was considered in Macleod's case But the conclusions reached in the two cases were poles asunder. The reason for this divergence is due to the fact that while a colonial legislature is deemed to be restricted in its authority to legislate for its territory only, unless specially empowered by an Imperial Statute, the Imperial legislature is subject to no such territorial restrictions.

Though States can legislate effectively only for their own territories including the territorial waters, it has been recognized, that for certain purposes, notably those of police, revenue,

[1] (1901) A C 446

public health and fisheries, a State may enact laws affecting the seas surrounding its coasts to a distance seaward which is even beyond the territorial waters. Lord Stowell stated in the case of *The Le Louis*[1] " Maritime States have claimed a right of visitation and inquiry within those parts of the ocean adjoining to their shores which the common courtesy of nations has for their common convenience allowed to be considered as parts of their dominions for various domestic purposes, particularly for fiscal or defence regulations more immediately affecting their safety and welfare Such are our hovering laws, which, within certain limited distances more or less moderately assigned subject foreign vessels to such examination."

In the case of *Croft* v. *Dunphy*[2] the Privy Council referred to this aspect of legislation in the following terms. " This special latitude of legislation in such matters is a familiar topic in the text books on International Law. Thus Travers Twiss, in his treatise on International Law in the volume dealing with Peace, says at p. 265, that a State in matters of revenue and health ' exercises a permissive jurisdiction the extent of which does not appear to be limited within any certain marked boundaries further than that it can only be exercised over her own vessels and over such foreign vessels as are bound to her ports '. In Halleck's *International Law*, 4th edition, Volume I, p. 168, it is pointed out that beyond the generally accepted limits of territorial waters ' States may exercise a qualified jurisdiction for fiscal and defence purposes —that is, for the execution of their revenue laws and ' to prevent hovering on their coasts.' Again, in Hall's *Foreign Powers and Jurisdiction of the British Crown*, it is stated in Paragraph 108, p. 244, that ' the justice and necessity of taking precautionary means outside territorial waters in order that infractions of revenue laws shall not occur upon the territory itself, is in principle uncontested ' Without multiplying quotations it may be sufficient to add references to Phillimore's *International Law*, Volume I, Paragraph 198 and Wheaton's *International Law*, 6th edition, Volume I, page 377."

The case of *Croft* v. *Dunphy* arose out of the following facts. On June 10, 1929, the Schooner *Dorothy M. Stuart* sailed for the " high seas," from the French island of St. Pierre, carrying a cargo on board of rum and other liquors, which are subject to duty under Canadian Law. The vessel had been registered in

[1] (1817) 2 Dod Adm 210, 245 [2] (1933) A C 156

Nova Scotia ; and both the vessel and its cargo were the property of the respondent, who was also a resident of Nova Scotia. On June 13, 1929, the Schooner, when at a distance of 11½ miles from the coast of Nova Scotia, was boarded by the appellant, an officer belonging to the Canadian Customs service. The cargo having been found to consist of dutiable goods, the vessel and cargo were seized and taken into port The validity of this seizure, which was effected in pursuance of powers conferred by the Customs Act of Canada, 1927, c. 42, as amended by 18 and 19 George V, c. 16, was challenged in these proceedings mainly upon the plea that the Dominion in conferring the powers in question exceeded its legislative competence. The provisions which were impugned were Sections 151 and 207 of the Statute as amended. Section 151 was as follows : " (1) If any vessel is hovering in territorial waters of Canada any officer may go on board such vessel and examine her cargo and may also examine the master or person in command upon oath touching the cargo and voyage and bring the vessel into port." . . . (7) For the purposes of this section and Section 207 of this Act, ' Territorial waters of Canada ' shall mean the waters forming part of the territory of the Dominion of Canada and the waters adjacent to the Dominion, within three marine miles thereof in case of any vessel and within twelve marine miles thereof in the case of any vessel registered in Canada " Section 207 ran as follows · " (1) If upon the examination of any officer of the cargo of any vessel hovering in territorial waters of Canada any dutiable goods or any goods the importation of which into Canada is prohibited are found on board, such vessel with her . . cargo shall be seized and forfeited. . . ." The question that arose for consideration was whether the Dominion Parliament was competent to enact legislation purporting to operate to a distance of twelve miles from the coast of Canada. The Supreme Court of Canada by a majority consisting of Duff, Rinfret and Lamont J. J., Newcombe and Cannon J J. dissenting, declared that the seizure was illegal. The appellant then preferred an appeal to the Privy Council. I have already extracted certain passages from the judgment of the Privy Council in this case which establish the proposition, that a State can enact legislation even operating beyond its ordinary territorial waters, for certain specified purposes like revenue, police, health and fisheries. But it was contended in this case that although the Imperial Parliament, as a Sovereign Parliament, may be conceded to possess such powers of legislation under international law and usage, the Parliament

of Canada had no such powers. Their Lordships of the Privy Council refused to recognize any such disability as attaching to the powers of a Dominion Parliament, holding that the legislation impugned in this case was validly enacted. Lord Macmillan in delivering the judgment of the Privy Council expressed himself thus, at p. 163: "It is not contested that under the British North America Act, the Dominion Legislature has full power to enact customs laws for Canada but it is maintained that it is debarred from introducing into such legislation any provisions designed to operate beyond its shores or at any rate beyond a marine league from the coast In their lordships' opinion the Parliament of Canada is not under any such disability. Once it is found that a particular topic of legislation is among those upon which the Dominion Parliament may competently legislate as being for the peace, order and good government of Canada or as being one of the specific subjects enumerated in Section 91, British North America Act, their lordships see no reason to restrict the permitted scope of such legislation by any other consideration than is applicable to the legislation of a fully Sovereign State." The principles enunciated in *The Queen* v. *Burah* and *Hodge* v. *The Queen* were adopted in this case. Lord Macmillan in this case has made the following further observations, at pp. 164-165, which are of interest: "Legislation of the Imperial Parliament, even in contravention of generally acknowledged principles of international law, is binding upon and must be enforced by the courts of this country, for in these courts the legislation of the Imperial Parliament cannot be challenged as *ultra vires*: Per Lord-Justice General Dunedin in *Mortensen* v *Peters*.[1] It may be that legislation of the Dominion Parliament may be challenged as *ultra vires* on the ground that it is contrary to the principles of international law, but that must be because it must be assumed that the British North America Act has not conferred power on the Dominion Parliament to legislate contrary to these principles. In the present case, however, there is no question of international law involved, for legislation of the kind here challenged is recognized as legitimate by international law, and in any event the provision impugned has no application to foreign vessels. The sole question is whether the Imperial Parliament in conferring upon Canada, as it admittedly has done, full power, to enact customs legislation, bestowed or withheld the power to enact provisions now challenged. No question of any infraction of international law arises. The

[1] (1906) 8 F (J C) 93, 101

question is a domestic one between the Imperial Parliament and the Dominion Parliament."

It may, in passing, be observed, that the Privy Council in the case above-mentioned arrived at this conclusion, independently of the provision contained in Section 3 of the Statute of Westminster which provides that "it is hereby declared and enacted that the Parliament of a Dominion has full power to make laws having extra-territorial operation" It was contended on behalf of the appellant that this section had retrospective effect, and the impugned legislation could be supported upon this provision also. The Privy Council did not express any opinion on this point; and proceeded to hold that the legislation was, even otherwise, perfectly valid.

The principle enunciated in the above decision, that a State may enact laws affecting the seas surrounding its coast to a distance seaward which is even beyond the territorial waters, for certain specified purposes, notably fiscal, defence and health purposes, is, it is submitted, fully applicable to the Indian Federal Legislature to enact laws with similar effect. The reasons are clear In the first place, such laws are recognized as proper in international law and usage, and in the second place, the Federal Legislature in respect of the powers coming within its ambit, is as sovereign as the Imperial Parliament itself. The Federal Legislature can, for instance, enact "hovering laws" of the type which were pronounced *intra vires* in *Croft* v. *Dunphy*, with a view to safeguard its customs revenue. These powers are exercisable by the Federal Legislature, independently of the powers conferred upon it to legislate extra-territorially, under Section 99, Sub-section (2) of the new Act.

As I have already mentioned, Sub-section (2) of Section 99, enumerates certain subjects in regard to which the Federal Legislature is deemed competent to enact laws having extra-territorial operation. Section 99, Sub-section (2), provides that no federal law shall, on the ground that it would have extra-territorial operation, be deemed to be invalid in so far as it applies—

(*a*) to British subjects and servants of the Crown in any part of India; or

(*b*) to British subjects who are domiciled in any part of India wherever they may be; or

(*c*) to, or to persons on, ships or aircraft registered in British India or any Federated State wherever they may be; or

(*d*) in the case of a law with respect to a matter accepted in

the Instrument of Accession of a Federated State as a matter with respect to which the Federal Legislature may make laws for that State, to subjects of that State wherever they may be ; or

(*e*) in the case of a law for the regulation or discipline of any naval, military, or air force raised in British India, to members of, and persons attached to, employed with or following, that force, wherever they may be

Now we shall take Clause (*a*) of this Sub-section for consideration According to the law now in force in British India, the term " British subject " is identical in meaning with the term " British subject " as defined in Section 27 of the British Nationality and Status of Aliens Act, 1914. This is clear from the provision contained in Section 2 (*a*) of the Indian Naturaliza- Act, 1926. Under Section 27 of the British Act the expression British Subject means (1) a person who is a natural-born British subject, or (2) a person to whom a certificate of naturalization has been granted or (3) a person who has become a subject of His Majesty by reason of any annexation of territory. Section 1 of the British Nationality and Status of Aliens Act, 1914 (as amended by the Acts of 1918, 1922 and 1933) defines the persons who are to be deemed natural-born British subjects The effect of that Section is that the following are to be classed as natural-born British subjects :

(*a*) Any person born within His Majesty's dominions and allegiance ; and

(*b*) Any person born out of His Majesty's dominions whose father was, at the time of that person's birth, a British subject, and who fulfils any one of the following conditions ; that is to say,

(i) his father was born within His Majesty's allegiance ; or

(ii) his father was a person to whom a certificate of naturalization had been granted ; or

(iii) his father had become a British subject by reason of any annexation of territory ; or

(iv) his father was at the time of that person's birth in the service of the Crown ; or

(v) his birth was registered at a British Consulate within one year or in special circumstances, with the consent of the Secretary of State, two years after its occurrence, and

(*c*) Any person born on board a British ship whether in foreign territorial waters or not.

A person born on board a foreign ship shall not be deemed to be a British subject by reason only that the ship was in territorial

waters at the time of his birth. (Section 1, Sub-section 2).

In Clause (*b*) of Section 99 (2) of the Act, it will be noticed, the expression " British subjects who are domiciled in any part of India " occurs. In the Draft India Bill the expression used was " Indian Subjects of His Majesty." Sir Thomas Inskip, the Attorney-General, in explaining the change effected in this Clause stated that the original expression was, " an inconvenient expression for more than one reason, but chiefly because it was not at all clear or definite as to the persons who come within the description," and that it was therefore proposed in the amendment to use the expression, " British subjects who are domiciled in India " He said that this would " result in a slight extension of the expression, because British subjects domiciled in India may include persons of pure European blood, whereas the other expression would possibly include only persons who were not of pure European descent."[1]

Professor Berriedale Keith writing in the *Journal of Comparative Legislation and International Law* (Third Series, Vol. XVII, p 278) on the Government of India Act, 1935, has made the following interesting observations with respect to this Clause in the Act · " Another satisfactory feature is the exact description of the persons over whom extra-territorial authority may be exercised, so as to cover British subjects domiciled in India. The adoption of the test of domicile is far more satisfactory than the uncertain term, ' native Indian British subjects ' ; in the same way the Burmese Legislature may regulate extra-territorially the actions of British subjects domiciled in Burma. This is a noteworthy concession to the principle of domicile as distinguishing classes of British subjects, and it should ultimately be regarded as the criterion for the exercise of such jurisdiction over Canadian and Union British subjects, unless it is preferred to restrict authority to Canadian and Union nationals. Clearly no part of the Commonwealth ought to seek to legislate for all British subjects irrespective of their connection with that part."

The provisions contained in Clauses (*a*) and (*b*) with regard to the powers of the Indian Legislature to enact legislation with reference to " British subjects and servants of the Crown in any part of India," and " British subjects domiciled in India wherever they may be," it is interesting to recall, are not in the nature of entirely new powers conferred on the Indian Legislature by the Government of India Act, 1935. For, analogous provisions, though restricted in scope, were in existence, in

[1] *Official Report, House of Commons*, March 27, 1935, Vol 299, Column 1922.

earlier enactments also. Section 43 of the Government of India Act, 1833, empowered the Governor-General in Council to make laws and regulations, " for all servants of the said Company within the dominions of Princes and States in alliance with the said Company." This provision was reproduced in Section 22 of the Indian Councils Act, 1861, in the following form, viz , " for all servants of the Government of India within the dominions of Princes and States in alliance with Her Majesty " Section 65 of the Government of India Act, now repealed (the Consolidated Act, the Government of India Act, 1915, as amended by the Acts of 1916 and 1919), which defined the powers of the Indian Legislature to make laws, enacted by Clause (*b*) that the said powers extended to the making of laws, " for all subjects of His Majesty and servants of the Crown within other parts of India." Section 1 of the Indian Councils Act, 1869, empowered the Indian Legislature to make laws and regulations for all persons, being native Indian subjects of Her Majesty, without and beyond as well as within the Indian territories under the dominion of Her Majesty Section 65 of the Consolidated Government of India Act, now repealed, (The Government of India Act of 1915, as amended by the Acts of 1916 and 1919) which defined the powers of the Indian Legislature to make laws, reproduced this provision as it enacted by Clause (*c*) that the power to make laws was to extend to " all native Indian subjects of Her Majesty, without and beyond as well as within British India." The Government of India Act, 1935, has substituted the expression, " British subjects who are domiciled in any part of India " for the expression, " Native Indian subjects of Her Majesty," which occurred in the previous Acts. The reason for this change has already been mentioned.

Clause (*c*) of this Sub-section did not find a place in the draft India Bill It was newly incorporated into it at the Committee stage This Clause enables a Federal Law to operate in regard to ships and aircraft registered in British India or any Federated State, as well as to persons on them, in whatever part of the world they may be, on the principle that a vessel or aircraft flying the flag of a country, is amenable to its laws even beyond its territorial limits. Of course, such extra-territorial legislation, will operate, subject to local laws while the ship or aircraft is within the jurisdiction of another country. That an independent country is free to enact such extra-territorial legislation so as to be applicable to ships and aircraft belonging to it, wherever they happen to be and to persons on them, there could be no doubt. But a Colonial Legislature is considered to be restricted

in its power to enact laws in respect of any matter so as to be operative only within its own territory, unless empowered to enact extra-territorially with regard to it by a Statute of the Imperial Parliament. The Indian Federal Legislature is presumably subject to this territorial limitation also ; unless in any particular case its power to enact laws extra-territorially is enlarged by a specific grant Clause (*c*) of this Sub-section, it may be assumed, was intended to place the Federal Indian Legislature on a par with the Imperial Legislature itself, to enact laws, operative on ships and aircraft amenable to its ordinary jurisdiction, even beyond its own frontiers

With this Clause may be compared the provision contained in Section 5 (one of the covering clauses) of the Commonwealth of Australia Constitution Act, 1900, by which it is enacted, " 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." This section in the Australian Act, it is interesting to observe, is more limited in its scope than Clause (*c*) of the Indian Act. With reference to the provision in the Australian Act, Dr. Donald Kerr says in his treatise on the *Law of the Australian Constitution*, page 59, that it " does not apply to all ships of which an Australian port is the home port, in whatever part of the world they may, for the time being, be trading, (*Clarke* v. *Union Steamship Co of New Zealand, Ltd*),[1] but (as has been held by the High Court) applies ' only to cases where the beginning and the end of the voyage are both in the Commonwealth ' ; *Merchant Service Guild of Australasia* v. *Currie*,[2] and accordingly a line of ships registered in Melbourne, and engaged in trade between Australia, Calcutta, and South Africa (the officers of which resided in Australia, were engaged here, but signed ship's articles in Calcutta), doing no inter-state trade, but occasionally doing trips from Calcutta to other Indian ports, was not subject to Commonwealth Legislation." Under the Australian Act, Commonwealth Legislation will only be operative on a ship which has " its first port of clearance and its port of destination are in the Commonwealth." Under the Indian Act all ships and aircraft registered in British India or a Federated State will be subject to Federal Legislation, wherever they may be.

The important case of in Re *The Award of the Wellington Cooks' and Stewards' Union*,[3] which is a decision of the Supreme Court of New Zealand, may also be mentioned here. Professor

[1] 18 C L R 143
[2] (1908) 5 C L R 737, p 743.
[3] (1906) 26 N Z L R. 394

Harrison Moore in his book *The Constitution of The Commonwealth of Australia*, 2nd edition, at pages 266-269, discusses this case in the following terms: "The New Zealand Court of Industrial Arbitration had made an award against Steamship Companies, whereby *inter-alia* it was required that overtime should be paid for certain work if performed by the employees in port, and that they should be specially paid for work done on holidays. In the case of two Steamship Companies - the Union Steamship Company of New Zealand and Huddart, Parker and Company—it was admitted that these payments were not made in respect of work done in Australian ports and on a prosecution for penalties for a breach of the award, it was argued that the New Zealand Legislature had no power to impose penalties for acts done or committed beyond its territorial waters. The Court in its decision, drew a distinction between the two companies, holding that the Union Company, as a New Zealand Company, with its head office and management there its vessels beginning and ending their round voyage (New Zealand—Australia—New Zealand) there, and engaging and paying its men there, was bound, while Huddart Parker's, as an Australian Company, with its head office and management in Australia, its vessels beginning and ending their round voyage (Australia—New Zealand—Australia) there, and engaging and paying its men there, was not. The members of the Court, agreeing in the result, differed as to the essential grounds of the distinction. Stout C.J. went to the length of declaring that the inhabitants of New Zealand were subject to the laws of that country even outside territorial limits, and might, without infringing the doctrine of *Macleod's Case*, be punished in New Zealand for crimes committed abroad So also, there were 'New Zealand' ships, whose 'law of the flag' was the law of New Zealand, even when they were on the high seas. He found the justification for this in the necessary expansion of power with the development of the Dominion; it was impossible to provide for that peace, order and good government of the colony for which plenary power was given by the Constitution, if such matters were not subject to New Zealand Law. The majority of the Court more fully admitted the principle of the territorial limitation, and made no claim over inhabitants or ships of New Zealand as such; and it was not necessary to consider whether a New Zealand court could punish offences committed abroad as if they were done in New Zealand. The present case was not one of offences committed abroad by New Zealanders, it was the case of a corporation in New Zealand engaged in a complicated

series of operations, some in New Zealand, some on the high seas, and some in Australia. The most important elements in the case were that the service to which the award related arose out of a contract in New Zealand, which was to be performed in the course of a round voyage, beginning and ending in New Zealand. This service could not properly be broken up, and the award covered the whole voyage which was the subject of the contract. In respect of the work done in Australian ports, it was pointed out that there was nothing in the award which purported to make such work illegal ; the work was lawful, and the award merely concerned the payment for it, an obligation the content of which could not be regarded as determinable by the law of that particular place in which payment might happen to be made. If the case had been an action in the civil courts for the difference between the wage provided by the award and that actually paid, the decision would seem to be merely an application of the familiar rule that the obligation of a contract is governed by its proper law, and there would seem to be no valid objection to a claimant recovering in any jurisdiction to which the defendant was amenable But it was a penal proceeding, open, as the court held, to any prosecutor, and not practicable in any courts except those of New Zealand. Still, once it is established that the substantive matter belongs to New Zealand law, it seems to follow that the law of New Zealand may determine how the obligation shall be sanctioned, whether by civil or penal proceedings. The court recognized that every reason which bound the New Zealand Company by the award exonerated the Australian Company from it. That Company would be properly bound by Australian law, if any ; and the Court emphasized the importance internationally of each country restricting itself to its own proper sphere."

Clause (*d*) refers to the powers of the Federal Legislature to pass laws applicable to subjects of Federated States in regard to matters accepted by them as matters with respect to which that Legislature could enact laws, so as to apply to them even beyond the territorial limits of India.

Clause (*e*) applies to Federal Laws enacted for the regulation and discipline of the naval, military and air forces raised in British India only, wherever such forces may be.

IV *Incidental Powers*

Article I, Section 8, of the Constitution of the United States of America, *inter alia*, specifically empowers the congress to

" make all laws which shall be necessary and proper for carrying into execution the foregoing powers (i.e., the powers vested in the Congress), and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof." In the Commonwealth of Australia Constitution Act, Section 51 (xxxix), provides that the Commonwealth Parliament shall have power to make laws for the peace, order and good government of the Commonwealth with respect to " matters incidental to the execution of any power vested in this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth." In the Government of India Act, 1935, there is no general provision regarding the exercise of incidental powers by the Indian Federal Legislature, similar to those to be found in the United States and Australian Constitutions Though a provision of this character does not find a place in the Indian Act, heads 42 and 43 of the Federal Legislative List (List I of the Seventh Schedule) expressly authorize the Federal Legislature to enact legislation respecting, " offences against laws with respect to any of the matters in this list," and as regards " inquiries and statistics for the purposes of any of the matters in this list." These heads of power, as a matter of fact, partake of the nature of incidental powers. It would not, I think, be correct to assume that because no specific mention of incidental powers, in the explicit way in which the Australian and American Constitutions make provision, has been made in the Indian Act, the Indian Federal Legislature does not possess such powers, apart from those specifically granted to it. A written constitution can only indicate the broad outlines of the powers of a legislature ; how and by what means those powers may be exercised fully and effectively are matters within the discretion of that legislature and necessarily implied in the grant of powers. It is submitted that the Federal Legislature will be competent to exercise incidental powers as part of the main grant of powers.

In *G. C. Crespin and Son* v. *Colac Co operative Farmers, Ltd.*,[1] Barton J. stated with reference to Section 51 (xxxix), of the Australian Act, " though the incidental power would have been exercisable without this express grant, the sub-section makes assurance doubly sure." In the case of *Attorney-General for the Commonwealth of Australia* v. *The Colonial Sugar*

[1] 21 C L R 205 Cited in Kerr *The Law of the Australian Constitution*, p 204.

Refining Co., Ltd.,[1] Lord Haldane made the following observations with reference to this very provision: "Nor in their Lordship's opinion, is the question carried further by sub-head (xxxix), which declares to be within the legislative capacity of the Central Parliament matters incidental to the execution of any power vested by this Constitution in the Parliament, or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth These words do not seem to them to do more than cover matters which are incidents in the exercise of some actually existing power, conferred by Statute or common law."

With respect to the analogous provision in the United States Constitution, Judge Cooley says: "The import of the clause is that Congress shall have all the incidental and instrumental powers . . . to carry into execution all the express powers. It neither enlarges any power specifically given nor is it a grant of any new power to Congress, but it is merely a declaration for the removal of all uncertainty that the means for carrying into execution those otherwise granted are included in the grant."[2]

The nature of these incidental powers was considered by the Supreme Court of the United States in the case of *McCulloch* v. *Maryland*.[3] The United States bank was incorporated by an Act of Congress; and the question that arose was, whether that Act of the Congress was *intra vires*, in view of the absence of any express power to establish banks or charter corporations granted to it under the Constitution The Supreme Court held that the Act establishing the bank was *intra vires* The observations of the great American Judge Marshall C.J in that case are worth quoting. He said: "A Constitution to contain an accurate detail of all the sub-divisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and would scarcely be embraced by the human mind. It would, probably, never be understood by the public. Its nature, therefore, requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. . . . In considering this question, then, we

[1] (1914) A C 237

[2] Cooley *Principles of Constitutional Law*, p 105, cited in W H Moore, in his book *The Constitution of the Commonwealth of Australia*, 2nd Edition, p. 276

[3] (1819) 4 Wheaton 316 = 4 L Ed 579.

must never forget that it is a Constitution we are expounding. Although, among the enumerated powers of Government we do not find the word, 'Bank' or 'incorporation,' we do find the great powers to lay and collect taxes, to borrow money, to regulate commerce, to declare and conduct a war, and to raise and support armies and navies The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation, are entrusted to its government. It can never be pretended that these vast powers draw after them others of inferior importance, merely because they are inferior Such an idea can never be advanced But it may with great reason be contended, that a government entrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends, must also be entrusted with ample means for their execution The power being given, it is the interest of the nation to facilitate its execution. It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution, by withholding the most appropriate means. Throughout this vast Republic, from the St. Croix to the Gulf of Mexico, from the Atlantic to the Pacific, revenue is to be collected and expended, armies are to be marched and supported. The exigencies of the nation may require that the treasure raised in the North should be transported to the South, that raised in the East conveyed to the West, or that this order should be reversed. Is that construction of the Constitution to be preferred, which would render these operations difficult, hazardous, and expensive? Can we adopt that construction (unless the words imperiously require it) which would impute to the framers of that instrument, when granting these powers for the public good, the intention of impeding their exercise by withholding a choice of means? If, indeed, such be the mandate of the Constitution we have only to obey; but that instrument does not profess to enumerate the means by which the powers it confers may be executed, nor does it prohibit the creation of a corporation, if the existence of such a being be essential to the beneficial exercise of those powers. It is, then, the subject of fair inquiry how far such means may be employed. It is not denied that the powers given to the Government imply the ordinary means of execution. That, for example of raising revenue, and applying it to national purposes, is admitted to imply the power of conveying money from place to place, as the exigencies of the nation may require, and of employing the usual means of conveyance. But it is denied that the Government

has its choice of means ; or that it may employ the most convenient means, if, to employ them, it is necessary to create a corporation. . . . The Government, which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictation of reason, be allowed to select the means ; and those who contend that it may not select any appropriate means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception. . . . The power of creating a corporation, though appertaining to sovereignty, is not like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent power, which cannot be implied as incidental to other powers, or used as a means of executing them. It is never the end for which other powers are exercised but a means by which other objects are accomplished. . . . We admit, as all must admit, that the powers of the Government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow to the national legislature, that discretion, with respect to the means by which the power it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means, which are appropriate, which are plainly adopted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional."

Griffith C.J. in the case of *State of Tasmania* v *The Commonwealth and State of Victoria*,[1] observed as follows : " The constitution is not a code going into minute details of the means by which the federation is to be carried into effect by the sovereign power created by it. There are many powers necessary to that end which are conferred—and one would expect them to be conferred—by necessary implication rather than in express words. It is, however, always a question of construction whether we are called upon to construe the terms of a section, or to decide whether powers are necessary to be implied in addition to those which are expressed."

In *Australian Boot Trade Employees' Federation* v. *Whybrow and others*,[2] Isaacs J. said : " The case is quite different when it is found that a given power, though fully and completely exercised and enforced, is not effectual to attain all the results

[1] 1 C L R. 329 · Cited in Kerr, p 204
[2] (1910) 10 C L.R. 266 : Cited in Kerr, p 207.

desired or expected. The matter is then one for the consideration of the authority in whom resides the right of granting a power more extensive. It is not open to a grantee of the power actually bestowed to add to its efficacy, as it is called, by some further means outside the limits of the power conferred, for the purpose of more effectively coping with the evils intended to be met. Where an instrument of expressly limited length or nature is designated for use but found in practice insufficient to reach the point intended, then, however just or desirable such a course may appear to those whose duty it is to employ that instrument, there is no legal principle which warrants its lengthening or transformation merely because the expected result has not been achieved. Where both end and means are strictly marked out, there is no right either to use other means to attain the specified end, or to use the specified means for unauthorized ends. (See per Lord Davey in *Rossi* v. *Edinburgh Corporation*).[1] The authority must be taken as it is created, taken to the full, but not exceeded. In other words, in the absence of express statements to the contrary, you may complement, but you may not supplement, a granted power."

It is not always easy to decide what are matters incidental or ancillary to any head or heads of legislative power. Differences of opinion may well arise, whether any legislative provision is only a matter incidental to the exercise of any particular power or powers, or is a matter involved in a substantive power, not authorized by the terms of the Constitution Act.

In *Grand Trunk Railway Company of Canada* v *Attorney-General of Canada*,[2] Section 1 of the Canadian Statute 4, Edward 7, c. 31 under which railway companies within the jurisdiction of the Dominion Parliament were prohibited from contracting out of their liability to pay damages for personal injury to their servants, was attacked as being *ultra vires* of the Dominion Parliament as it trenched upon Head 13 of Section 92, viz., property and civil rights in the province, which was within the exclusive competence of the provincial legislatures. This contention was rejected on the ground that the provision impugned was ancillary to through railway legislation. Viscount Dunedin, delivering the judgment of their Lordships of the Privy Council, observed, at page 68, as follows : " Accordingly, the true question in the present case does not seem to turn upon the question whether this law deals with a civil right—which may be conceded—but whether this law is truly ancillary to railway legislation. It seems to their Lordships that, inasmuch

[1] (1905) A C. 21 [2] (1907) A C 65.

as these railway corporations are the mere creations of the Dominion Legislature—which is admitted—it cannot be considered out of the way that the Parliament which calls them into existence should prescribe the terms which were to regulate the relations of the employees to the corporation. It is true that, in so doing, it does touch what may be described as the civil rights of those employees. But this is inevitable, and, indeed, seems much less violent in such a case where the rights, such as they are, are, so to speak, all *intra familiam*, than in the numerous cases which may be figured where the civil rights of outsiders may be affected. As examples may be cited provisions relating to expropriation of land, conditions to be read into contracts of carriage and alterations upon the common law of carriers."

In *Attorney-General for Canada* v. *Attorney-General for British Columbia and others* (known as the Fish Cannery Case),[1] Sections 7 A and 18 of the Fisheries Act, 1914, of Canada, as amended, which provided that no one shall operate for commercial purposes a fish cannery, or in British Columbia a salmon cannery or curing establishment, without taking out a license from the Minister of Marine and Fisheries after paying a prescribed fee, were challenged as *ultra vires* of the Parliament of Canada. Under Section 91 (12) of the British North America Act, "sea coast and inland fisheries," is a matter within the exclusive competence of the Dominion Parliament. The appellant representing the Dominion Government contended that these provisions were *intra vires* firstly on the ground that the subject "sea coast and inland fisheries" covered such matter as regulation of fish cannery or curing establishments, either ashore or afloat, by means of a licensing system, and secondly on the ground that such licensing of fish canning and curing establishments was necessarily incidental to effective legislation under that subject. The respondents, representing the Provincial Governments of Canada, contended *inter alia*, that the impugned provisions did not relate to fisheries, but to fish canneries for commercial purposes, that trade processes by which fish when caught are converted into a commodity suitable for being placed on the market cannot upon any reasonable construction be brought within the scope of the subject expressed by the words "sea coast and inland fisheries." The Privy Council accepted the contentions of the respondents and rejected the appeal. Lord Tomlin, who delivered the judgment of the Privy Council, adverting to the contention that the

[1] (1930) A C 111

provisions which were challenged could be supported on the ground that they were incidental legislation, observed, at page 121 as follows : " It may be, though on this point their Lordships express no opinion, that effective fishery legislation requires that the Minister should have power for the purpose of enforcing regulations against the taking of unfit fish or against the taking of fish out of season, to inspect all fish canning or fish curing establishments and require them to make appropriate statistical returns Even if this were so the necessity for applying to such establishments any such licensing system as is embodied in the sections in question does not follow. It is not obvious that any licensing system is necessarily incidental to effective fishery legislation, and no material has been placed before the Supreme Court or their Lordships' Board establishing the necessary connection between the two subject matters. In their Lordships' view, therefore, the appellant's second contention is not well founded."

In the *Commonwealth* v *The State of Queensland*,[1] Knox, C J., held that Section 51 (iv) of the Commonwealth of Australia Constitution Act, which relates to the powers of the Commonwealth Parliament for " borrowing money on the public credit of the Commonwealth," covered legislation as to the rate of interest to be paid, and, generally as to the conditions on which subscriptions to loans are invited, and hence the condition that interest derived from the Commonwealth Stock shall be exempt from State taxation

It has been held in the United States that as incidental to the taxing power, the United States has powers to prescribe the character, size and appearance of the articles to be taxed , for example, requiring oleomargarine to be put in packages marked and branded in accordance with regulations made by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury [2]

Dr. Donald Kerr in his treatise on the *Law of the Australian Constitution* observes as follows at page 208 : " It is not indispensable to the existence of any power claimed for the Commonwealth that it can be found specified in the words of the Constitution, or clearly and directly traceable to some one of the specified powers. Its existence may be deduced fairly from more than one of the substantive powers, expressly defined, or from them all combined It is allowable to group together any number of them, and infer from them all, that the

[1] (1920) 29 C L R 1 Cited in Kerr, p 208
[2] See in Re *Kollock* 165 U S 526 = 41 L Ed 813

power claimed has been conferred.[1] Thus Story gives, as illustrations, the right to sue and make contracts, the oath required by law from officers of the Government; building a capitol or a Presidential mansion; the penal code; and the provisions respecting the census Further instances are that the power to establish post offices and post roads carries with it power to provide for carrying the mails, punishing theft of letters and mail robberies, and for transporting the mails to foreign countries; the power to regulate commerce entails ability to make provision for the improvement of harbours, the erection of break-waters and buoys, the registry, enrolment, and construction of ships, and a code for the government of foreign and interstate shipping."

The considerations which apply to the exercise of incidental powers by the Federal Legislature would, it is submitted, apply to the Provincial Legislatures also. When a power is granted to the Provincial Legislature, it must be assumed that, by implication, every ancillary power which is necessary for the proper exercise of that power is given as a part of the grant. It has been decided that the Provincial Legislatures in Canada and the Provincial Councils in South Africa, possess ancillary and incidental powers to carry out fully the objects of the original powers granted to them. Chief Justice Innes has declared in *Gertzen's Case* [2] " No department of human activity is entirely insulated. It ramifies into other departments, affecting and being in turn affected by them. And therefore no general subject matter can be fully regulated without incidentally dealing with matters which, strictly speaking lie beyond it. When legislative jurisdiction is conferred upon a provincial council in respect of some special subject matter it follows, in the absence of any indication to the contrary, that it is intended to empower the council to deal fully with that matter, in accordance with the conditions and requirements prevailing at the time of legislation . . As already pointed out, that body possesses under the South Africa Act legislative authority within its province, but in respect of defined subjects only. And in deciding whether or not there has, in any particular instance, been an excess of authority, regard must be had to the maxim: *Quando lex aliquid alicui concedit, concedere videtur id sine quo res ipsa esse non potest* The principle therein embodied is of wide application, and bearing in mind the aim and scope

[1] Cf *Legal Tender Cases*, 12 Wall, 454

[2] (1914) A D at P 551 Cited in Kennedy and Schlosberg, *The Law and Custom of the South African Constitution* (1935) at pp 265-266

of the South Africa Act, I think we may say that the legislative authority committed to the council must (in the absence of manifest intent to the contrary) be taken to include all powers properly required to effect the purpose for which it was conferred. That would seem to be substantially the view taken by Canadian Courts. In Lefroy's Federal System of Canada (at page 183), a dictum of the Chief Justice of Ontario is quoted as unquestionable authority to the effect that where a provincial legislature, 'has the right to legislate upon a named subject, it must by necessary implication be held that all powers are given fully to carry out the object of the enactment although subjects such as civil rights and procedure, civil or criminal, may be apparently interfered with.' I take it, however, that no powers would be implied which are not properly or reasonably ancillary to those expressly conferred."

So far we have considered the powers of the Federal and Provincial Legislatures to enact incidental and ancillary legislation as part of the main grant of powers made to them under the distribution of powers carried out by the seventh schedule to the Government of India Act, 1935 I have also ventured to express the opinion that it is implied in the main grant of powers to those legislatures that they should have powers incidental to the carrying out of the objects involved in those grants That appears to be the position so far as British India is concerned. But can the Federal Legislature be deemed to possess powers to enact incidental legislation, so far as the Indian States are concerned? What view the Federal Court and the Privy Council will take in regard to this matter, it is difficult to say Two views are, indeed, possible. It may be argued, that the Instrument of Accession is a treaty, and that when that Instrument has to be construed along with the statute, a construction has to be employed in the interpretation of that document, which will impose the minimum amount of obligation on the State concerned, and that the doctrine of "incidental powers" cannot be read into it. The second view is, that when a State enters the framework of Federation outlined in the Act, and has accepted the authority of the Federal Legislature to enact legislation with respect to certain subjects, it must be presumed, that in relation to those subjects, the State has consented to the exercise of powers incidental to the main grant. If I may venture to express an opinion, the latter view appears to be the more reasonable of the two. In fact from the very nature of incidental and ancillary powers, it may be argued, that such powers are included in the original grant

itself. These incidental powers are essentially inseparable from the main grant, as the effective exercise of the substantive powers requires the enactment of legislation incidental to the carrying out of the main object of those powers. If that represents the real nature of these powers, the main grant must be presumed to carry with it, the incidental powers also. But one important qualification may, perhaps, be stated. If, with reference to any subject of power, the exercise of any power claimed as incidental to it, would be to over-ride any provision of the Instrument of Accession, then such exercise may not be possible. In such a case, the provision in the Instrument of Accession must prevail But, where there is no such conflict, it must be presumed, that when a State has accepted any subject in the Federal Legislative List as a subject upon which the Federal Legislature is competent to make laws, the powers of the Federal Legislature to enact legislation with respect to that subject, is as extensive and ample in the case of the State concerned as it is with reference to British India. But, if the doctrine of incidental powers is ruled out, so far as the Federated States are concerned, it will lead to the strange situation that the powers of the Federal Legislature to enact legislation with reference to the same subject matter, will not be the same in the case of British India and the Federated States. Now, it is open to a Federated State at the time of its entry into Federation to impose any restrictions or qualifications in the case of any subject-matter occurring in List I of the Seventh Schedule, which is accepted by it as a subject-matter, with reference to which the Federal Legislature may enact laws operative therein. Apart from these specific restrictions, it is reasonable to hold that the Federal Legislature is just as much competent to exercise incidental powers with reference to that State, as it is with reference to British India What will be the ultimate view of the Courts, it is difficult to say now.

Now we may pass on to the consideration of the following topics, namely (1) the allocation of powers between the Federal and Provincial Legislatures under the scheme of distribution of powers embodied in the Government of India Act, 1935, as well as the mode in which the conflicts that are likely to arise in connection with the exercise of such powers are proposed to be resolved, (2) the restrictions imposed by the Act on the exercise of legislative powers, (3) the provisions which are intended to

deal with certain forms of legislative discrimination, (4) the legislative powers of the Governor-General and the Governors, (5) the provisions of the Act which are to operate in case of breakdown of the constitutional machinery.

VI. *The Scheme of Distribution of Legislative Powers*

The first of the five topics, which I propose to consider, will be the allocation of powers between the Federal and Provincial Legislatures under the New Act, as well as the methods by which conflicts that will naturally arise in connection with their exercise, are to be resolved. In the distribution of legislative powers, the Government of India Act, 1935, has chalked out a new line of its own. There is no exact precedent for this method of allocation of powers in other federal constitutions. The nearest analogy for the scheme of distribution under the Indian Act, I can think of, is the one presented by the distribution of legislative authority under the British North America Act, 1867. But even this analogy does not proceed very far. Speaking broadly, the federal constitutions in other parts of the world have followed one or other of two methods for the partition of legislative powers as between the Central or Federal Legislature on the one hand, and the Provincial or State Legislatures on the other The first method is to enumerate the powers of the Federal Legislature, while the residue of powers is to belong to the State Legislatures This is the case with the Australian and United States Constitutions The second method is to define the subjects over which the Provincial Legislatures are to have authority ; while the rest of the legislative field is thrown open to the Central Legislature. The latter method has been adopted in the case of Canada by the British North America Act, 1867. Though the distribution of powers under the Canadian Act, furnishes an example of the second method, it must be remembered, that the Canadian scheme of allocation of powers is complicated by certain other considerations It is true, that Section 92 of the British North America Act, 1867, gives a list of sixteen subjects, in respect of which the Provincial Legislatures in Canada are to have exclusive powers to enact laws. It is also true that the ultimate effect of Section 91 of the Act, which defines the powers of the Dominion Legislature in Canada, is to vest the residue of legislative authority, not allocated to the provinces, in the Dominion. But Section 91 does not make the bald statement that all legislative powers not vested by Section 92 in the provinces, are to

belong to the Dominion. Section 91, in fact, enumerates twenty-nine subjects over which the Dominion Legislature are to have exclusive powers of legislation. But this enumeration of twenty-nine specific subjects which are to be within the exclussive competence of the Dominion Legislature, it is stated by this section, is only by way of greater certainty, and not so as to restrict the generality of the powers possessed by that legislature to make laws for the peace, order and good government of Canada, in relation to all matters not coming within the classes of subjects which are by the Act assigned exclusively to the legislatures of the Provinces Thus, though the general residue of unallotted powers are vested in the Dominion Parliament, there is a twofold enumeration of subjects, one relating to the Dominion and the other to the Provinces. It may also be mentioned, that under the British North America Act, there are only two subjects, namely, immigration and agriculture, which are subject to the concurrent control of both the Provincial and Dominion Legislatures , with this qualification, that where any law passed by a Provincial Legislature comes into conflict with a Dominion Law, in the concurrent field, the latter is to prevail.

The Government of India Act, 1935, as I have observed already, strikes out an entirely new path in regard to the allocation of powers between the Federal and Provincial Legislatures, unknown to other federal constitutions The novelty of the scheme adopted in this respect by the Indian Act, would, of course, furnish no ground of itself for a person to be prejudiced either in favour of or against it. The value of this scheme of allocation must be assessed upon its own merits Leaving aside for the moment the details of the scheme of distribution, and speaking in broad terms, the plan of the Indian Act is somewhat to this effect. An attempt has been made to group all possible heads of legislative power under three separate lists. The first list contains the subjects in respect of which the Federal Legislature is given the exclusive power to enact legislation ; the second list contains those subjects which will be within the exclusive competence of the Provincial Legislatures. To the extent to which either legislature invades the exclusive province of the other as fixed by the two lists described above, its enactment will become *ultra vires* and void. There is a third list of subjects—it may be mentioned that the concurrent list is also a very long list—in regard to which both the Federal and Provincial Legislatures have concurrent powers of legislation, certain special provisions being made to resolve

conflicts that will inevitably arise when two competing legislatures operate in the same field. It is assumed—and it cannot indeed be otherwise— that even though an attempt has been made to comprehend within these lists all those matters which can form the subject of legislation, there will still be a residue which is not foreseeable at present, for which special provision had to be made. With regard to any subject of a residuary nature, that is to say, a subject not foreseen and included in the three lists, the Act makes a very novel provision by which the Governor-General is made the sole arbiter for determining as to whether it should come within the Federal or Provincial Legislative field. This is, in brief, the scheme of distribution of powers under the Indian Act.

The Joint Select Committee, at page 143 of their report (Volume I), indeed, have observed, " that the attempt which these lists represent to allocate by enumeration with any approach to completeness the functions of legislation, including taxation, to rival legislatures is without precedent. In other constitutions the method adopted has usually been to specify exclusively the subjects allocated to one legislature and to assign to the other the whole of the unspecified residue." Now, apart from the fact that this scheme of allocation has no precedent elsewhere, the specific enumeration of powers of both the Federal as well as Provincial Legislatures, with the addition of a long concurrent list of subjects, is an invitation for trouble as the danger of overlapping and doubt are increased to a large extent. Sir Samuel Hoare, the Secretary of State for India, indeed admitted in the Committee stage of the India Bill, that owing to the sharp cleavage of opinion among the Hindus and Mussalmans in regard to the vesting of the residual power, this method of allocation had to be adopted in preference to a more logical method He said : " If it had been possible to have one list we should have been glad, but unfortunately, as in many of these Indian problems, when we came to apply to the actual facts what we desired we found it to be impossible. We found that Indian opinion was very definitely divided between, speaking generally, the Hindus who wish to keep the predominant power in the Centre, and the Moslems who wish to keep the predominant power in the Provinces The extent of that feeling made each of these communities look with the greatest suspicion at the residuary field, the Hindus demanding that the residuary field should remain with the Centre and the Moslems equally strongly demanding that the residuary field

should remain with the Provinces. My Honourable Friend will believe me when I say that the feeling was very deep and very bitter on this issue. We tried year after year, not only in the Joint Select Committee but also in the various Round Table Conferences, to bridge the difference, but the only bridge that we could find between these two diametrically opposite points of view was to have three lists, namely, the Federal List, the Provincial List, and the Concurrent List, each as exhaustive as we could make it, so exhaustive as to leave little or nothing for the residuary field. I believe that we have succeeded in that attempt and that all that is likely to go into the residuary field are perhaps some quite unknown spheres of activity that neither my Honourable Friend nor I can contemplate at this moment. We find that we have really exhausted the ordinary activities of government in the three other fields I agree with my Honourable Friend that it means complications. I believe that it also means the possibility of increased litigation."[1]

It is true that a simpler and more efficient method of distribution of powers could not be attempted, owing to the sharp difference of opinion that existed among the Hindu and Muslim delegates that attended the Round Table Conferences and the Joint Select Committee in regard to the allocation of the residuary powers. Judged from the standpoint of efficiency and simplicity, the scheme now adopted cannot be regarded as satisfactory.

Earl Loreburn, L.C., in the case of *Attorney-General for Ontario* v. *Attorney-General for Canada*[2] observed as follows with reference to the distribution of powers under the British North America Act, 1867. "Numerous points have arisen, and may hereafter arise, upon those provisions of the Act which draw the dividing line between what belongs to the Dominion or to the Province respectively. An exhaustive enumeration being unattainable (so infinite are the subjects of possible legislation), general terms are necessarily used in describing what either is to have, and with the use of general terms come the risk of some confusion, whenever a case arises in which it can be said that the power claimed falls within the description of what the Dominion is to have, and also within the description of what the Province is to have Such apparent overlapping is unavoidable, and the duty of a Court of Law is to decide in each particular case on which side of the line it falls in

[1] Official Reports, *House of Commons*, March 27, 1935 Volume 299, Columns 1928–29

[2] (1912) A.C 571.

view of the whole Statute." In describing the subjects of legislative power in a constitution where such powers are enumerated with reference to a particular legislature, general terms are necessarily used. In defining the content of any subject of power, difficulties sometimes present themselves. That difficulty will be all the greater when the enumeration of powers is carried out with reference not only to one legislature, Federal or Provincial, but to both, as in the case of the Indian Act. There is also the further complication of a concurrent field—very extensive indeed as it covers thirty-six subjects — in which two legislatures will be operating side by side All these tend to a multiplication of the points of inconsistency in legislation. One of the weaknesses inherent in Federalism is the danger of legislative acts being challenged as *ultra vires* in Courts of law. The scheme of distribution of powers adopted in the Indian Act is likely to accentuate rather than minimise that weakness. With these preliminary observations, we may proceed to examine the provisions which deal with the topic under consideration, in greater detail

Section 100 which deals with the subject-matter of Federal and Provincial Laws and Section 107 which relates to the inconsistency between Federal and Provincial or State Laws may be considered together

100. (1) Notwithstanding anything in the two next succeeding sub-sections, the Federal Legislature has, and a Provincial Legislature has not, power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule to this Act (hereinafter called the " Federal Legislative List ")

(2) Notwithstanding anything in the next succeeding sub-section, the Federal Legislature, and, subject to the preceding sub-section, a Provincial Legislature also, have power to make laws with respect to any of the matters enumerated in List III in the said Schedule (hereinafter called the " Concurrent Legislative List.")

(3) Subject to the two preceding sub-sections, the Provincial Legislature has, and the Federal Legislature has not, power to make laws for a Province or any part thereof with respect to any of the matters enumerated in List II in the said Schedule, (hereinafter called the " Provincial Legislative List ")

(4) The Federal Legislature has power to make laws with respect to matters enumerated in the Provincial Legislative List except for a Province or any part thereof.

These provisions embody in statutory form the recommendations made by the Joint Select Committee, in regard to the

respective legislative jurisdictions of the Federal and Provincial Legislatures and to the possibility of the overlapping of the entries in the three legislative lists As the authors of the report have observed: "We recommend, however, as some mitigation of the uncertainty arising from the inevitable risks of overlapping between the entries in the Lists, that the Act should provide that the jurisdiction of the Federal Legislature shall, notwithstanding anything in Lists II and III, extend to the matters enumerated in List I, and that the jurisdiction of the Federal Legislature under List III shall, notwithstanding anything in List II, extend to the matters enumerated in List III The effect of this will be that, in case of conflict between entries in List I and entries in List II, the former will prevail, and in case of conflict between entries in List III and entries in List II, the former will prevail, so far as the Federal Legislature is concerned "[1]

I had occasion to point out already, that Section 91 of the British North America Act, 1867, which deals with the legislative powers of the Dominion Parliament, while it vests in that Parliament all the residuary powers not allocated to the Provincial Legislatures by Section 92 of the Act, proceeds also to enumerate specifically twenty-nine subjects over which it shall have exclusive competence to enact laws There is, in fact, a double enumeration of powers, one with reference to the Dominion Parliament and the other with reference to the Provincial Parliament. It has been decided by the Privy Council with reference to the allocation of powers under the Canadian Act, that the legislation of the Parliament of the Dominion, so long as it strictly relates to subjects of legislation expressly enumerated in Section 91, is of paramount authority, even though it trenches upon matters assigned to the Provincial Legislatures by Section 92 A passage from the judgment of Lord Watson in the case of *Tennant* v *Union Bank of Canada*[2] may be cited in support of this proposition. He said in that case: "Statutory regulations with respect to the form and legal effect in Ontario, of warehouse receipts, which pass the property of goods without delivery, unquestionably relate to property and civil rights in that province, and the objection taken by the appellant to the provisions of the Bank Act would be unanswerable if it could be shown that, by the Act of 1867, the Parliament of Canada is absolutely debarred from trenching to any extent upon the matters assigned to the Provincial Legislature by Section 92. But Section 91 expressly declares that, 'notwithstanding

[1] *J P C Report*, Volume I, p. 144. [2] (1894) A C. 31 at p. 45.

anything in this act,' the exclusive legislative authority of Canada shall extend to all matters coming within the enumerated classes ; which plainly indicates that the legislation of that parliament, so long as it strictly relates to those matters, is to be of paramount authority. To refuse effect to the declaration would render nugatory some of the legislative powers specially assigned to the Canadian Parliament. For example, among the enumerated classes of subjects in Section 91, are ' patents of invention and Discovery ' and ' Copyrights ' It would be practically impossible to legislate upon either of these subjects without affecting the property and civil rights of individuals in the provinces."

The position so far as the legislative Acts of the Federal Legislature in regard to subjects of legislation specifically enumerated in List I is, that they are of paramount authority, exactly like the Legislative Acts of the Dominion Parliament coming within the enumerated subjects in Section 91 of the Canadian Act So long as the legislation enacted by the Federal Legislature can be supported as relating to any one or more of the matters coming within List I of the Seventh Schedule, that legislation will be of paramount authority, even though it might trench upon any of the matters assigned to the Provincial Legislatures under List II, or affects any subject matter of legislation in the concurrent field coming under List III That seems to be the real position, in view of the words occurring in Sub-Section 1, which provide that notwithstanding anything in the two next succeeding sub-sections, the Federal Legislature has, and the Provincial Legislature has not, power to make laws with respect to any of the matters enumerated in List I.

Another principle which the Canadian cases establish is, that it is within the competence of the Dominion Parliament to provide for matters which, though otherwise within the legislative competence of the Provincial Legislatures, are necessarily incidental to effective legislation of the Parliament of the Dominion upon a subject of legislation expressly enumerated in Section 91. *Attorney-General of Ontario* v. *Attorney-General for the Dominion*,[1] *Attorney-General for Ontario* v. *Attorney-General for the Dominion*.[2] In the same way, it would be within the competence of the Federal Legislature to provide for matters, which though otherwise within the competence of the Provincial Legislatures, are necessarily incidental to effective legislation of the Federal Legislature upon any of the matters coming within List I.

[1] (1894) A C 189 [2] (1896) A C 348

..., coming to the concurrent list of subjects, enumerated in List III, the following principles may be gathered by an examination of the language of Sub-section (2). The competency of the Federal Legislature to enact laws in respect of any of the matters in List III is not in any way affected by the powers of the Provincial Legislature to enact laws in List II ; that is to say, such federal legislation, so long as it relates to any of the matters in the concurrent list, will be operative even though it might overlap any of the subjects in List II. That appears to be the effect of the words " notwithstanding anything in the next succeeding sub-section," which occurs at the beginning of the sub-section The competency of the Provincial Legislature to enact laws in regard to matters in List III, is subject to the paramount authority of the Federal Legislature to enact laws in List I , that is to say, Provincial Legislatures should refrain from legislating on subjects in the concurrent field where there is overlapping with List I. That construction appears to follow from the words, " subject to the preceding sub-section," a Provincial Legislature also has the power to make laws with respect to any of the matters in List III

The position of the Provincial Legislature to enact laws in regard to matters coming within the purview of List II is stated in sub-section (3) As the words of that sub-section indicate, the exclusive powers of the Provincial Legislatures to enact laws with regard to the subject-matters of Legislation in List II, is subject to the two preceding sub-sections.

Sub-section (4) relates to the powers of the Federal Legislature to pass laws in regard to matters enumerated in the Provincial Legislative List for Chief Commissioners' Provinces, or tribal areas, i e , for areas other than Governor's Provinces or any part thereof.

107. (1) If any provision of a Provincial Law is repugnant to any provision of a Federal Law which the Federal Legislature is competent to enact or to any provision of an existing Indian Law with respect to one of the matters enumerated in the Concurrent Legislative List, then, subject to the provisions of this section, the Federal Law, whether passed before or after the Provincial Law, or, as the case may be, the existing Indian Law, shall prevail and the Provincial Law shall, to the extent of the repugnancy, be void.

(2) Where a Provincial Law with respect to one of the matters enumerated in the Concurrent Legislative List contains any provision repugnant to the provisions of an earlier Federal

Law or an existing Indian Law with respect to that matter, then, if the Provincial Law, having been reserved for the consideration of the Governor-General or for the signification of His Majesty's pleasure, has received the assent of the Governor-General or of His Majesty, the Provincial Law shall in that Province prevail, but nevertheless the Federal Legislature may at any time enact further legislation with respect to the same matter.

Provided that no Bill or amendment for making any provision repugnant to any Provincial Law, which, having been so reserved, has received the assent of the Governor-General or of His Majesty, shall be introduced or moved in either Chamber of the Federal Legislature without the previous sanction of the Governor-General in his discretion.

(3) If any provision of a law of a Federated State is repugnant to a Federal Law which extends to that State, the Federal Law, whether passed before or after the law of the State, shall prevail and the law of the State shall, to the extent of the repugnancy, be void.

Sub-section (1) deals with the question of repugnancy of any provision of a Provincial Law and (1) any provision of a Federal Law which the Federal Legislature is competent to enact, or (2) any provision of an existing Indian Law which relates to any of the matters coming within the Concurrent Legislative List The Sub-section lays down that in case of such repugnancy subject to the provisions of the section, the Federal Law whether it was passed prior to or after the Provincial Law, or an existing Indian Law, shall prevail over a Provincial Law, to the extent to which there is a conflict

Sub-section (2) deals with the question of repugnancy arising with reference to competing legislations in regard to matters coming within the Concurrent List of subjects. The provisions of this sub-section, in fact, modify to some extent the general rule enunciated in Sub-section (1) so far as it relates to repugnancy between competing legislations in the Concurrent field ; as, under certain circumstances, to be mentioned presently, even Provincial Legislation will prevail over Federal Legislation in a Province. What this sub-section enacts is this. If a Provincial Law with respect to any of the matters coming within the Concurrent List of subjects is repugnant to the provisions of an earlier Federal Law or any existing Indian Law with respect to that matter, then the Provincial Law, notwithstanding the repugnancy, will prevail, provided that the Provincial Law having been reserved for the consideration of the Governor-

General or for the signification of His Majesty's pleasure, has received the assent of the Governor-General or of His Majesty. But the hands of the Federal Legislature to pass any law with respect to the same matter in the future is not tied. The Federal Legislature will, nevertheless, be competent to pass further legislation with respect to the same matter, subject to this qualification that no bill or amendment for the making of any provision repugnant to any Provincial Law, which having been reserved as hereinbefore mentioned, has received the assent of the Governor-General or of His Majesty, shall be introduced or moved in either Chamber of the Federal Legislature, without first obtaining the sanction of the Governor-General thereto. Such sanction may be granted or withheld by him in his discretion.

Sub-section (3) is a very important provision. A detailed comment on this sub-section will be made under Section 101.

101. Nothing in this Act shall be construed as empowering the Federal Legislature to make laws for a Federated State otherwise than in accordance with the Instrument of Accession of that State and any limitations contained therein.

Under Section 6 (2) of the Act, when a Ruler executes the Instrument of Accession, he has to specify the matters which he accepts as matters with respect to which the Federal Legislature may make laws for his State, and the limitations, if any, to which the power of the Federal Legislature to make laws for his State, and the exercise of the executive authority of the Federation in his State, are respectively to be subject. Section 101 makes it clear, beyond doubt, that when any question arises as to the power of the Federal Legislature to enact laws with regard to any matter in a State, the Instrument of Accession has to be looked into to ascertain whether that power has been expressly ceded by that Instrument or not. Moreover the position of the Indian States in regard to residuary legislation will vitally differ from that of the British Indian Provinces. The British Indian Provincial Legislatures, under the new Act, can enact competent legislation, firstly with regard to subjects which are expressly mentioned in List II of the Seventh Schedule and secondly in regard to the subjects enumerated in List III of the same Schedule, though with respect to the latter, the Federal Legislature will have concurrent powers of legislation. In regard to matters comprising the residue not coming within any of the three lists of the Seventh Schedule, the Governor-General will be the sole authority to decide whether the legislative control over such matters should be entrusted to the

Provincial or the Federal Legislature. In the case of an Indian State, however, it is perfectly obvious that in all matters except those which have been expressly accepted by that State as Federal, the State retains its original powers intact. In other words, the residuary powers necessarily remain with the States themselves. The position of the Indian States in this respect will resemble that of the Australian States under the Commonwealth of Australia Constitution Act, where, the Commonwealth Legislature can enact legislation only in regard to certain enumerated subjects, while the residual powers continue to be vested in the constituent States themselves. In fact Section 107 of the Commonwealth of Australia Constitution Act provides that " every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth or as at the admission or establishment of the State, as the case may be."

The Privy Council have ruled with reference to the Australian Constitution that in the case of Commonwealth Legislation intended to be operative in the constituent States, the " burden rests on those who affirm that the capacity to pass these Acts was put within the powers of the Commonwealth Parliament to show that this was done " *Attorney-General for the Commonwealth of Australia* v. *Colonial Sugar Refining Co., Ltd.*[1] This rule of onus is likely to be adopted by the Privy Council when any question arises as to whether any legislation enacted by the Federal Legislature which is contended as applicable to any State is really applicable or not. The onus in such a case will rest upon the person who contends that such legislation is applicable to any State to show that the Federal Legislative List, read in conjuction with the Instrument of Accession of that State, really gives the Federal Legislature power to enact such legislation operative in that State.

There is one other matter of great importance which requires to be noticed. Section 107, Sub-section (3) provides that if any provision of a law of a Federated State is repugnant to a Federal Law which extends to that State, the Federal Law whether passed before or after the law of the State, shall prevail and the law of the State shall, to the extent of the repugnancy, be void. The effect of this provision appears to be that even in regard to matters which have been accepted by the States as federal

[1] (1914) A C. 237, p. 255.

subjects in their Instruments of Accession, they will continue to retain the right to enact legislation, with the proviso that when the Federal Legislature chooses to enter the field and passes any enactment which is within its competence, and which is in conflict with any State Legislation upon the same matter, the Federal Law will prevail to the extent of the repugnancy. State Law existing at the time of the accession of a State even on a Federal subject, will continue to have full validity until the Federal Legislature has chosen to exercise its power on the same subject, and such legislation is repugnant to State Legislation.

Section 8 (2) of the Act provides that the executive authority of the Ruler of a Federated State shall continue to be exercisable in that State with respect to matters with respect to which the Federal Legislature has power to make laws for that State except in so far as the executive authority of the Federation becomes exercisable in the State to the exclusion of the executive authority of the Ruler by virtue of a Federal Law. This provision reinforces the conclusion that, notwithstanding the acceptance by the Indian States of any of the subjects in the Federal Legislative List as subjects in regard to which the Federal Legislature can enact valid legislation applicable to State territory, the States not only retain the right of concurrent legislation in regard to those matters, subject, of course, to the rule of repugnancy already mentioned, but also retain the power of exercising executive authority in regard to those matters, subject to the rule that such executive authority may be displaced in regard to any matter by that of the Federation in view of the enactment of Federal Legislation in regard to it.

It would be useful at this point to consider the position of the constituent States under the Australian Constitution in regard to concurrent powers of legislation, as the principles which have been recognized as applicable to them in regard to this matter, are, it would seem, generally applicable to the Indian States also. The analogy seems very close indeed. Before considering how far the Australian analogy is applicable to the Indian States, it is necessary to have some idea of the distribution of legislative powers under the Commonwealth of Australia Constitution Act. The Commonwealth Parliament under the Australian Constitution Act possesses two kinds of powers, one exclusive, and the other concurrent. Section 52 of that Constitution provides that the Commonwealth Parliament shall have exclusive power over (1) the seat of government of the Commonwealth, and all places acquired by the Commonwealth

for public purposes, (2) matters relating to any department of the public service, the control of which is by the Constitution transferred to the Executive Government of the Commonwealth, (3) other matters which are declared by the Constitution to be within the exclusive power of the Commonwealth. The " other matters " which are expressly stated to be within the exclusive power of the Commonwealth are contained in Sections 90 and 111. Section 90 relates to the exclusive power of the Commonwealth to impose duties of customs and excise and to grant bounties on the production or export of goods ; and Section 111 deals with the exclusive jurisdiction of the Commonwealth over territory surrendered to it by any State. Section 51 of the Constitution Act is the important section which makes the main grant of powers to the Commonwealth Parliament. It enumerates thirty-nine heads of power and of these some are exclusive by necessary implication, such as " borrowing money on the public credit of the Commonwealth," " fisheries in Australian waters beyond territorial limits," " the service and execution throughout the Commonwealth of State process and judgments," and " the relations of the Commonwealth with the Islands of the Pacific."[1] As Dr Donald Kerr has pointed out in his treatise on the *Law of the Australian Constitution*, at page 10, there are two other cases in regard to which the power of the Commonwealth Parliament by necessary implication is exclusive, " namely by the combined effect of Section 51 (VI) and Section 114, Naval and Military Defence and Forces, and the combined effect of Section 51 (XII) and Section 115, Coinage." With regard to the other heads of power enumerated in Section 51, the powers of the Commonwealth Parliament are concurrent with those of the States For instance, banking other than state banking, patents and trade marks, copyrights, bills of exchange and promissory notes, divorce and matrimonial causes, are some of the heads of power enumerated in Section 51, in regard to which the legislative powers of the Commonwealth Parliament are concurrent with those of the States, that is to say, the powers of the State Parliaments are not affected until the Commonwealth Parliament occupies the field. Section 109 enunciates the rule that when a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

Now, we might proceed to consider briefly how far the position of the Australian States in regard to the exercise of

[1] Quick and Garran *Annotated Constitution of the Australian Commonwealth*, p 656

concurrent powers provides a parallel to the corresponding exercise of concurrent powers by the Indian States under the Government of India Act, 1935. As I have already pointed out, the acceptance of the States of any of the heads of power in the Federal Legislative List does not prohibit the States from continuing to legislate upon them. Nor would existing laws bearing upon those topics in the States be wiped out. They will continue to have full operation until the Federal Legislature enters the field and choses to legislate. In that event, the law of the State would have to yield place to the Federal Law to the extent to which it is in conflict with the latter. This is precisely the position of the Australian States in regard to most of the heads of power which are enumerated in Section 51 of the Australian Act which are regarded as concurrent. When we examine Items 1 to 47 in the Federal Legislative List, as they are the items to which the States will be asked to adhere if they want to enter the Federation, we find that some of the items of power are by necessary implication exclusive powers, while several others are concurrent powers. As examples of the former may be cited His Majesty's Naval, Military and Air Forces borne on the Indian establishment (Item 1), External affairs (Item 3), Public Debt of the Federation (Item 6), Federal Public Services and Federal Public Service Commission (Item 8). As examples of the latter may be mentioned copyright, inventions, designs, trademarks and merchandise marks (Item 27), Regulation of Labour and safety in mines and oil fields (Item 35) If, for instance, in a State there is legislation in regard to the regulation of labour and safety in mines already in existence at the time of its entry into Federation, it will continue to have full operation until the Federal Legislature enacts a law intended to apply to that State in regard to the same matter and such legislation is in conflict with State Legislation, in which case, Federal Legislation will prevail over State Legislation. The State will also have power to enact further legislation in regard to any Federal subject, subject to the rule of repugnancy.

102. (1) Notwithstanding anything in the preceding sections of this chapter, the Federal Legislature shall, if the Governor-General has in his discretion declared by Proclamation (in this Act referred to as a " Proclamation of Emergency ") that a grave emergency exists whereby the security of India is threatened, whether by war or internal disturbance, have power to make laws for a Province or any part thereof with respect to any of the matters enumerated in the Provincial Legislative List :

Provided that no Bill or amendment for the purposes aforesaid shall be introduced or moved without the previous sanction of the Governor-General in his discretion, and the Governor-General shall not give his sanction unless it appears to him that the provision proposed to be made is a proper provision in view of the nature of the emergency.

(2) Nothing in this section shall restrict the power of a Provincial Legislature to make any law which under this Act it has power to make, but if any provision of a Provincial Law is repugnant to any provision of a Federal Law which the Federal Legislature has under this section power to make, the Federal Law, whether passed before or after the Provincial Law, shall prevail, and the Provincial Law shall to the extent of the repugnancy, but so long only as the Federal Law continues to have effect, be void.

(3) A Proclamation of Emergency—

(*a*) may be revoked by a subsequent Proclamation ;

(*b*) shall be communicated forthwith to the Secretary of State and shall be laid by him before each House of Parliament ; and

(*c*) shall cease to operate at the expiration of six months, unless before the expiration of that period it has been approved by Resolutions of both Houses of Parliament.

(4) A law made by the Federal Legislature which that Legislature would not but for the issue of a Proclamation of Emergency, have been competent to make shall cease to have effect on the expiration of a period of six months after the Proclamation has ceased to operate, except as respects things done or omitted to be done before the expiration of the said period.

This section makes specific provision authorizing the invasion by the Federal Legislature of the Provincial Legislative field in a case of grave emergency, whereby the security of India is threatened, whether by war or internal disturbance. That such a power should reside in the Federal Legislature when the national life of the country is placed in grave peril by war, is undoubted. Though no express provision, similar to the one now under consideration, occurred in either the Canadian or the Australian Act, in both these countries during the war, the powers of the Central Legislature received so wide an interpretation at the hands of the Courts, that the two countries behaved more like unitary rather than Federal States. This is really an interesting matter, and I shall have more to say about it later. Whether or not such extraordinary powers should exist in the Central Legislature even in regard to an internal disturbance

also is, however, open to argument. The power to declare an emergency is placed by this section in the hands of the Governor-General, and he will be the sole authority to determine whether any internal disturbance is of so grave and widespread a character, as to require the assumption of powers which would have the consequence of interfering with the autonomy of the Provinces.

Clause (*c*) of Sub-section (3) provides that a Proclamation of Emergency will cease to operate at the expiration of six months, unless before the expiration of that period it has been approved by resolutions of both Houses of Parliament. If a Proclamation of Emergency is approved by Parliament before the expiry of six months, the period of emergency can be indefinitely prolonged, that is to say, it can be continued, until the Governor-General chooses to revoke it under Clause (*a*) of Sub-section (3). The wording of this provision shows that the intention behind it is, that the Governor-General cannot on his own responsibility declare a period of emergency to be effective beyond a period of six months, and in the absence of Parliamentary sanction, a Proclamation of Emergency will automatically expire at the end of six months. If, however, Parliament approves of the proclamation, before the expiry of six months, the period of emergency can be made to continue until the Governor-General otherwise directs.

We may now consider the position under the British North America Act, 1867, and the Commonwealth of Australia Constitution Act, 1900, so far as the powers of the Central Parliament are concerned in a grave national crisis like war.

In *Fort Frances Pulp and Power Company, Ltd*, v. *Manitoba Free Press Co., Ltd, and others*,[1] the question that arose for consideration was whether the Canadian War Measures Act, 1914, and Orders in Council made thereunder, during the War, for controlling throughout Canada the supply of newsprint paper by manufacturers and its price, as also a Dominion Statute passed after the cessation of hostilities for continuing the control until the Proclamation of Peace, with power to conclude matters then pending, were *intra vires* the Dominion Parliament. The contention was that the impugned legislations trenched upon property and civil rights in the Province, which was a matter exclusively within the competence of a Provincial Legislature, and were therefore *ultra vires*. It was held by the Privy Council rejecting this contention that the Dominion Parliament has an implied power, for the safety of

[1] (1923) A C 695.

the Dominion as a whole, to deal with a sufficiently great emergency, such as that arising from war, although in so doing it trenched upon property and civil rights in the Province, a sphere normally allotted to a Provincial Legislature. Viscount Haldane, delivering the judgment of the Privy Council, observed at pages 703-705, as follows: "It is clear that in normal circumstances the Dominion Parliament could not have so legislated as to set up the machinery of control over the paper manufacturers which is now in question The recent decision of the Judicial Committee in the *Board of Commerce Case*[1] as well as earlier decisions, show that as the Dominion Parliament cannot ordinarily legislate so as to interfere with property and civil rights in the Provinces, it could not have done what the two Statutes under consideration purport to do had the situation been normal But it does not follow that in a very different case, such as that of sudden danger to social order arising from the outbreak of a great war, the Parliament of a Dominion cannot act under other powers, which may well be implied in the Constitution. The reasons given in the *Board of Commerce Case* recognize exceptional cases where such a power may be implied. In the event of war, when the national life may require for its preservation the employment of every exceptional means, the provision of peace, order, and good government for the country as a whole may involve effort on behalf of the whole nation, in which the interests of individuals may have to be subordinated to that of the community in a fashion which requires Section 91 to be interpreted as providing for such an emergency. . . . That the basic instrument on which the character of the entire constitution depends should be construed as providing for such Centralized power in an emergency situation follows from the manifestation in the language of the Act of the principle that the instrument has among its purposes to provide for the State regarded as a whole, and for the expression and influence of its public opinion as such. This principle of a power so implied has received effect also in countries with a written and apparently rigid constitution such as the United States, where the strictly federal character of the national basic agreement has retained the residuary powers not expressly conferred on the Federal Government for the component States. The operation of the scheme of interpretation is all the more to be looked for in a constitution such as that established by the British North America Act, where the residuary powers are given to the Dominion Central Government, and the

[1] (1922) 1 A C. 191.

preamble of the Statute declares the intention to be that the Dominion should have a constitution similar in principle to that of the United Kingdom."

The Australian Constitution, like that of the United States, is more federal than the Canadian Constitution. In fact, the Commonwealth Parliament is a Parliament of enumerated powers, all the residuary powers being vested in the States. But, even so, during the Great War, the High Court of the Commonwealth of Australia interpreted the defence power of the Commonwealth in such a wide manner, that it ruled that the Parliament of the Commonwealth, " could itself make any laws whatever, or authorize the executive to make any regulations whatever, unless they could be plainly shown to have no possible bearing on the military preparedness of the nation."[1]

In *Farey* v. *Burvett*[2] it was held by Griffith C J , and Barton, Isaacs, Higgins and Powers J.J , (Gavan Duffy and Rich J.J. dissenting), that under the defence power of the Commonwealth Section 51 (vi) it was competent for the Commonwealth to fix the prices of necessities, within the limits of locality, during the War. The validity of a Commonwealth regulation fixing the highest price which might be charged for bread in the suburbs of Melbourne was upheld in this case. Griffith C J. said : " The first question then is, what is the nature and extent of the power conferred by pl. VI ? It is contended by the appellant that the word ' defence,' as there used, must bear a single and uniform meaning at all times, in the sense that an act which is not authorized to be done in time of peace cannot be authorized in time of war, and that any wider meaning of the word is excluded by the context No one disputes that an attempt of the Commonwealth Parliament to fix the price of food in time of peace would be a trespass on the reserved power of the States. It is contended that it is, therefore, equally a trespass in time of war As to the suggested limitation by the context, the words ' naval ' and ' military ' are not words of limitation, but rather of extension, showing that the subject-matter includes all kinds of warlike operations. The concluding words cannot have any restricting effect, unless they are read as an exhaustive definition of all that may be done, which is an impossible construction. In my opinion, the word ' defence,' of itself, includes all acts of such a kind as may be done in the United Kingdom, either under the authority of the Parliament or under the Royal Prerogative, for the purpose of the defence

[1] *Studies in the Australian Constitution* Edited by G V Portus, p 32
[2] (1916) 21 C L R. 433 cited in Keir, pp 163–164

of the realm, except so far as they are prohibited by other provisions of the constitution. This then is the subject-matter with respect to which power to legislate is given. It includes preparation for war in time of peace, and any such action in time of war as may conduce to the successful prosecution of the war and defeat of the enemy. This is the constant and invariable meaning of the term It is obvious, however, that the question whether a particular legislative act is within it may fall to be determined upon very different considerations in time of war and time of peace."

103. If it appears to the Legislatures of two or more Provinces to be desirable that any of the matters enumerated in the Provincial Legislative List should be regulated in those Provinces by Act of the Federal Legislature, and if resolutions to that effect are passed by all the Chambers of those Provincial Legislatures, it shall be lawful for the Federal Legislature to pass an Act for regulating that matter accordingly, but any Act so passed may, as respects any Province to which it applies, be amended or repealed by an Act of the Legislature of that Province.

With this provision may be compared Section 51 (xxxvii) of the Commonwealth of Australia Constitution Act, 1900, which authorizes the Commonwealth Parliament to enact laws with respect to " Matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law."

104. (1) The Governor-General may by public notification empower either the Federal Legislature or a Provincial Legislature to enact a law with respect to any matter not enumerated in any of the Lists in the Seventh Schedule to this Act, including a law imposing a tax not mentioned in any such list, and the executive authority of the Federation or of the Province, as the case may be, shall extend to the administration of any law so made, unless the Governor-General otherwise directs

(2) In the discharge of his functions under this section the Governor-General shall act in his discretion.

Though an endeavour has been made to bring within the three legislative lists practically all the subject-matters of legislation, there will necessarily be a residue not contemplated and covered by the classification so made This section is intended to deal with that residuary field. With reference to this question, the Report of the Joint Select Committee contains the following observations : " Recognizing the strength

of Indian feeling on this matter we are unwilling to disturb the compromise embodied in the White Paper, the effect of which is to empower the Governor-General acting in his discretion to allocate to the Centre or Province as he may think fit the right to legislate on any matter which is not covered by the enumeration in the Lists. We are conscious of the objections to this proposal It is inconsistent with our desire to see a statutory delimitation of legislative jurisdictions ; and the power vested in the Governor-General necessarily empowers him not merely to allocate an unenumerated subject, but also, in so doing to determine conclusively that a given legislative project is not, in fact, covered by the enumeration as it stands—a question which might well be open to argument, though, we assume, that in practice the Governor-General would seek an advisory opinion from the Federal Court "[1]

105. (1) Without prejudice to the provisions of this Act with respect to the legislative powers of the Federal Legislature, provision may be made by Act of that Legislature for applying the Naval Discipline Act to the Indian naval forces and, so long as provision for that purpose is made either by an Act of the Federal Legislature or by an existing Indian law, the Naval Discipline Act as so applied shall have effect as if references therein to His Majesty's navy and His Majesty's ships included references to His Majesty's Indian navy and the ships thereof, subject however—

(*a*) in the application of the said Act to the forces and ships of the Indian navy and to the trial by court martial of officers and men belong thereto, to such modifications and adaptations if any, as may be, or may have been, made by the Act of the Federal or Indian Legislature to adapt the said Act to the circumstances of India, including such adaptations as may be, or may have been, so made for the purpose of authorizing or requiring anything which under the said Act is to be done by or to the Admiralty, or the Secretary of the Admiralty, to be done by or to the Governor-General, or some person authorized to act on his behalf , and

(*b*) in the application of the said Act to the forces and ships of His Majesty's navy other than those of the Indian navy, to such modifications and adaptations as may be made, or may have been made under Section sixty-six of the Government of India Act, by His Majesty in Council for the purpose of regulating the relations of those forces and ships to the forces and the ships of the Indian navy.

[1] *J P C Report*, Volume I, p 144

(2) Notwithstanding anything in this Act or in any Act of any Legislature in India, where any forces and ships of the Indian navy have been placed at the disposal of the Admiralty, the Naval Discipline Act shall have effect as if references therein to His Majesty's navy and His Majesty's ships included references to His Majesty's Indian navy and the ships thereof, without any such modifications or adaptations as aforesaid

There is already on the Statute book an Act passed in the year 1934 (Act 34 of 1934), providing for the application of the Naval Discipline Act (29 and 30 Vict., c 109), to the Indian navy.

106. (1) The Federal Legislature shall not by reason only of the entry in the Federal Legislative List relating to the implementing of treaties and agreements with other countries have power to make any law for any Province except with the previous consent of the Governor, or for a Federated State except with the previous consent of the Ruler thereof.

(2) So much of any law as is valid only by virtue of any such entry as aforesaid may be repealed by the Federal Legislature and may, on the treaty or agreement in question ceasing to have effect, be repealed as respects any Province or State by a law of that Province or State.

(3) Nothing in this section applies in relation to any law which the Federal Legislature has power to make for a Province or, as the case may be, a Federated State, by virtue of any other entry in the Federal or the Concurrent Legislative List as well as by virtue of the said entry.

One of the matters specified in item (3) of the Federal Legislative List is the implementing of treaties and agreements with other countries. This section is intended to make it clear, that the provision in the Federal Legislative List aforesaid does not enable the Federal Legislature to pass laws implementing treaties and agreements which may be concluded with other countries, except with the consent of the constituent units of the Federation viz , the Provinces and the Federated States, in so far as the law proposed to be enacted is not confined to matters which are within the competence of the Federal Legislature. The object of this provision is, that international agreements which pertain to services within the field of the units, that is to say, activities which in the Provinces would be provincial services, and in the Indian States entirely internal activities with respect to which they have not federated, should not be forced upon the units, without their consent, as the administration of these services would be in the hands of those units.

Of course, there is the other view that this provision might well prevent uniformity of legislation upon matters which are of vital importance to the country as a whole, if any of the units prove refractory in the matter of the adoption of uniform laws.

With this section may be compared the provision contained in Section 132 of the British North America Act which runs thus : " The Parliament and Government of Canada shall have all powers necessary or proper for performing the obligations of Canada or of any Province thereof as part of the British Empire towards foreign countries arising under treaties between the Empire and such foreign countries." The scope and effect of this provision in the Canadian Act came up for consideration in *In re The Regulation and Control of Aeronautics in Canada.*[1] The case arose out of the following facts. After the close of the Great War, the Supreme Council of the Peace Conference which met at Paris, appointed a Commission to draw up a convention for regulating aerial navigation. The convention, so prepared, and dated October 13, 1919, was signed by the representatives of the allied and associated powers including Canada, and was also ratified by His Majesty on behalf of the British Empire on June 1, 1922. The Dominion of Canada in order to implement her obligations as a part of the British Empire under the convention, which was then in the stage of preparation, enacted the Air Board Act, c 11 of the Statutes of Canada, 1919 (1st session) This was later on amended and was consolidated in the Revised Statutes of Canada, 1927, as c 43, under the title of the Aeronautics Act. It is important to notice, however, that the Act did not by its reproduction in the Revised Statutes take effect as a new law In pursuance of the Air Board Act, the Governor-General in Council issued detailed " Air Regulations," on December 31, 1919, and these, with certain amendments were in force at the time the case came up for consideration. Under the provisions of the National Defence Act, 1922, the Minister of National Defence, thereafter exercised the functions of the Air Board. These Statutes and regulations aforesaid, made provision for the regulation and control of aerial navigation in Canada including its territorial waters Section 4 of the Aeronautics Act in particular purported to give the Minister of National Defence the general power to regulate and control, subject to the approval of the Governor-General in Council, aerial navigation over the whole of Canada including the power of regulating and the licensing of pilots, aircraft, aerodromes and commercial services ; the conditions under which aircraft

[1] (1932) A C 54

might be used for goods, mails, and passengers or their carriage over any part of Canada, the prohibition (absolutely or conditionally) of flying over prescribed areas; aerial routes, and provision for safe and proper flying The question that arose for consideration was, whether the provisions made in regard to the control of aeronautics in Canada by the Statutes and regulations hereinbefore mentioned, were within the competence of the Dominion legislature, or were so related to property and civil rights in the province, or to matters of a local nature, as to come within the exclusive legislative jurisdiction of the Provincial Legislatures. On behalf of the Dominion of Canada it was contended that the legislative control of aerial navigation in Canada could be supported with reference to certain heads of power which were within the exclusive sphere of the Dominion Parliament under Section 91, like "navigation and shipping," "postal services," "trade and commerce," and "beacons." It was further contended, that in view of the fact that the enactments in question were made for implementing the obligations of Canada as a part of the British Empire under the aerial convention, they attracted to themselves the provisions contained in Section 132 which placed such legislation under the competence of the Dominion Parliament. With reference to the argument based upon Section 132, Lord Sankey L.C. observed at page 74, as follows: "They consider the governing section to be Section 132, which gives to the Parliament and Government of Canada all powers necessary or proper for performing the obligations towards foreign countries arising under treaties between the Empire and such foreign countries. As far as Section 132 is concerned, their Lordships are not aware of any decided case which is of assistance on the present occasion. It will be observed, however, from the very definite words of the section, that it is the Parliament and Government of Canada who are to have all powers necessary or proper for performing the obligations of Canada, or any Province thereof. It would, therefore, appear to follow that any convention of the character under discussion necessitates Dominion Legislation in order that it may be carried out." The Privy Council, accordingly ruled that the whole field of legislation in relation to aerial navigation belonged to the Dominion, and reversed the judgment of the Supreme Court of Canada which had reached a conclusion adverse to the Dominion upon this matter.

It was pointed out by the Privy Council in the case of *Regulation and Control of Radio Communication in Canada in re*,[1] that

[1] (1932) A C. 304.

Section 132 of the British North America Act, applied only to Dominion Legislation undertaken to implement treaties entered into by the British Empire as an entity with foreign countries, and that it did not cover legislation intended to implement conventions which Canada had agreed to as an independent unit. The question which arose for consideration in this case was, whether Dominion Legislation enacted for the purpose of the regulation and control of radio communication in Canada, in pursuance of the agreement come to in connection with that subject at the International Radio Telegraph Convention, 1927, between the Governments of about eighty countries, including Canada, was validly passed. The Privy Council held that Section 132 did not apply to the case; but that the legislation was nevertheless valid, as the undertaking of broadcasting was an undertaking "connecting the Province and extending beyond the limits of the Province," and as broadcasting also came within the description of "Telegraphs," matters which are within the exclusive competence of the Dominion Parliament under the British North America Act.

In the recent case of *Attorney-General for Canada* v *Attorney-General for Ontario and others*,[1] the principle enunciated in the Radio Case that Section 132 of the British North America Act did not apply to obligations undertaken by Canada as an independent unit, by virtue of her new status as an international person, but only to obligations undertaken under a treaty by the British Empire as a whole with foreign countries was affirmed and applied. The validity of certain acts passed by the Dominion Parliament in 1934 and 1935 to carry out the conventions adopted by the International Labour Organization of the League of Nations in accordance with the Labour part of the Treaty of Versailles of June 28, 1919, was challenged in this case. It was contended by the Provinces that the legislative enactments in question, affected property and civil rights, a topic of legislation which belonged to the Provinces under the British North America Act For the Dominion of Canada, it was contended, *inter alia*, that the legislation could be justified under Section 132 of the British North America Act. The Privy Council refused to accept the contention of the Dominion founded upon Section 132, mainly upon the ground that the obligations arising under the Labour conventions did not arise under treaties contracted by Canada as a part of the British Empire, and that the co-operation of the Provinces was therefore necessary to make the impugned statutes legally effective

[1] (1937) A C. 326.

as the sphere of legislation covered by them belonged to the Provinces. Lord Atkin, in delivering the judgment of the Privy Council, has observed at pages 353-354 as follows : " It must not be thought that the result of this decision is that Canada is incompetent to legislate in performance of treaty obligations In totality of legislative powers, Dominion and Provincial together, she is fully equipped But the legislative powers remain distributed, and if in the exercise of her new functions derived from her new international status Canada incurs obligations they must, so far as legislation be concerned, when they deal with provincial classes of subjects, be dealt with by the totality of powers, in other words by co-operation between the Dominion and the Provinces. While the ship of State now sails on larger ventures and into foreign waters she still retains the water-tight compartments which are an essential part of her original structure."

The effect of Section 106 of the Government of India Act, 1935, is, that while it would be perfectly competent for the Federal Legislature to enact legislation to implement obligations undertaken by the Indian Federation under treaties or agreements entered into by it with other countries, so long as such legislation relates to a topic or topics coming within the ambit of the powers committed to the Federal Legislature, it would be necessary for that legislature to secure the previous consent of the Governor or the Ruler of the Federated State, before it can validly enact legislation which trenches upon the legislative field of that Province or that Federated State.

The Privy Council case already referred to, *Attorney-General for Canada* v. *Attorney-General for Ontario and others*[1] shows, that within the British Empire, there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires Legislative action. As Lord Atkin has observed at pages 347-348 in this case : " It will be essential to keep in mind the distinction between (1) the formation, (2) the performance, of the obligations constituted by a treaty, using that word as comprising any agreement between two or more sovereign States. Within the British Empire there is a well established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action. Unlike some other countries, the stipulations of a treaty duly ratified do not within the Empire,

[1] (1937) A C 326.

by virtue of the treaty alone, have the force of law. If the national executive, the government of the day, decide to incur the obligations of a treaty which involve alteration of law they have to run the risk of obtaining the assent of Parliament to the necessary statute or statutes. To make themselves as secure as possible they will often in such cases before final ratification seek to obtain from Parliament an expression of approval. But it has never been suggested, and it is not the law, that such an expression of approval operates as law, or that in law it precludes the assenting Parliament, or any subsequent Parliament, from refusing to give its sanction to any legislative proposals that may subsequently be brought before it. Parliament, no doubt, as the Chief Justice points out, has a constitutional control over the executive : but it cannot be disputed that the creation of the obligations undertaken in treaties and the assent to their form and quality are the function of the executive alone. Once they are created, while they bind the State as against the other contracting parties, Parliament may refuse to perform them and so leave the State in default. In a unitary State whose legislature possesses unlimited powers the problem is simple. Parliament will either fulfil or not treaty obligations imposed upon the State by its executive. The nature of the obligations does not affect the complete authority of the Legislature to make them law if it so chooses. But in a State where the Legislature does not possess absolute authority, in a Federal State where Legislative authority is limited by a constitutional document, or is divided up between different legislatures in accordance with the classes of subject-matter submitted for legislation, the problem is complex. The obligations imposed by treaty may have to be performed, if at all, by several legislatures , and the executive have the task of obtaining the legislative assent not of the one Parliament to whom they may be responsible, but possibly of several Parliaments to whom they stand in no direct relation. The question is not how is the obligation formed, that is the function of the executive , but how is the obligation to be performed, and that depends upon the authority of the competent legislature or legislatures."[1]

[1] The position is different in Australia. There, the authority of the Commonwealth Parliament to implement legislatively the treaties made by the Federal Executive with other countries under the federal power of "external affairs" [Sec 51 (xxix)] has been held by the High Court of Australia to be one of wide amplitude. *The King* v *Burgess Ex parte Henry* (1936) 55 C L R 608, Mr J D Holmes deals with this decision in his article in the *Canadian Bar Review* for June 1937, at pp 497-501

VII. *Restrictions on Legislative Powers*

The second topic to be considered will be the restrictions on legislative powers.

108. (1) Unless the Governor-General in his discretion thinks fit to give his previous sanction, there shall not be introduced into, or moved in, either Chamber of the Federal Legislature, any Bill or amendment which—

(*a*) repeals, amends or is repugnant to any provisions of any Act of Parliament extending to British India, or

(*b*) repeals, amends or is repugnant to any Governor-General's or Governor's Act, or any ordinance promulgated in his discretion by the Governor-General or a Governor, or,

(*c*) affects matters as respects which the Governor-General is, by or under this Act, required to act in his discretion; or

(*d*) repeals, amends or affects any Act relating to any police force; or

(*e*) affects the procedure for criminal proceedings in which European British subjects are concerned; or

(*f*) subjects persons not resident in British India to greater taxation than persons resident in British India or subjects companies not wholly controlled and managed in British India to greater taxation than companies wholly controlled and managed therein, or

(*g*) affects the grant of relief from any Federal tax on income in respect of income taxed or taxable in the United Kingdom.

(2) Unless the Governor-General in his discretion thinks fit to give his previous sanction, there shall not be introduced into, or moved in, a Chamber of a Provincial Legislature any Bill or amendment which—

(*a*) repeals, amends, or is repugnant to any provisions of any Act of Parliament extending to British India, or

(*b*) repeals, amends or is repugnant to any Governor-General's Act, or any ordinance promulgated in his discretion by the Governor-General, or

(*c*) affects matters as respects which the Governor-General is by or under this Act, required to act in his discretion; or

(*d*) affects the procedure for criminal proceedings in which European British subjects are concerned;

and unless the Governor of the Province in his discretion thinks fit to give his previous sanction, there shall not be introduced or moved any Bill or amendment which—

(*i*) repeals, amends or is repugnant to any Governor's Act, or any ordinance promulgated in his discretion by the Governor; or

(*ii*) repeals, amends or affects any Act relating to any police force.

(3) Nothing in this section affects the operation of any other provision in this Act which requires the previous sanction of the Governor-General or of a Governor to the introduction of any Bill or the moving of any amendment.

Under Section 65 of the Consolidated Government of India Act, (i.e. the Government of India Act, 1915, as amended by the Acts of 1916 and 1919) the Indian Legislature was prohibted, unless specially authorized by an Act of Parliament, from enacting any law either repealing or affecting any Act of Parliament passed after 1860 and extending to British India , and Section 84 of that Act ruled that a law made by any authority in British India which was repugnant to the provisions of any Act of Parliament extending to British India was to the extent of the repugnancy, void. The new Government of India Act, provides, that except in regard to matters which are specified in Section 110, and with respect to which the Federal Legislature is absolutely debarred from legislating, the restriction which existed under the Consolidated Act, is removed partially because it is possible for the Federal Legislature to pass laws either repealing or affecting any Act of Parliament, by securing the previous sanction of the Governor-General to introduce such legislation into either Chamber. A similar provision has been made with reference to the Provincial Legislature in regard to this matter It may be mentioned in this connection, that the Dominions, who have adopted the provisions of Section 2 of the Statute of Westminster, 1931, have now the power to pass legislation repugnant to the provisions of any Act of Parliament of the United Kingdom extending to that Dominion as the Colonial Laws Validity Act, 1865, will no longer be operative in those Dominions.

109. (1) Where, under any provision of this Act the previous sanction or recommendation of the Governor-General or of a Governor is required to the introduction or passing of a Bill or the moving of an amendment, the giving of the sanction or recommendation shall not be construed as precluding him from exercising subsequently in regard to the Bill in question any powers conferred upon him by this Act with respect to the withholding of assent to, or the reservation, of Bills.

(2) No Act of the Federal Legislature or a Provincial Legislature, and no provision in any such Act, shall be invalid by reason only that some previous sanction or recommendation was not given, if assent to that Act was given—

(*a*) where the previous sanction or recommendation required was that of the Governor, either by the Governor, by the Governor-General, or by His Majesty ,

(*b*) where the previous sanction or recommendation required was that of the Governor-General, either by the Governor-General or by His Majesty.

110. Nothing in this Act shall be taken —

(*a*) to affect the power of Parliament to legislate for British India, or any part thereof , or

(*b*) to empower the Federal Legislature, or any Provincial Legislature—

(i) to make any law affecting the Sovereign or the Royal Family, or the Succession to the Crown, or the sovereignty, dominion or suzerainty of the Crown in any part of India, or the law of British nationality, or the Army Act, the Air Force Act, or the Naval Discipline Act, or the law of Prize or Prize Courts ; or

(ii) except in so far as is expressly permitted by any subsequent provisions of this Act, to make any law amending any provision of this Act, or any Order in Council made thereunder, or any rules made under this Act by the Secretary of State, or by the Governor-General or a Governor in his discretion, or in the exercise of his individual judgment , or

(iii) except in so far as is expressly permitted by any subsequent provisions of this Act, to make any law derogating from any prerogative right of His Majesty to grant special leave to appeal from any court.

VII. *Provisions with respect to Discrimination*

The third topic which I propose to consider is the provisions made by the Act in regard to certain forms of legislative discrimination. Those sections of the Act, in particular, which deal with that aspect of discrimination, usually known as " commercial discrimination," have come in for a great deal of criticism in India, on the ground that, they are unwarranted restrictions on the powers of the Indian Legislatures to enact legislation designed to help in the building up of indigenous industries, particularly basic, key and infant industries. These provisions are also unique inasmuch as no Dominion Constitution contains provisions which are in any way analogous to them.

The British Indian delegation to the Joint Select Committee on Indian Constitutional Reform, in the Joint Memorandum

submitted by them to the Committee observed as follows: "The All Parties Conference which met in India in 1928 and which was presided over by that eminent leader of the Congress, the late Pandit Motilal Nehru stated in their report (commonly known as the Nehru report) that 'it is inconceivable that there can be any discriminatory legislation against any community doing business lawfully in India.' The statement was endorsed in even more emphatic terms by Mr. Gandhi, at the second Round Table Conference. It has been accepted on the one hand that there shall be no unfair discrimination against British Companies operating in India, while it is equally agreed on the other side that the Indian Government should have all the powers which Great Britain and the Dominions possess to develop indigenous industries by all legitimate methods. The difficulty throughout has been to define by legislation the expressions, 'legitimate' and 'unfair' and also the term 'indegenous'"[1] The Statutory Commission, while dealing with the question whether or not the Constitution Act should contain constitutional safeguards against legislation, central or provincial, which discriminated against particular sections of the community in matters of taxation, trade or commerce, observed that it would be inexpedient to make such provisions for the very good and important reason that they have to be drafted in such wide terms, that they would not only afford no precise guidance to the courts but also lead to a large volume of litigation.[2] The Joint Select Committee, however, took the view that experienced Parliamentary draftsmen would not find the task of drafting suitable provisions difficult; and the result is, that in the Act several provisions dealing with this matter have found a place. These sections, which will be considered hereafter, undoubtedly curtail the freedom of the Indian Legislatures to enact legislation for fostering the growth of indigenous industries.

111. (1) Subject to the provisions of this chapter a British subject domiciled in the United Kingdom shall be exempt from the operation of so much of any Federal or Provincial Law as—

(*a*) imposes any restriction on the right of entry into British India; or

(*b*) imposes by reference to place of birth, race, descent, language, religion, domicile, residence or duration of residence, any disability, liability, restriction or condition in regard to

[1] *Records of the Joint Select Committee on Constitutional Reform* Unrevised (10) Session 1932–33 II L. 79 (111) p 45.

[2] *Report of the Indian Statutory Commission*, Vol. II, pp 129–130

travel, residence, the acquisition, holding, or disposal of property, the holding of public office, or the carrying on of any occupation, trade, business or profession :

Provided that no person shall by virtue of this sub-section be entitled to exemption from any such restriction, condition, liability or disability as aforesaid if and so long as British subjects domiciled in British India are by or under the law of the United Kingdom subject in the United Kingdom to a like restriction, condition, liability, or disability imposed in regard to the same subject matter by reference to the same principle of distinction.

(2) For the purposes of the preceding sub-section, a provision, whether of the law of British India or of the law of the United Kingdom, empowering any public authority to impose quarantine regulations, or to exclude or deport individuals, wherever domiciled, who appear to that authority to be undesirable persons, shall not be deemed to be a restriction on the right of entry.

(3) Notwithstanding anything in this section, if the Governor-General, or as the case may be, the Governor of any Province, by public notification certifies that for the prevention of any grave menace to the peace or tranquillity of any part of India or, as the case may be, of any part of the Province, or for the purpose of combating crimes of violence intended to overthrow the Government, it is expedient that the operation of the provisions of sub-section (1) of this section should be wholly or partially suspended in relation to any law, then while the notification is in force the operation of those provisions shall be suspended accordingly.

The functions of the Governor-General and of a Governor under this sub-section shall be exercised by him in his discretion.

It is important to notice that the section confers a privilege, as it were, on a British subject domiciled in the United Kingdom, by exempting him from the operation of any Federal or Provincial Law which imposes any restriction on entry into British India, or which imposes any restriction or condition, in regard to travel, residence, the acquisition, holding, or disposal of property, the holding of public office, or the carrying on of any occupation, trade, business or profession, by reference to his place of birth, race, descent, language, religion, domicile, residence or duration of residence. The place of birth, race, descent and other circumstances specified in the section, have been chosen as it is expected that these cover almost everything

which pertains to the status of a person as a British subject, by reference to which it may be sought to impose discrimination as against him. The section does not bar discriminatory legislation against British subjects domiciled on other parts of the British Empire. The Act indeed proceeds upon the footing that the freedom of the Indian Legislatures to enact discriminatory legislation as against British subjects domiciled in any Dominion, Colony or other British possession, should not in any way be fettered. The treatment accorded to Indians in some parts of the British Empire, like South Africa, is so very unfair that discriminatory legislation, in an appropriate case, in regard to tariffs, restriction on entry, or other matters, may perhaps, prove to be in future a valuable leverage in the hands of the Indian Government, to secure an improvement in the position of Indian nationals in those countries The exemption enjoyed by British subjects domiciled in the United Kingdom so far as discriminatory Indian legislation is concerned will cease, with reference to any matter, if and when the United Kingdom chooses to discriminate against British subjects domiciled in British India The extent and nature of discriminatory legislation of the United Kingdom passed with reference to British subjects domiciled in British India will determine the competency of the Indian Legislatures to pass similar discriminatory legislation in regard to British subjects domiciled in the United Kingdom

112. (1) No Federal or Provincial Law which imposes any liability to taxation shall be such as to discriminate against British subjects domiciled in the United Kingdom or Burma or companies incorporated, whether before or after the passing of this Act, by or under the laws of the United Kingdom or Burma, and any law passed or made in contravention of this section shall, to the extent of the contravention, be invalid.

(2) Without prejudice to the generality of the foregoing provisions, a law shall be deemed to be such as to discriminate against such persons or companies as aforesaid if it would result in any of them being liable to greater taxation than that to which they would be liable if domiciled in British India or incorporated by or under the laws of British India, as the case may be.

(3) For the purposes of this section a company incorporated before the commencement of Part III of this Act under any existing Indian Law and registered thereunder in Burma shall be deemed to be a company incorporated by or under the laws of Burma.

113. (1) Subject to the following provisions of this chapter, a company incorporated, whether before or after the passing of this Act, by or under the laws of the United Kingdom, and the members of the governing body of any such company and the holders of its shares, stock, debentures, debenture stock or bonds, and its officers, agents, and servants, shall be deemed to comply with so much of any Federal or Provincial Law as imposes in regard to companies carrying on or proposing to carry on business in British India requirements or conditions relating to or connected with—

(*a*) the place of incorporation of a company or the situation of its registered office, or the currency in which its capital or loan capital is expressed ; or

(*b*) the place of birth, race, descent, language, religion, domicile, residence or duration of residence of members of the governing body of a company, or of the holders of its shares, stock, debentures, debenture stock or bonds, or of its officers, agents or servants :

Provided that no company or person shall by virtue of this section be deemed to comply with any such requirement or condition as aforesaid if and so long as a like requirement or condition is imposed by or under the law of the United Kingdom in regard to companies incorporated by or under the laws of British India and carrying on or proposing to carry on business in the United Kingdom.

(2) If and in so far as any total or partial exemption from, or preferential treatment in respect of, taxation imposed on companies by or under any Federal or Provincial Law depends on compliance with conditions as to any of the matters mentioned in Sub-section (1) of this Section, any company incorporated by or under the laws of the United Kingdom carrying on business in British India shall be deemed to satisfy those conditions and be entitled to the exemption or preferential treatment accordingly, so long as the taxation imposed by or under the laws of the United Kingdom on companies incorporated by or under the laws of British India and carrying on business in the United Kingdom does not depend on compliance with conditions as to any of the matters so mentioned.

This section deals with companies incorporated by or under the laws of the United Kingdom, whether before or after the passing of the Act, in regard to their compliance with rules or conditions which may be prescribed by any Federal or Provincial Law relative to their carrying on business in British India. The effect of this section is this. A company incor-

porated in the United Kingdom *ipso facto* complies with the provisions of any Federal or Provincial law which imposes in regard to companies carrying on or proposing to carry on business in British India, requirements or conditions relating to or connected with, the place of incorporation, the situation of its registered office, or the currency in which its capital or loan capital is expressed, the place of birth, race, descent, language, religion, domicile, residence or duration of residence of members of the governing body of a company, or of the holders of its shares, stock, debentures, debenture stock, or bonds, or of its officers, agents or servants. To the extent to which any total or partial exemption from, or preferential treatment in respect of taxation depends on compliance with any of the conditions or requirements as to any of the matters prescribed in Sub-section (1), a company incorporated in the United Kingdom will, in respect of those matters, be deemed to have complied with those provisions and be entitled to such total or partial exemption from, or preferential treatment in respect of taxation. Supposing, it is prescribed by any Federal Law, that all companies engaged in a particular class of industry are entitled to a rebate of twenty-five per cent. in the normal rates of income tax leviable, provided that sixty per cent. of its shareholders are either British subjects domiciled in British India, or subjects of Federated States, and sixty per cent of its directors are also British subjects domiciled in British India or subjects of Federated States, then, a company incorporated under the laws of the United Kingdom and engaged in that particular class of industry in India, would be entitled to the rebate of twenty-five per cent in the income tax, even though all the shareholders and directors are British subjects domiciled in the United Kingdom or for that matter are even British subjects domiciled in South Africa or even German nationals. The reason is, that a company incorporated in the United Kingdom *ipso facto* complies with any requirement of a Federal Law connected with race, descent, language or duration of residence of members of the governing body of a company, or of the holders of its shares In the example, I have taken, I have mentioned that so far as taxation is concerned, no distinction can be made between an Indian Company and a company incorporated in the United Kingdom, even if in the case of the latter all the shareholders or directors are not British subjects domiciled in the United Kingdom, but are British subjects domiciled in South Africa or even German nationals. But it must be remembered that while under Section 111 of the Act, British

subjects domiciled in the United Kingdom are exempted from the operation of any law which imposes any restriction on the right of entry into British India, no such privilege is enjoyed, either by British subjects domiciled in other parts of the British Empire or by the nationals of other countries. A Federal Law prohibiting the entry of nationals of countries other than the United Kingdom would be perfectly valid. If a Federal Law prescribes that a British subject domiciled in South Africa shall not enter British India, then, such a person can be prohibited from entry into British India, even though he happens to be the Director of a company incorporated in the United Kingdom, and carrying on business in British India In Clause (*a*) of Sub-section (1) of this Section, one of the conditions mentioned is the " currency in which its capital or loan capital is expressed." Even though the capital of a company incorporated in the United Kingdom is expressed in sterling, that company will be deemed to have complied with the provision of any Federal or Provincial Law which requires that in respect of a particular industry, a Company proposing to carry on business in British India, shall have its share capital expressed in Rupees But it must be observed that the section only deals with the currency and not with " the amount of share or loan capital " of the company In fact, when the bill was discussed in Committee in the House of Commons, a private member sought to amend the clause by introducing those words also. But, Sir Donald Somervell, the Solicitor-General, did not accept the amendment, observing, "The amendment as a whole proposes to exempt British companies from any legislation as to the amount of the share or loan capital There might be perfectly proper legislation with regard to insurance companies or banking companies, laying down certain requirements in that matter, and it would not be within the desire of the Committee that there should be any exemption so far as that is concerned."[1]

114. (1) Subject to the following provisions of this chapter, a British subject domiciled in the United Kingdom shall be deemed to comply with so much of any Federal or Provincial Law as imposes in regard to companies incorporated or proposed to be incorporated, whether before or after the passing of this Act, by or under the laws of British India, any requirements or conditions relating to, or connected with, the place of birth, race, descent, language, religion, domicile, residence or duration

[1] *Official Reports House of Commons*, March 27, 1935. Vol. 299, Column 2032.

of residence of members of the governing body of a company, or of the holders of its shares, stock, debentures, debenture stock or bonds, or of its officers, agents or servants :

Provided that no person shall by virtue of this section be deemed to comply with any such requirement or condition as aforesaid if and so long as a like requirement or condition is imposed by or under the law of the United Kingdom in regard to companies incorporated or proposed to be incorporated by or under the laws of the United Kingdom on British subjects domiciled in British India.

(2) If and in so far as, in the case of any such companies as aforesaid, any total or partial exemption from, or preferential treatment in respect of, taxation imposed by or under any Federal or Provincial Law depends on compliance with conditions as to any of the matters aforesaid, then, so far as regards such members of its governing body and such of the holders of its shares, stock, debentures, debenture stock or bonds, and such of its officers, agents, and servants, as are British subjects domiciled in the United Kingdom, any such company shall be deemed to satisfy those conditions and be entitled to the exemption or preferential treatment accordingly, so long as the taxation imposed by or under the laws of the United Kingdom on companies incorporated by or under those laws does not, as regards such of the members of a company's governing body, or such of the holders of its shares, stock, debentures, debenture stock or bonds, or such of its officers, agents, or servants, as are British subjects domiciled in British India, depend on compliance with conditions as to any of the matters aforesaid

(3) For the purposes of this section, but not for the purposes of any other provision of this chapter, a company incorporated before the commencement of Part III of this Act under any existing Indian Law and registered thereunder in Burma, shall be deemed to be a company incorporated by or under the laws of British India

This section deals with companies incorporated in British India. The effect of this section is that if any Federal or Provincial Law imposes in regard to companies incorporated or proposed to be incorporated whether before or after the passing of the Act, by or under the laws of British India, any requirements or conditions relating to, or connected with, the place of birth, race, descent, language, religion, domicile, residence or duration of residence of members of the governing body of a company, or of the holders of its shares, stock, debentures, debenture stock or bonds, or its officers, agents or servants,

then a British subject domiciled in the United Kingdom shall be deemed to comply with those conditions or requirements aforesaid. The principle upon which the section proceeds is that a British subject domiciled in the United Kingdom should be regarded for the purposes of this section as occupying a position identical in all respects with the position of a British subject domiciled in British India A Britisher in the United Kingdom is placed on a par with an Indian National

115. (1) No ship registered in the United Kingdom shall be subjected by or under any Federal or Provincial Law to any treatment affecting either the ship herself, or her master, officers, crew, passengers or cargo, which is discriminatory in favour of ships registered in British India, except in so far as ships registered in British India are for the time being subjected by or under any law of the United Kingdom to treatment of a like character which is similarly discriminatory in favour of ships registered in the United Kingdom

(2) This section shall apply in relation to aircraft as it applies in relation to ships.

(3) The provisions of this section are in addition to and not in derogation of the provisions of any of the preceding sections of this chapter.

This section makes it impossible for the future Indian Federal Government to reserve coastal shipping to Indian nationals. A ship registered in the United Kingdom cannot be subjected by or under any Federal or Provincial Law to any treatment affecting either the ship herself, or her master, officers, crew, passengers or cargo, which is discriminatory in favour of ships registered in British India. The provision in the section for equal treatment on a reciprocal basis of ships registered respectively in British India and the United Kingdom, is of no advantage to ships owned by Indian nationals, as there is not the remotest prospect of such ships being able to compete with British ships in British coastal trade at any time in the forseeable future.

The section also applies to aircraft registered in the United Kingdom in the same way as it applies to ships registered in that country

116. (1) Notwithstanding anything in any Act of the Federal Legislature or of a Provincial Legislature, companies incorporated whether before or after the passing of this Act, by or under the laws of the United Kingdom and carrying on business in India shall be eligible for any grant, bounty or subsidy, payable out of the revenues of the Federation or of a Province

for the encouragement of any trade or industry to the same extent as companies incorporated by or under the laws of British India are eligible therefor :

Provided that this Sub-section shall not apply in relation to any grant bounty or subsidy for the encouragement of any trade or industry, if and so long as under the law of the United Kingdom for the time being in force companies incorporated by or under the laws of British India and carrying on business in the United Kingdom are not equally eligible with companies incorporated by or under the laws of the United Kingdom for the benefit of any grant, bounty or subsidy payable out of public moneys in the United Kingdom for the encouragement of the same trade or industry

(2) Notwithstanding anything in this chapter, an Act of the Federal Legislature or of a Provincial Legislature may require, in the case of a company which at the date of the passing of that Act was not engaged in British India in that branch of trade or industry which it is the purpose of the grant, bounty or subsidy to encourage, that the company shall not be eligible for any grant, bounty or subsidy under the Act unless and until —

(*a*) the company is incorporated by or under the laws of British India or, if the Act so provides, is incorporated by or under the laws of British India or of a Federated State ; and

(*b*) such proportion, not exceeding one half, of the members of its governing body as the Act may prescribe, are British subjects domiciled in India or, if the Act so provides, are either British subjects domiciled in India or subjects of a Federated State , and

(*c*) the company gives such reasonable facilities as may be so prescribed for the training of British subjects domiciled in India or, if the Act so provides, of British subjects domiciled in India or subjects of a Federated State.

(3) For the purposes of this section a company incorporated by or under the laws of the United Kingdom shall be deemed to be carrying on business in India if it owns ships which habitually trade to and from ports in India.

This section deals with the conditions under which companies incorporated by or under the laws of the United Kingdom and carrying on business in India will become eligible for the grant of bounties or subsidies payable out of the revenues of the Federation or of a Province for the encouragement of any trade or industry under the Act of a Federal or Provincial Legislature. If the section had limited the eligibility to receive grants, bounties and subsidies from Indian revenues only to

such companies, as having been incorporated in the United Kingdom were carrying on business in India on the date of the passing of the Government of India Act, 1935, there would have been something to be said in favour of such a provision. But the section proceeds very much further than that. It may be observed, that the dividing line in regard to the grant of bounties and subsidies with or without conditions for companies incorporated in the United Kingdom and carrying on business in India is to be drawn on the date on which an Act making provision for a grant of a subsidy or bounty is passed by an Indian Legislature. Every company incorporated by or under the laws of the United Kingdom, even though incorporated subsequent to the passing of the Government of India Act, 1935, would become eligible for the grant of bounty or subsidy to the same extent as a company incorporated by or under the laws of British India would be eligible, provided that it was on the date of the passing of the Subsidy Act, engaged in British India in that branch of trade or industry, which it is the purpose of the grant, bounty or subsidy to encourage Though a company may be wholly owned and controlled by British subjects domiciled in the United Kingdom or for that matter even by foreign nationals, it would nevertheless become eligible for the grant, bounty or subsidy, unreservedly, provided that it was carrying on business in India in the class of industry for which assistance is intended to be given on the date of the passing of the Subsidy Act (I have used the expression "Subsidy Act" for every Act which makes provision for a grant, bounty or subsidy) and was a company incorporated by or under the laws of the United Kingdom The benefit attaches by the very fact, that it is a company incorporated by or under the laws of the United Kingdom, though it may be entirely owned, directed and run by persons who are not Indian nationals.

With regard, however, to a company which was not at the date of passing of a Subsidy Act, engaged in British India in that branch of trade or industry which it is the purpose of the grant, bounty or subsidy to encourage, the Constitution Act provides that it is open to the Federal or a Provincial Legislature to impose conditions by the Subsidy Act that it should satisfy certain conditions before it can become eligible for any grant, bounty or subsidy The conditions which an Indian Legislature would be competent to impose in regard to such companies are specified in Clauses (*a*), (*b*) and (*c*) of Sub-section (2). The conditions which may be imposed by the Subsidy

Act are (*a*) that the company should be incorporated by or under the laws of British India or, if the Act so provides, incorporated by or under the laws of British India or of a Federated State, (*b*) that such proportion, not exceeding one half of the members of the governing body as the Act may prescribe, should be British subjects domiciled in India or, if the Act so provides, are either British subjects domiciled in India or subjects of a Federated State, and (*c*) that the company should provide reasonable facilities for the training of British subjects domiciled in India or, if a Subsidy Act so provides, of British subjects domiciled in India or subjects of a Federated State. It will be noticed that while the Act may prescribe that to become eligible for the grant, bounty or subsidy, one half of the governing body of the company shall be British subjects domiciled in India or subjects of Federated States, it cannot provide that a certain proportion of the share capital say fifty or sixty per cent should be held by Indian nationals before it can claim the benefit of encouragement under the Act from the Indian revenues. This is a serious matter; because it may well happen that the bulk of the share capital of a company may be owned by non-Indians and the company would nevertheless be entitled to all the benefits under the Subsidy Act.

It is difficult to support this section in any respect When payments are to be made out of Indian revenues, the Indian Legislatures must have full freedom to prescribe such conditions as they may deem necessary, so that the benefit reaches only those indigenous industries, which are struggling to establish themselves against the competition of foreign rivals, with superior organizations and resources This provision, it may be mentioned, is again built up, on the rather fallacious ground of reciprocity It is difficult to believe, that Indian companies would be able to establish themselves in any appreciable numbers in the United Kingdom and enjoy the benefit of bounties and subsidies granted out of the revenues of that country within any time which could be taken into account. It is only concerns started by Indian nationals in India, that require assistance in the shape of bounties and subsidies, to stand against foreign competition in certain branches of trade and industry. If the section had extended the benefits of a grant, bounty, or subsidy only to companies incorporated in the United Kingdom but which were in existence on the date of the passing of the Government of India Act, 1935, there would perhaps not be much to say against it. But the section in its present form goes very much further than that and seriously

impairs the ability of the Indian Legislatures to foster infant and key industries out of their limited resources.

117. The foregoing provisions of this chapter shall apply in relation to any ordinance, order, byelaw, rule or regulation passed or made after the passing of this Act and having by virtue of any existing Indian Law, or of any law of the Federal or any Provincial Legislature, the force of law as they apply in relation to Federal and Provincial laws, but, save as aforesaid, nothing in those provisions shall affect the operation of any existing Indian Law

The object of this section is to enact that the provisions already referred to which provide against certain forms of discrimination should apply not only to Federal and Provincial Laws, but also to ordinances, orders, byelaws, rules and regulations passed after the passing of this Act under the authority of an existing Indian Law, or any law of the Federal or Provincial Legislature. But the section also provides that except to the extent aforesaid, the operation of any existing Indian Law is not affected by the earlier provisions The object of this Clause seems to be to prevent the validity of any existing Indian Law being impugned on the ground that it is in conflict with any of the provisions contained in Sections 111 to 116

118. (1) If after the establishment of the Federation a convention is made between His Majesty's Government in the United Kingdom and the Federal Government whereby similarity of treatment is assured in the United Kingdom to British subjects domiciled in British India and to companies incorporated by or under the laws of British India and in British India to British subjects domiciled in the United Kingdom and to companies incorporated by or under the laws of the United Kingdom, respectively, in respect of the matters, or any of the matters, with regard to which provision is made in the preceding sections of this chapter, His Majesty may, if he is satisfied that all necessary legislation has been enacted both in the United Kingdom and in India for the purpose of giving effect to the convention, by Order in Council declare that the purposes of those sections are to such extent as may be specified in the Order sufficiently fulfilled by that convention and legislation, and while any such order is in force, the operation of those sections shall to that extent be suspended.

(2) An Order in Council under this section shall cease to have effect if and when the convention to which it relates expires or is terminated by either party thereto.

This section which provides that when a convention is

arranged between the Indian Federal Government and the United Kingdom and is implemented by legislation in both countries, an Order in Council might suspend the operation of these provisions to the extent specified therein, for a time, that is to say so long as the convention continues to have force, is not likely to be of advantage to India, because the United Kingdom, while negotiating for a convention might insist upon the existing statutory provisions being taken as the starting point for the negotiation and bargain for more favourable terms. On the whole, it would seem, that this provision would be of little use to India.

This view receives support from the observations made by Sir Samuel Hoare, the Secretary of State for India, when this section was under examination in the House of Commons during the Committee stage of the India Bill. He said: "The proposal pre-supposes a convention that carries out in the spirit and the letter the provisions which we have been discussing. The Government contemplate that only a convention fully carrying out those safeguards could be regarded as being in substitution for a statutory enactment. The Joint Select Committee came to the view that it was wise to make the alternative of a convention of this kind, for this reason. There was an opinion more than once expressed from the benches of the Indian delegates that, supposing these provisions had been carried out by agreement, they would receive more assent in India than would be the case if there were simply the sanction of a Parliamentary enactment. It was to meet that view that this alternative proposal was made. There was never for us any suggestion of the alternative falling short in any way of the actual statutory provisions "[1]

The wordings of Sub-section (2) indicate that any convention that may be agreed upon might either prescribe a definite period, after which the convention must cease, or provide that either party might terminate it by giving notice, the period of which may also be agreed upon in the convention itself.

IX. *Legislative Powers of the Governor-General and the Governors*

The provisions relating to the legislative powers of the Governor-General are contained in Chapter IV of Part II of the Act. Sections 42 to 44 deal with this matter.

42. (1) If at any time when the Federal Legislature is not in

[1] *Official Reports. House of Commons*, March 28, 1935. Volume 299 Columns 2123–2124

session the Governor-General is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such ordinances as the circumstances appear to him to require :

Provided that the Governor-General—

(*a*) shall exercise his individual judgment as respects the promulgation of any ordinance under this section if a Bill containing the same provisions would under this Act have required his previous sanction to the introduction thereof into the Legislature ; and

(*b*) shall not, without instructions from His Majesty, promulgate any such ordinance if he would have deemed it necessary to reserve a Bill containing the same provisions for the signification of His Majesty's pleasure thereon.

(2) An ordinance promulgated under this section shall have the same force and effect as an Act of the Federal Legislature assented to by the Governor-General, but every such ordinance—

(*a*) shall be laid before the Federal Legislature and shall cease to operate at the expiration of six weeks from the reassembly of the Legislature, or, if before the expiration of that period resolutions disapproving it are passed by both Chambers, upon the passing of the second of those resolutions ,

(*b*) shall be subject to the provisions of this Act relating to the power of His Majesty to disallow Acts as if it were an Act of the Federal Legislature assented to by the Governor-General , and

(*c*) may be withdrawn at any time by the Governor-General.

(3) If and so far as an ordinance under this section makes any provision which the Federal Legislature would not under this Act be competent to enact, it shall be void

This provision deals with the power of the Governor-General to promulgate ordinances when the legislature is not in session Presumably these ordinances are to be promulgated upon the advice of the ministers in an emergency Clause (*a*) of Subsection (2) provides that every such ordinance shall be laid before the Federal Legislature and shall cease to operate at the expiry of six weeks from the reassembly of the legislature, or even earlier if resolutions disapproving of the ordinance are passed by both Chambers.

It may be interesting to compare this provision with the powers exercisable in Great Britain under the authority of the Emergency Powers Act, 1920 (10 and 11 George V, c. 55). Under this act, if at any time it appears to His Majesty that any

action has been taken or is immediately threatened by any persons or a body of persons of such a nature and on so extensive a scale as to interfere with the supply of food, water, fuel, or light to any substantial portion of the community, a Proclamation of Emergency may be issued by His Majesty. When such a Proclamation is issued, it would be lawful for His Majesty in Council to issue regulations so as to secure the essentials of life for the people. Where a Proclamation of Emergency is issued it has to be communicated forthwith to Parliament, and if the Parliament is not in session, a Proclamation for the meeting of Parliament within five days has to be issued. Parliament also exercises a wide measure of control over the regulations issued under the Act.

43. (1) If at any time the Governor-General is satisfied that circumstances exist which render it necessary for him to take immediate action for the purpose of enabling him satisfactorily to discharge his functions in so far as he is by or under this Act required in the exercise thereof to act in his discretion or to exercise his individual judgment, he may promulgate such ordinances as in his opinion the circumstances of the case require.

(2) An ordinance promulgated under this section shall continue in operation for such period not exceeding six months as may be specified therein, but may by a subsequent ordinance be extended for a further period not exceeding six months.

(3) An ordinance promulgated under this section shall have the same force and effect as an Act of the Federal Legislature assented to by the Governor-General, but every such ordinance—

(*a*) shall be subject to the provisions of this Act relating to the power of His Majesty to disallow Acts as if it were an Act of the Federal Legislature assented to by the Governor-General;

(*b*) may be withdrawn at any time by the Governor-General; and

(*c*) if it is an ordinance extending a previous ordinance for a further period, shall be communicated forthwith to the Secretary of State and shall be laid by him before each House of Parliament.

(4) If and so far as an ordinance under this section makes any provision which the Federal Legislature would not under this Act be competent to enact, it shall be void.

(5) The functions of the Governor-General under this section shall be exercised by him in his discretion.

The ordinances which can be issued by the Governor-General under the powers vested in him by Section 43 have to be distinguished from the ordinances issued by the same authority under Section 42 The situation contemplated by Section 42 is an emergency when legislative action has to be taken, without waiting for the approval of the legislature which is not in session at the time. But every such ordinance must be placed before the Federal Legislature and will cease to operate on the expiry of six weeks after the reassembly of the legislature In fact the ordinances may cease to have effect even earlier than six weeks, if after the reassembly of the Federal Legislature resolutions are passed by both Houses thereof disapproving of the same. It is contemplated that ordinances to be issued under Section 42 are to be issued upon the advice of the ministers, though that section itself does not say so, in so many words This matter was made clear by Sir Samuel Hoare, the Secretary of State for India, when the relevant clauses were under discussion in the Committee stage of the India Bill He observed as follows: "I am not quite sure whether my Honourable Friend has appreciated the scope of this Clause (i e Clause 42) which deals with the ordinances dealt with by the Governor-General upon the advice of his ministers Clause 43 deals with the ordinances made by the Governor-General in his own discretion The first kind made by the Governor-General on the advice of his ministers are very much like the emergency orders made by the Government here in time of emergency under what is called the Emergency Powers Act, and which have to receive Parliamentary sanction within a given time. The Governor-General's ordinances either within his own competence or his special responsibilities are made in Clause 43 "[1] But ordinances may be issued by the Governor-General under Section 43 at any time even though the legislature happens to be in session They are in fact issued on the sole responsibility of the Governor-General, if he is satisfied that circumstances exist which make it necessary for him to take immediate action for the purpose of enabling him to fulfil his functions, in so far as he is by or under the Act required in the exercise thereof to act in his discretion or exercise his individual judgment. Moreover, these ordinances are not subject to the control of the Federal Legislature, as in the case of ordinances issued under Section 42. As a matter of fact, Section 108 lays down that neither Chamber of the Federal Legislature is competent to entertain

[1] *Official Report House of Commons* March 13, 1935 Volume 299, Columns 454–455.

any bill which in any way amends, repeals or is repugnant to such an ordinance, without the previous sanction of the Governor-General.

It must be observed that ordinances issued by the Governor-General, whether under Section 42 or Section 43, should strictly confine themselves to the field which is within the legislative competence of the Federal Legislature. If any ordinance travels beyond it, it will, to that extent, be void and of no effect.

44. (1) If at any time it appears to the Governor-General that, for the purpose of enabling him satisfactorily to discharge his functions in so far as he is by or under this Act required in the exercise thereof, to act in his discretion or to exercise his individual judgment, it is essential that provision should be made by legislation, he may by message to both Chambers of the Legislature explain the circumstances which in his opinion render legislation essential, and either—

(*a*) enact forthwith, as a Governor-General's Act, a Bill containing such provisions as he considers necessary ; or

(*b*) attach to his message a draft of the Bill which he considers necessary.

(2) Where the Governor-General takes such action as is mentioned in paragraph (*b*) of the preceding sub-section, he may at any time after the expiration of one month enact, as a Governor-General's Act, the Bill proposed by him to the Chambers either in the form of the draft communicated to them or with such amendments as he deems necessary, but before so doing he shall consider any address which may have been presented to him within the said period by either Chamber with reference to the Bill or to amendments suggested to be made therein.

(3) A Governor-General's Act shall have the same force and effect, and shall be subject to disallowance in the same manner, as an Act of the Federal Legislature assented to by the Governor-General and, if and in so far as a Governor-General's Act makes any provision which the Federal Legislature would not under this Act be competent to enact, it shall be void.

(4) Every Governor-General's Act shall be communicated forthwith to the Secretary of State and shall be laid by him before each House of Parliament.

(5) The functions of the Governor-General under this section shall be exercised by him in his discretion.

While Section 43 provides for the promulgation of ordinances by the Governor-General, operative only for short periods, this

section enables him to place on the Statute Book permanent Acts. Both these powers, however, are to be invoked in order to implement only those of the Governor-General's functions in regard to which he is required to exercise his discretion or individual judgment by the provisions of the Act. It may also be mentioned, that under Section 108 of the Act, unless the Governor-General in his discretion thinks fit to give his previous sanction, there shall not be introduced into, or moved in either Chamber of the Federal Legislature any bill or amendment which repeals, amends or is repugnant to any Governor-General's Act or any ordinance promulgated in his discretion by the Governor-General The same section also provides that the prior sanction of the Governor-General is required for the introduction of any Bill or amendment in a Chamber of the Provincial Legislature, which repeals, amends or is repugnant to a Governor-General's Act or ordinance promulgated by him in his discretion.

The Legislative powers of the Governors are contained in Chapter IV of Part III of the Act. Sections 88 to 90 which deal with the ordinances and Legislative Acts which are within the competence of the Provincial Governors are analogous to the provisions contained in Sections 42 to 44 which define the legislative powers of the Governor-General It is unnecessary to deal with Sections 88 to 90 separately, as these sections are worded in practically the same terms as those sections which deal with the powers of the Governor-General ; and the observations hereinbefore made with reference to the latter apply *mutatis mutandis* to the former also

X *Breakdown of the Constitutional Machinery*

The fifth and last topic to be considered is the provisions of the Act which will come into operation in case of a breakdown of the Constitutional Machinery.

Section 45 of the Act makes express provision for the Governor-General to take prompt steps to carry on the administration if there is a breakdown of the Constitutional system.

45. (1) If at any time the Governor-General is satisfied that a situation has arisen in which the Government of the Federation cannot be carried on in accordance with the provisions of this Act, he may by Proclamation—

(*a*) declare that his functions shall to such extent as may be specified in the Proclamation be exercised by him in his discretion,

(*b*) assume to himself all or any of the powers vested in or exercisable by any Federal body or authority,

and any such proclamation may contain such incidental and consequential provisions as may appear to him to be necessary or desirable for giving effect to the objects of the Proclamation, including provisions for suspending in whole or in part the operation of any provisions of this Act relating to any Federal body or authority :

Provided that nothing in this sub-section shall authorize the Governor-General to assume to himself any of the powers vested in or exercisable by the Federal Court or to suspend, either in whole or in part, the operation of any provision of this Act relating to the Federal Court.

(2) Any such Proclamation may be revoked or varied by a subsequent Proclamation.

(3) A Proclamation issued under this section—

(*a*) shall be communicated forthwith to the Secretary of State and shall be laid by him before each House of Parliament ;

(*b*) unless it is a Proclamation revoking a previous Proclamation, shall cease to operate at the expiration of six months :

Provided that, if and so often as a resolution approving the continuance in force of such a Proclamation is passed by both Houses of Parliament, the Proclamation shall, unless revoked, continue in force for a further period of twelve months from the date on which under this sub-section it would otherwise have ceased to operate.

(4) If at any time the government of the Federation has for a continuous period of three years been carried on under and by virtue of a Proclamation issued under this section, then, at the expiration of that period, the Proclamation shall cease to have effect and the government of the Federation shall be carried on in accordance with the other provisions of this Act, subject to any amendment thereof which Parliament may deem it necessary to make, but nothing in this sub-section shall be construed as extending the power of Parliament to make amendments in this Act without affecting the accession of a State.

(5) If the Governor-General, by a Proclamation under this section, assumes to himself any power of the Federal Legislature to make laws, any law made by him in the exercise of that power shall, subject to the terms thereof, continue to have effect until two years have elapsed from the date on which the Proclamation ceases to have effect, unless sooner repealed or re-enacted by Act of the appropriate Legislature, and any reference in this Act to Federal Acts, Federal Laws, or Acts or

Laws of the Federal Legislature shall be construed as including a reference to such a law.

(6) The functions of the Governor-General under this section shall be exercised by him in his discretion.

The section, as it stood in the draft India Bill, permitted the carrying on of the government by a Proclamation for an indefinite period when there was a breakdown of the Constitutional machinery. This was considered to be a violation of the spirit underlying the establishment of a Federal Constitution. The draft provision was accordingly amended so that the absolute maximum period during which the Federation could be carried on under and in virtue of a Proclamation issued under this section was fixed at three years. After such period, the Proclamation ceases to have effect and the Government of the Federation has to be carried on in accordance with the provisions of the Act. Parliament may make alterations necessary, but it is expressly laid down that this provision should not be construed as extending the power of Parliament to make amendments in this Act without affecting the accession of a State. Presumably the intention is that each individual State must be a consenting party to the amendments sought to be made which go beyond the purview of the provisions mentioned in the Second Schedule The States might claim to withdraw their accession to the Federation in case the amendments sought to be introduced into the Act do not meet with their approval, and travel beyond those provisions of the Act enumerated in the Second Schedule to the Act, in regard to which amendments may be made without affecting the accession of the States. But, the Act itself contains no machinery, whereby, the Federated States could agitate the question that the amendments of the Act sought to be introduced go beyond the provisions of the Act contained in the Second Schedule, which could be amended without the consent of the States. The question would then become a political one to be settled by means of negotiation.

Section 93 of the Act makes provision similar to that contained in Section 45, enabling a Governor to issue a Proclamation in the event of a breakdown of the Constitutional machinery in his Province, notifying the assumption of such powers as would be necessary for him for carrying on the government of the Province. Even this section fixes the maximum period during which the Proclamation could be in force at three years, as in the case of Section 45.

CHAPTER XIII

THE LEGISLATIVE LISTS

THE scheme of allocation of legislative powers between the Federal and Provincial Legislatures under the Government of India Act, 1935, has been considered in some detail, in the previous chapter. The purpose of this chapter is to set out the subjects of legislative power, in accordance with the classification made in the Seventh Schedule to the Act, under the three lists, the Federal, the Provincial and the Concurrent Lists; and to comment briefly on the content and scope of some of these heads of power.

Federal Legislative List (*List* I)

1. His Majesty's naval, military and air forces borne on the Indian establishment and any other armed force raised in India by the Crown, not being forces raised for employment in Indian States or military or armed police maintained by Provincial Governments, any armed forces which are not forces of His Majesty, but are attached to or operating with any of His Majesty's naval, military or air forces borne on the Indian establishment, central intelligence bureau, preventive detention in British India for reasons of State connected with defence, external affairs, or the discharge of the functions of the Crown in its relations with Indian States.

2. Naval, military and air force works, local self-government in cantonment areas (not being cantonment areas of Indian State troops), the regulation of house accommodation in such areas, and, within British India, the delimitation of such areas.

As illustrations of what may come under the purview of the words, "naval, military and air force works," the following may be cited, namely, maintenance of dockyards for the building or repairs of naval units, the building of fortifications, the establishment of factories for the manufacture of munitions, arms, uniforms and equipment, the construction of aircraft, military aerodromes, and the like.

3 External affairs; the implementing of treaties and agreements with other countries; extradition, including the surrender of criminals and accused persons to parts of His Majesty's dominions outside India.

The portion of this item which relates to the implementing of treaties and agreements with other countries, must be read, subject to the qualification contained in Section 106 of the Act. This matter has already been considered, while commenting upon Section 106 of the Act.

4. Ecclesiastical affairs, including European cemeteries.

5. Currency, coinage and legal tender.

Similar powers are conferred on the Central Legislature under both the Canadian and Australian Acts Section 91 of the British North America Act mentions, "currency and coinage head (14)" and "legal tender" head (20) as subjects within the exclusive competence of the Dominion Parliament. Section 51 (xii) vests the power to legislate in regard to "currency, coinage and legal tender" in the Commonwealth Parliament. The function of issue and control of coins and currency is everywhere regarded as a prerogative of the central sovereign authority; and this principle is observed even under the Indian Act by vesting this power in the Federation. Some of the Indian States mint coins. Hyderabad, in addition to minting coins, issues paper currency. Perhaps some of the Indian States would like to preserve their existing rights in regard to these matters on sentimental grounds as the minting of coins and the issue of paper currency are generally regarded as marks of Sovereignty. It would be extremely anomalous if such rights are permitted to be exercised by some of the Federating units, as, logically speaking, Federation implies the surrender of such rights in favour of the Central Government.

6. Public Debt of the Federation.

7. Post and telegraphs, including telephones, wireless, broadcasting, and other like forms of communication; Post Office Saving Banks.

Transmission of wireless messages and broadcasting are comparatively recent discoveries in the field of science. Broadcasting and other forms of radio communication must be under the control of the Central Government, not only because of their importance, but also because of their international character. That is the reason why the Indian Act vests the regulation of these matters in the Central Government. When the British North America Act was passed in 1867, radio communication was unknown and the Act did not, therefore, contain any reference to it. The Privy Council was called upon to decide, in a recent case, the question, whether, the Parliament of Canada had the exclusive power to regulate radio communication in Canada. The Privy Council answered the question in

the affirmative.[1] Under Section 92, Head (10) of the British North America Act, " Lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the Province with any other or others of the Provinces, or extending beyond the limits of the Province " are matters excluded from the competence of the Provincial Legislatures. The Privy Council held that the undertaking of broadcasting was an undertaking " connecting the Province with other Provinces and extending beyond the limits of the Province," and that broadcasting also came within the description of " Telegraphs " and consequently broadcasting was a matter, excluded from the competence of the Provincial Legislatures, and was within the legislative field assigned to the Dominion Parliament.

Item 7 must be read along with Section 129 of the Act which makes certain reservations in regard to broadcasting in favour of the British Indian Provinces and Federated States.

8 Federal Public Services and Federal Public Service Commission.

9. Federal pensions, that is to say, pensions payable by the Federation or out of Federal revenues.

10. Works, lands and buildings vested in, or in the possession of, His Majesty for the purposes of the Federation (not being naval, military or air force works), but, as regards property situate in a Province, subject always to Provincial Legislation save in so far as Federal Law otherwise provides, and, as regards property in a Federated State held by virtue of any lease or agreement with that State, subject to the terms of that lease or agreement.

11. The Imperial Library, the Indian Museum, the Imperial War Museum, the Victoria Memorial and any similar institution controlled or financed by the Federation.

12. Federal agencies and institutes for the following purposes, that is to say, for research, for professional or technical training, or for the promotion of special studies.

13. The Benares Hindu University and the Aligarh Muslim University.

14. The Survey of India, the Geological, Botanical and Zoological Surveys of India ; Federal meteorological organizations.

15. Ancient and historical monuments , archaeological sites and remains.

16. Census.

[1] See *In Re Regulation and Control of Radio Communication in Canada* (1932) A C. 304.

17. Admission into, and emigration and expulsion from, India, including in relation thereto the regulation of the movements in India of persons who are not British subjects domiciled in India, subjects of any Federated State, or British subjects domiciled in the United Kingdom, pilgrimages to places beyond India.

Every country has the right to control the composition of her population. The Privy Council have held in the case of *Musgrove* v. *Chun Teeong Toy*[1] that an alien has no legal right enforceable by action to enter British territory. Broadly speaking the term "alien" applies to every person who is not a British subject. Even a British subject who is domiciled in one part of the Empire, cannot claim to immigrate into another as of right. It is well known that discriminatory laws have been passed by some of the Dominions not only in regard to the immigration of British subjects domiciled in India into them, but also with respect to the exercise of ordinary civic rights of persons of Indian extraction who have settled there for generations. In fact the treatment accorded to Indians, particularly in South Africa, has been a long-standing grievance. According to the scheme of the Act, the future Federal Government will retain the right to control the entry of persons, other than British subjects domiciled in the United Kingdom, in the same way as other Dominions do.

The word "admission" in this item seems to cover the entry into India of not only persons who intend to make India their permanent home but also those who intend to make a short sojourn in India.

Under this head of power, the Federal Legislature is competent to pass laws with respect to emigration and expulsion of persons from India in addition to the admission of persons into India. The power of expulsion carries with it the power to forcibly expel a person by exercising extra-territorial constraint also. According to the decision in *Attorney-General for Canada* v. *Cain and Gilhula*,[2] where a colonial statute, assented to by the Crown, gives the colonial government the power, which the Crown itself has, of expelling an alien from the colony, then the fact that extra-territorial constraint has to be used in the process of expulsion will not invalidate the warrant; the reason being that the power to exclude carries with it the power to expel the person who enters in contravention of the laws.

18. Port quarantine; seamen's and marine hospitals, and hospitals connected with port quarantine.

[1] (1891) A C 272, p. 282. [2] (1906) A.C 542.

With this may be compared the provision contained in Section 91, Head (11) of the British North America Act which vests the power of legislation with respect to " Quarantine, and the establishment and maintenance of Marine Hospitals " in the Dominion Parliament.

19. Import and export across customs frontiers as defined by the Federal Government.

20. Federal railways ; the regulation of all railways other than minor railways in respect of safety, maximum and minimum rates and fares, station and service terminal charges, interchange of traffic and the responsibility of railway administrations as carriers of goods and passengers ; the regulation of minor railways in respect of safety and the responsibility of the administrations of such railways as carriers of goods and passengers.

21. Maritime shipping and navigation, including shipping and navigation on tidal waters ; Admiralty jurisdiction.

Under the Commonwealth of Australia Constitution Act, 1900, Section 51 (i) the Commonwealth Parliament is competent to make laws with respect to " Trade and commerce with other countries, and among the States." Section 98 of the same Act provides, that the power of that parliament to make laws with respect to trade and commerce extends to navigation and shipping, and to railways the property of any State. The combined effect of Sections 51 (i) and 98, so far as shipping and navigation are concerned, according to Australian cases, is, that the power of the Commonwealth to make laws is restricted to navigation and shipping of an over-seas or inter-state character only, and that the States retain the power to legislate in regard to intra-state shipping and navigation. In *Huddart Parker and Co., Pty., Ltd.* v. *Moorehead*, Griffith, C. J. observed : " The Constitution is therefore to be construed as if it contained an express declaration that power to make laws with respect to trade and commerce within the limits of a State, and not relating to trade and commerce with other countries or among the States, is reserved to the States, except so far as the exercise of that power by the Commonwealth is necessary for or incidental to the execution of some other power conferred on the Parliament."[1] As the regulation of navigation and shipping in Australia is not subject to a unified control, numerous difficulties of a practical character have arisen in Australia. The Royal Commission which reported in 1929 on the working of the Australian Constitution, have observed as follows, at

[1] (1908) 8 C L R 330, p 352. Cited in Kerr, p. 125

page 151 of their report: "The Commonwealth Act deals, and can deal only, with inter-state and foreign shipping Intra-state shipping is subject to State Laws. Different rules may prevail, therefore, and different conditions may apply to ships in the inter-state coastal trade and ships trading solely between the ports of one State. Different conditions may apply to the same ship, according to the voyage which it undertakes, or the waters which it traverses. Different standards may be applied in granting certificates, according as the certificates are to be used in inter-state or intra-state trade" The Royal Commission, after a careful examination of the whole matter, made the following recommendation at page 256 of their report: "In our opinion the requirements for coastal navigation should be the same whether the ships navigated trade between one or more States or along the coast of one State only. Further, we are of opinion that the administration of the laws relating to navigation should be under one central authority, adequate provision being made for a decentralized administration and the subordinate officers having an adequate discretion We fully accept the evidence of a number of expert witnesses to the effect that the State and Federal authorities have worked harmoniously, but we think that there should not be the opportunity for friction and for overlapping which must exist under the present method of control Further, we are of opinion that there should not be any room for the doubts which have arisen as to the laws under which an offence may be punishable, or as to the authority which may appoint courts of inquiry, which have arisen in a number of recent cases referred to by witnesses before this Commission. We recommend that the Commonwealth Parliament be empowered to legislate with respect to navigation and shipping"

The provision of the Indian Act under consideration is an improvement upon the corresponding Australian provision. This head of power in the Indian Act does not provide that the Indian Federal Legislature is subject to the qualification that when legislating in regard to shipping and navigation it should not trench upon intra-state shipping and navigation, but must confine the operative sphere of its legislation to inter-state or overseas shipping and navigation, unlike the corresponding provision of the Australian Act which defines the powers of the Australian Commonwealth Legislature in these matters. Even ships, which are engaged in trade along the coast of only one Province, will also come under the control of the Federal Legislature. It would also appear, that in regard to Federated

States, unless special reservations are made in this behalf in their Instruments of Accession, they would be as much subject to Federal Legislative control, in regard to shipping and navigation as the British Indian Provinces are.

The importance of the word " maritime " in this head of power must be taken note of. The exclusive Federal control of shipping and navigation extends only to maritime or sea navigation and shipping, including shipping and navigation on tidal waters. Shipping and navigation on inland waterways, like navigable rivers, lakes, or artificial waterways, are not subject to exclusively federal legislative control. Item 32 of List III makes shipping and navigation on inland waterways as regards mechanically propelled vessels, and the rule of the road on such waterways, carriage of passengers and goods on inland waterways, concurrent subjects of legislation Item 18 of List II provides, that subject to the provision contained in List III, inland waterways and traffic thereon, will be under Provincial Legislative control.

22. Major ports, that is to say, the declaration and delimitation of such ports, and the constitution and powers of Port Authorities therein.

23. Fishing and fisheries beyond territorial waters.

Almost an identical provision occurs in the Commonwealth of Australia Constitution Act, 1900. Under Section 51 (x) the Commonwealth Legislature may make laws in regard to " Fisheries in Australian waters beyond territorial limits." Fisheries within the territorial waters, that is to say, within the three-mile belt of sea adjoining the coast, and other inland fisheries will be subject to the control of the Provincial Legislatures. In fact Item 24 in the Provincial Legislative List simply says, " Fisheries." If the provisions in the Federal and Provincial Legislative lists in regard to fisheries are placed in juxtaposition, it would be clear that except in regard to fisheries beyond territorial waters which would be under Federal Legislative control, all other fisheries will be under Provincial Legislative Control.

24. Aircraft and air navigation ; the provision of aerodromes ; regulation and organization of air traffic and of aerodromes.

The difficulty which presented itself under the British North America Act, 1867, as to whether the field of legislation in relation to aerial navigation in Canada, belonged to the Dominion or to the Provinces, cannot arise under the Indian Act, in view of this express provision. In the case of *the Regulation and*

Control of Aeronautics in Canada, In re.[1] which has already been referred to in connection with Section 106 of the Act, the Privy Council ruled that aerial navigation was subject to the legislative control of the Dominion Parliament in Canada

25. Lighthouses, including lightships, beacons and other provision for the safety of shipping and aircraft

The power of the Federal Legislature to legislate in regard to lighthouses, lightships, beacons and other provisions for the safety of shipping and aircraft, is expressed in broad terms The power of the Federal Legislature is not limited only to ocean lighthouses, ocean lightships and ocean beacons It is, therefore, possible for the Federal Legislature to regulate lighthouses, beacons and other safety devices relating to ships and aircraft situated in rivers, minor ports, and also upon land

26. Carriage of passengers and goods by sea or by air

27. Copyright, inventions, designs, trademarks and merchandise marks.

The legislative control over these topics is vested in the Federal Legislature in many Federal Constitutions, as uniformity in the laws governing these matters is always desirable. For instance, the Commonwealth Parliament has the power to make laws regarding "copyrights, patents of inventions and designs, and trade marks" under Section 51 (xviii) of the Commonwealth of Australia Constitution Act. Under the British North America Act, patents of invention and discovery, Section 91, Head (22), and copyrights, Section 91, Head (23), are subject to the legislative control of the Dominion Parliament.

28. Cheques, bills of exchange, promissory notes and other like instruments

29. Arms; firearms, ammunition

30 Explosives.

31 Opium, so far as regards cultivation and manufacture, or sale for export

The Provinces have the power under Item 40 of List II to levy excise duties on opium manufactured or produced in the Province, as also countervailing duties at the same or lower rates on the same commodity manufactured or produced elsewhere in India. In view of Item 31, List II, the legislative control of opium, as regards possession, purchase and sale (except sale for export) and transport in the Provinces, will be under Provincial control. The cultivation and manufacture, as well as the control over the sale for export of this commodity will, however, be under Federal control.

[1] (1932) A C 54.

32. Petroleum and other liquids and substances declared by Federal Law to be dangerously inflammable, so far as regards possession, storage and transport.

33. Corporations, that is to say, the incorporation, regulation and winding-up of trading corporations, including banking, insurance and financial corporations, but not including corporations owned or controlled by a Federated State and carrying on business only within that State or co-operative societies, and of corporations, whether trading or not, with objects not confined to one unit.

It is likely that this head of power will give rise to several controversial questions. In Canada, under the British North America Act, 1867, Dominion as well as Provincial Legislation relating to companies, have frequently come under the scrutiny of courts, and there are several decisions of the Privy Council upon this branch of Canadian Constitutional Law The principles enunciated in Canadian cases which have come before the Privy Council in regard to companies will undoubtedly be of great assistance in deciding analogous questions under the Indian Act, though it must be pointed out, that the analogy may not hold good in all cases in view of certain differences between the British North America Act and the Indian Act.

Under the British North America Act, it has been authoritatively decided that the status and essential capacities of a company incorporated under a Dominion Statute cannot be impaired or sterilized by Provincial Legislation. Three cases may be cited in support of this proposition. The case of *John Deere Plow Co., Ltd.*, v. *Wharton*[1] related to a company incorporated under Dominion Legislation to carry on the business of trading in agricultural implements in the whole of Canada. An Act passed by the Provincial Legislature of British Columbia provided that companies incorporated by the Dominion Parliament should be licensed or registered under it as a condition of carrying on business in the Province or in suing in its courts. The validity of this legislation was challenged by the Company as *ultra vires* the Provinces, and the Privy Council upheld that contention holding that Provincial Legislation cannot seek to destroy the status and powers of a Dominion company. The case of *Great West Saddlery Co.* v *The King*[2] related to a Dominion company endowed with powers to carry on trade throughout Canada. The Provincial Acts of Ontario, Manitoba and Saskatchewan, in so far as they purported to preclude Dominion trading companies from carrying

[1] (1915) A C 330 [2] (1921) 2 A C 91.

on their business in those Provinces unless they had been registered or licensed thereunder, or subjected them to penalties for so carrying on business, were declared to be *ultra vires*, by the Privy Council. It was laid down by the Privy Council that it was not competent to the Provincial Legislatures in Canada, to enact legislation which would either sterilize all the functions and activities of a Dominion Company, or impair in any substantial degree its status and essential capacities. The case of *The Attorney-General of Manitoba* v *Attorneys-General for Canada and Ontario*[1] arose under the following circumstances. The Provincial Legislature of Manitoba had passed two Acts namely, the Sale of Shares Act, and the Municipal and Public Utility Board Act. The provisions of these Acts in so far as they purported to prohibit Dominion companies from selling their own shares within the Province without the consent of a Provincial Commissioner or Board were held to be *ultra vires* on the ground that they interfered, directly and substantially, with the status and capacities conferred on the companies by

follows: "An artificial person, incorporated under the powers of the Dominion with certain objects, invested by these powers with capacities to trade in pursuit of those objects and with the status and capacities of a Dominion incorporation, is under these Acts liable in the most ordinary course of business to be stillborn from the moment of incorporation, sterilized in all its functions and activities, thwarted and interfered with in its first and essential endeavours to enter on the beneficial and active employment of its powers, by the necessity of applying to a Provincial executive for permission to begin to act and to raise its necessary capital, a permission which may be subjected to conditions or refused altogether according to the view, which in their discretion that executive may take of the plans, promises and prospects of a creation of the Dominion. The question is whether legislation, which must in many cases have this effect, even though not in all, is *intra vires* the legislature of Manitoba. It appears to admit of only one answer in view of what is now settled law with regard to the effect of Sections 91 and 92 of the British North America Act on this class of legislation."

The case above cited, viz., *Attorney-General of Manitoba* v. *Attorney-General of Canada*[2] was referred to and distinguished

[1] (1929) A C 260 [2] (1929) A C 260

in a later Canadian case which went up to the Privy Council *Lymburn* v. *Mayland*.[1] The Provincial Legislature of Alberta passed an Act called the Security Frauds Prevention Act, 1930, by which it was provided that no person might trade in securities, unless he was registered with the approval of the Attorney-General ; a corporation could be registered, and in that case its officials would not need to be registered. The effect of the Act was to preclude a public company from selling its shares in the Province unless the Company itself was registered or it took the assistance of a registered person to sell them The Act also reserved wide powers to the Attorney-General, or his delegate to examine any person or company with a view to find out whether any fraudulent act, which was defined in very wide terms, was being committed. The Act also provided penalties for breach of its provisions. The two contentions raised in this case were, firstly that the Act destroyed the status of Dominion companies by making it impossible for them to issue their share capital, and secondly that the inquiry provided for in the Act was beyond the competence of a Provincial Legislature under the British North America Act, and hence the whole Act was *ultra vires*. Lord Atkin, in delivering the judgment of the Privy Council, rejected the first of these contentions, by making the following observations at pages 324-325 : " It appears to their Lordships impossible to bring this legislation within such a principle. A Dominion company constituted with powers to carry on a particular business is subject to the competent legislation of the Province as to that business and may find its special activities completely paralysed, as by legislation against drink traffic, or by the laws as to holding land. If it is formed to trade in securities there appears no reason why it should not be subject to the competent laws of the Province as to the business of all persons who trade in securities. As to the issue of capital there is no complete prohibition, as in the *Manitoba Case* in 1929 : and no reason to suppose that any honest company would have any difficulty in finding registered persons in the Province through whom it could lawfully issue its capital. There is no material upon which their Lordships could find that the functions and activities of a company were sterilized or its status and essential capacities impaired in a substantial degree." With regard to the second contention, it was pointed out by the Privy Council that having regard to the power vested in the Provincial Legislatures in Canada to legislate with respect to property and civil rights in the Pro-

[1] (1932) A C 318.

vince, the provisions in the Act with respect to inquiries, though far-reaching in character were nevertheless *intra vires*, as it came within the purview of that grant, and that while exercising its powers, a Provincial Legislature was Sovereign, and had the sole power and responsibility of determining the degree of protection it would afford to the public

We may now consider how far the principles laid down in the Canadian cases mentioned above are applicable to the Indian Act. It is submitted that these principles are fully applicable to the Indian Act also. It would not, I think, be open to a Provincial Legislature to prescribe by a Provincial Act that a company, incorporated under a Federal Act, should not carry on business in the Province, or sue in its courts, or offer its shares for sale, unless it is registered or licensed thereunder. It is true that Item 27 of the Provincial Legislative List vests the control over " Trade and Commerce within the Province " in the Provincial Legislatures, and in case legislation of the character already discussed is sought to be introduced in a Province, this particular head of power may be pressed into service. But, even so, it is submitted that legislation, under the guise of regulation of trade and commerce in the Province, cannot impair the status or sterilize the activities of a Federal company. It would also seem that legislation of a restricted character, such as was under consideration in the case of *Lymburn* v. *Mayland*,[1] would be within the competence of Provincial Legislatures in India, as in Canada.

Federal companies would, however, be amenable to the laws of the Provincial Legislatures, enacted within their competence. For instance, a company incorporated under the provisions of a Federal Companies Act for the purpose of running a chain of cinema houses throughout India, would have to conform to the laws and regulations enacted by or under the authority of a Provincial statute in regard to the conditions under which cinemas should be conducted (Item 35 of the Provincial Legislative List) ; and would also be liable to pay taxes prescribed by a Provincial Legislature in regard to entertainments and amusements (Item 50 of the Provincial Legislative List). We may take another example. Supposing a company is incorporated under the terms of a Federal Statute to carry on trade in alcoholic liquors Such a company would certainly be amenable to Provincial regulations passed regarding liquor traffic (Item 31 of List II). Now, it may even happen that such a company, incorporated under a Federal Act, for the express

[1] (1932) A C 318

purpose of trading in alcoholic liquors, may find that, owing to Provincial legislation in a particular province against drink traffic, its business activities become wholly paralysed. I think the Indian Provinces under the terms of the Act will have full power to enact legislation prohibiting traffic in drink, if they are so minded Item 31, I think, impliedly grants the power to a Provincial Legislature to legislate against drink traffic by enacting for example that alcoholic liquors should not be sold to the public, except for medicinal use. Would it be open to a Federal company, which has been incorporated for the purpose of trading in liquors, to contend, when such a piece of legislation is enacted in a Province, that it is *ultra vires*, as the effect of it would be completely to sterilize its activities? The answer would be in the negative. The reason is clear. Such legislation would be competent Provincial Legislation under the Government of India Act. A passage from the judgment of the Privy Council in the Canadian case of *Lymburn* v. *Mayland*[1] brings out clearly the principle involved in a case of that kind: "A Dominion company constituted with powers to carry on a particular business is subject to the competent legislation of the Province as to that business and may find its special activities completely paralysed, as by legislation against drink traffic or by the laws as to holding land."

34 Development of industries, where development under Federal control is declared by Federal Law to be expedient in the public interest.

The wording of this item is somewhat indefinite. It is difficult to say what all would come within the scope of this power. Three things are necessary for the exercise of this power, namely (1) an industry, (2) a desire on the part of the Federation to develop it under Federal control in the public interest, and (3) such desire being expressed in the form of a legislative enactment whereby the nature of the control to be exercised over it will be specified The words used in this item "development under Federal control" are rather important. The development of an industry under Federal control, may merely take the form of assistance given to it by the establishment of a Research Institute to deal with specific problems concerning that industry, or the organization of a department for disseminating useful information relating to it. The development of an industry under Federal control may, it would seem, take place in other ways also. A subsidy Act may be passed by which monetary assistance would be given to any

[1] (1932) A C. 318, p 324

particular class of industry under conditions specified in the Act. The Act may also provide that such concerns as receive subsidies from the Federal Government are liable to be inspected by appropriate Federal authorities and also carry out the instructions—the nature of which will be prescribed in the Act or rules made thereunder—given to them by those authorities. A question may arise whether the wording of this item is wide enough to enable the Federation by means of a legislative enactment to nationalize any particular class of industry ? The answer to that question seems to be in the affirmative. The Federal control under which the development of an industry is to take place may well be full and exclusive control, that is to say, control to the exclusion of all private, Provincial or State enterprise in that industry, if the Federal Legislature should pass a law that it is expedient in the public interest that the development of that industry should take place under the sole control of the Federation. If that construction is correct, then industries like the Iron and Steel industry, or the armament industry, could be nationalized under this head of power.

35. Regulation of labour and safety in mines and oilfields.

36. Regulation of mines and oilfields and mineral development to the extent to which such regulation and development under Federal control is declared by Federal law to be expedient in the public interest.

37. The law of insurance, except as respects insurance undertaken by a Federated State, and the regulation of the conduct of insurance business, except as respects business undertaken by a Federated State ; Government insurance, except so far as undertaken by a Federated State, or, by virtue of any entry in the Provincial Legislative List or the Concurrent Legislative List, by a Province.

38. Banking, that is to say, the conduct of banking business by corporations other than corporations owned or controlled by a Federated State and carrying on business only within that State.

39. Extension of the powers and jurisdiction of members of a police force belonging to any part of British India to any area in another Governor's Province or Chief Commissioner's Province, but not so as to enable the police of one part to exercise powers and jurisdiction elsewhere without the consent of the Government of the Province or the Chief Commissioner, as the case may be ; extension of the powers and jurisdiction of members of a police force belonging to any unit to railway areas outside that unit.

40. Elections to the Federal Legislature, subject to the provisions of this Act and of any Order in Council made thereunder.

41. The salaries of the Federal Ministers, of the President and Vice-President of the Council of State and of the Speaker and Deputy Speaker of the Federal Assembly; the salaries, allowances and privileges of the members of the Federal Legislature, and, to such extent as is expressly authorized by Part II of this Act, the punishment of persons who refuse to give evidence or produce documents before Committees of the Legislature.

42. Offences against laws with respect to any of the matters in this list.

43. Inquiries and statistics for the purposes of any of the matters in this list.

44. Duties of customs, including export duties.

45. Duties of excise on tobacco and other goods manufactured or produced in India except—

(*a*) alcoholic liquors for human consumption,

(*b*) opium, Indian hemp and other narcotic drugs and narcotics; non-narcotic drugs;

(*c*) medicinal and toilet preparations containing alcohol, or any substance included in sub-paragraph (*b*) of this entry.

46. Corporation tax.

47. Salt.

48. State lotteries.

49. Naturalization.

The power to admit to citizenship the national of another country by granting a certificate of naturalization, also involves the right to revoke that certificate, under conditions to be prescribed by the Federal Legislature. In *Meyer* v. *Poynton*, the legality of the provision in the Australian Naturalization Act, 1903-1917, for revoking the certificate of naturalization under certain circumstances, was upheld on the ground that, "if the power given by the Naturalization Act to admit to Australian citizenship is within the power to make laws with respect to Naturalization, so must authority to withdraw that citizenship on specified conditions be also within that power." Per Starke, J. in the above case.[1]

50. Migration within India from or into a Governor's Province or a Chief Commissioner's Province.

51. Establishment of standards of weight.

52. Ranchi European Mental Hospital.

53. Jurisdiction and powers of all courts, except the Federal

[1] (1920) 27 C.L.R 436, p 440. Cited in Kerr, p 174

Court, with respect to any of the matters in this list and, to such extent as is expressly authorized by Part IX of this Act, the enlargement of the appellate jurisdiction of the Federal Court, and the conferring thereon of supplemental powers

54. Taxes on income other than agricultural income.

55. Taxes on the capital value of the assets, exclusive of agricultural land, of individuals and companies ; taxes on the capital of companies.

56. Duties in respect of succession to property other than agricultural land.

57. The rates of stamp duty in respect of bills of exchange, cheques, promissory notes, bills of lading, letters of credit, policies of insurance, proxies and receipts.

58. Terminal taxes on goods or passengers carried by railway or air ; taxes on railway fares and freights

59. Fees in respect of any of the matters in this list, but not including fees taken in any Court.

Provincial Legislative List (List II)

1. Public order (but not including the use of His Majesty's naval, military or air forces in aid of the civil power) ; the administration of justice ; constitution and organization of all courts, except the Federal Court, and fees taken therein ; preventive detention for reasons connected with the maintenance of public order ; persons subjected to such detention.

2. Jurisdiction and powers of all courts except the Federal Court, with respect to any of the matters in this list ; procedure in Rent and Revenue Courts.

3. Police, including railway and village police.

4. Prisons, reformatories, Borstal institutions and other institutions of a like nature, and persons detained therein ; arrangements with other units for the use of prisons and other institutions.

5. Public debt of the Province.

6. Provincial Public Services and Provincial Public Service Commissions.

7. Provincial pensions, that is to say, pensions payable by the Province or out of Provincial revenues.

8. Works, lands and buildings vested in or in the possession of His Majesty for the purposes of the Province.

9. Compulsory acquisition of land.

10. Libraries, museums and other similar institutions controlled or financed by the Province.

11. Elections to the Provincial Legislature, subject to the provisions of this Act and of any Order in Council made thereunder.

12. The salaries of the Provincial Ministers, of the Speaker and Deputy Speaker of the Legislative Assembly, and, if there is a Legislative Council, of the President and Deputy President thereof; the salaries, allowances and privileges of the members of the Provincial Legislature; and, to such extent as is expressly authorized by Part III of this Act, the punishment of persons who refuse to give evidence or produce documents before Committees of the Provincial Legislatures.

13. Local government, that is to say, the constitution and powers of municipal corporations, improvement trusts, district boards, mining settlement authorities and other local authorities for the purpose of local self-government or village administration.

14. Public health and sanitation, hospitals and dispensaries; registration of births and deaths

15. Pilgrimages, other than pilgrimages to places beyond India.

16. Burials and burial grounds.

17. Education.

18. Communications, that is to say, roads, bridges, ferries, and other means of communication not specified in List I, minor railways subject to the provisions of List I with respect to such railways; municipal tramways; ropeways; inland waterways and traffic thereon subject to the provisions of List III with regard to such waterways; ports, subject to the provisions in List I with regard to major ports; vehicles other than mechanically propelled vehicles.

19. Water, that is to say, water supplies, irrigation and canals, drainage and embankments, water storage and water power

20. Agriculture, including agricultural education and research, protection against pests and prevention of plant diseases, improvement of stock and prevention of animal diseases; veterinary training and practice; pounds and the prevention of cattle trespass.

21. Land, that is to say, rights in or over land, land tenures, including the relation of landlord and tenant, and the collection of rents; transfer, alienation and devolution of agricultural land; land improvement and agricultural loans; colonization; Courts of Wards, encumbered and attached estates; treasure trove.

22. Forests.

23. Regulation of mines and oilfields and mineral development subject to the provisions of List I with respect to regulation and development under Federal control.

24. Fisheries.

25. Protection of wild birds and wild animals.

26. Gas and gasworks

27. Trade and commerce within the Province, markets and fairs; money lending and money lenders.

28. Inns and innkeepers.

29. Production, supply and distribution of goods, development of industries, subject to the provisions in List I with respect to the development of certain industries under Federal control.

30. Adulteration of foodstuffs and other goods; weights and measures.

31. Intoxicating liquors and narcotic drugs, that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors, opium and other narcotic drugs, but subject, as respects opium, to the provisions of List I and, as respects poisons and dangerous drugs, to the provisions of List III

32. Relief of the poor; unemployment.

33. The incorporation, regulation and winding-up of corporations other than corporations specified in List I, unincorporated trading, literary, scientific, religious and other societies and associations, co-operative societies

34. Charities and charitable institutions; charitable and religious endowments

35. Theatres, dramatic performances and cinemas, but not including the sanction of cinematograph films for exhibition

36. Betting and gambling.

37. Offences against laws with respect of any of the matters in this list.

38. Inquiries and statistics for the purpose of any of the matters in this list.

39. Land revenue, including the assessment and collection of revenue, the maintenance of land records, survey for revenue purposes and records of rights, and alienation of revenue.

40. Duties of excise on the following goods manufactured or produced in the Province and countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India—

(*a*) alcoholic liquors for human consumption;

(*b*) opium, Indian hemp and other narcotic drugs and narcotics; non-narcotic drugs;

(*c*) medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (*b*) of this entry.

41. Taxes on agricultural income.

42. Taxes on lands and buildings, hearths and windows.

43. Duties in respect of succession to agricultural land.

44. Taxes on mineral rights, subject to any limitations imposed by any Act of the Federal Legislature relating to mineral development.

45. Capitation taxes.

46. Taxes on professions, trades, callings and employments.

47. Taxes on animals and boats.

48. Taxes on the sale of goods and on advertisements.

49. Cesses on the entry of goods into a local area for consumption, use or sale therein.

50. Taxes on luxuries, including taxes on entertainments, amusements, betting and gambling.

51. The rates of stamp duty in respect of documents other than those specified in the provisions of List I with regard to rates of stamp duty.

52. Dues on passengers and goods carried on inland waterways.

53. Tolls.

54. Fees in respect of any of the matters in this list, but not including fees taken in any Court.

Concurrent Legislative List (*List III*)

PART I

1 Criminal law, including all matters included in the Indian Penal Code at the date of the passing of this Act, but excluding offences against laws with respect to any of the matters specified in List I or List II and excluding the use of His Majesty's naval, military and air forces in aid of the civil power.

2 Criminal Procedure, including all matters included in the Code of Criminal Procedure at the date of the passing of this Act.

3. Removal of prisoners and accused persons from one unit to another unit.

4. Civil Procedure, including the law of Limitation and all matters included in the Code of Civil Procedure at the date of the passing of this Act ; the recovery in a Governor's Province or a Chief Commissioner's Province of claims in respect of taxes and other public demands, including arrears of land revenue and sums recoverable as such, arising outside that Province.

5. Evidence and oaths, recognition of laws, public acts and records and judicial proceedings.

6. Marriage and divorce ; infants and minors ; adoption

7. Wills, intestacy, and succession, save as regards agricultural land.

8. Transfer of property other than agricultural land ; registration of deeds and documents.

9. Trusts and Trustees.

10. Contracts, including partnership, agency, contracts of carriage, and other special forms of contract, but not including contracts relating to agricultural land

11. Arbitration.

12. Bankruptcy and insolvency ; administrators-general and official trustees

13 Stamp duties other than duties or fees collected by means of judicial stamps, but not including rates of stamp duty.

14. Actionable wrongs, save in so far as included in laws with espect to any of the matters specified in List I or List II.

15. Jurisdiction and powers of all courts, except the Federal Court, with respect to any of the matters in this list

16. Legal, medical and other professions.

17. Newspapers, books and printing presses.

18 Lunacy and mental deficiency, including places for the reception or treatment of lunatics and mental deficients.

19. Poisons and dangerous drugs

20 Mechanically propelled vehicles.

21 Boilers.

22. Prevention of cruelty to animals

23. European vagrancy , criminal tribes

24. Inquiries and statistics for the purpose of any of the matters in this part of this List.

25. Fees in respect of any of the matters in this part of this List, but not including fees taken in any Court.

PART II

26. Factories.

27. Welfare of labour ; conditions of labour ; provident funds ; employers' liability and workmen's compensation ; health insurance, including invalidity pensions , old age pensions.

28. Unemployment insurance

29. Trade Unions ; industrial and labour disputes.

30. The prevention of the extension from one unit to another of infectious or contagious diseases or pests affecting men, animals or plants.

31. Electricity.

32. Shipping and navigation on inland waterways as regards mechanically propelled vessels, and the rule of the road on such waterways ; carriage of passengers and goods on inland waterways.

33. The sanctioning of cinematograph films for exhibition.

34. Persons subjected to preventive detention under Federal authority.

35. Inquiries and statistics for the purpose of any of the matters in this part of this List

36. Fees in respect of any of the matters in this Part of this List, but not including fees taken in any Court

CHAPTER XIV

ADMINISTRATIVE RELATIONS BETWEEN THE FEDERATION AND THE FEDERAL UNITS

WITH the setting up of a Federal Constitution, involving as it does a strict demarcation of the functions of the Centre and Provinces, except in the Concurrent field a recasting of the relationship which has so far existed as between the Centre and the Provinces, was inevitable The Constitution under which British India functioned so far was unitary, and as the language of Section 45 of the Government of India Act made it clear, every Local Government, subject to the provisions of the Act and the rules framed thereunder, was bound to obey the orders of the Governor-General in Council Such a conception of relationship connoting the subordination of the Provinces to the Centre can hardly be in consonance with a scheme of Federation in which both the Centre and the Provinces have their activities marked out, and each is free to exercise its functions within its competence, untrammelled by the others New bonds of relationship not only between the Centre and the Provinces, but also between the Centre and such of the States as might join the Federation had therefore to be evolved, as the Centre and the Units could not exist in isolation but had to be brought together into a co-operative mechanism. The purpose of this chapter is to deal briefly with the manner in which the administrative mechanisms of the Centre and the Units will become correlated under the Act.

From the scheme of allocation of powers already discussed in a previous chapter, it is manifest that the laws framed by the Federal Legislature with respect to the matters coming under List I will have full operative effect not only in the autonomous Provinces, but also in every Federated State, though it must be pointed out that in the case of a Federated State the power of the Federal Legislature to make laws extends only to the first forty-seven items in the Legislative List, and even in regard to some of them there may be exclusions or limitations made by a ruler in his instrument of accession Section 8, Sub-section (1) of the Act provides, that the executive authority of the Federation extends to the matters with respect to which the Federal Legislature has power to make laws. It is, however, not necessary that the administration and execution of these laws

should always be undertaken by the Federation itself. It is, in fact, open to the Governor-General, with the consent of the Government of a Province or the Ruler of a Federated State, to entrust either conditionally or unconditionally, to that Government or Ruler, or to their respective officers, functions in relation to any matter to which the executive authority of the Federation extends. An Act of the Federal Legislature may, indeed, confer powers and impose duties upon a Province or officers and authorities thereof, though the Act relates to a matter with respect to which a Provincial Legislature has no power to make laws. In the same way, an Act of the Federal Legislature which extends to a Federated State may confer powers and impose duties upon the State, or officers and authorities thereof, to be designated for the purpose by the Ruler. Where such powers and duties have been conferred or imposed upon a Province or a Federated State or officers or authorities thereof, the Act provides that they should be paid any extra costs of administration incurred by the Province or State as the case may be, in connection with the exercise of those powers and duties. These provisions are contained in Section 124 of the Act. Very often the Provincial or State agency may be found both convenient and economical to execute and administer a Federal subject, and the Act makes ample provision for the employment of the agency of the Units to carry out a Federal measure

It is important to notice that the Act contemplates and provides for a situation under which the Ruler of a Federated State expressly stipulates by his Instrument of Accession that the functions in relation to the administration of any law of the Federal Legislature which applies to his State, must be entrusted to him or his officers In such an event, Section 125 of the Act enacts, that an agreement shall be made between the Governor-General and the Ruler so as to implement the terms of the Instrument of Accession. With respect to the administration of other Federal Laws applying to a Federated State but in regard to which no specific reservations are made by a Ruler, it is open to the Governor-General to enter into agreements with the Ruler thereof for the exercise of those functions relating to their administration as may be conveniently entrusted to the Ruler or his officers. In both these cases, Section 125 of the Act provides that the agreements entered into should contain provisions enabling the Governor-General in his discretion to satisfy himself, by inspection or otherwise, that the administration of the law to which the agreement relates is being carried

out in accordance with the policy of the Federal Government.

The considerations which apply to the administration of the laws coming within the purview of the Concurrent List, it must be observed, are not the same as those which apply to the administration of laws coming within the Federal Legislative List. The Joint Select Committee which considered this matter have made the following observations in the course of their report: "It is evident that in its exclusive field the Federal Government ought to have power to give directions—detailed and specific if need be—to a Provincial Government as proposed in the White Paper. The same principle should apply to matters in which action or inaction by a Provincial Government within its own exclusive sphere affects the administration of an exclusively Federal subject—that is to say, it should be open to the Federal Government to give directions to a Provincial Government which is so carrying on the administration of a Provincial subject as to affect prejudicially the efficiency of a Federal subject. But it is much more doubtful whether it should have such power in the Concurrent field. The objects of legislation in this field will be predominantly matters of Provincial concern, and the agency by which such legislation will be administered will be almost exclusively a Provincial agency. The Federal Legislature will be generally used as an instrument of legislation in this field merely from considerations of practical convenience and, if this procedure were to carry with it automatically an extension of the scope of Federal administration, the Provinces might feel that they were exposed to a dangerous encroachment. On the other hand, the considerations of practical convenience which would prompt the use of the Federal Legislature in this field will often be the need for securing uniformity in matters of social legislation, and uniformity of legislation will be useless if there is no means of enforcing reasonable uniformity of administration We think the solution is to be found in drawing a distinction between subjects in the Concurrent List which on the one hand relate, broadly speaking, to matters of social and economic legislation, and those which on the other hand relate mainly to matters of law and order and personal rights and status. The latter form the larger class, and the enforcement of legislation on these subjects would, for the most part, be in the hands of the Courts or of the Provincial authorities responsible for public prosecutions. There can clearly be no question of Federal directions being issued to the courts, nor could such directions properly be issued to prosecuting authorities in the Provinces. In these

matters, therefore, we think that the Federal Government should have in law as they could have in practice, no powers of administrative control. The other class of concurrent subjects consists mainly of the regulation of mines, factories, employers' liability and workmen's compensation, trade unions, welfare of labour, industrial disputes, infectious diseases, electricity and cinematograph films. In respect of this class, we think that the Federal Government should, where necessary, have the power to issue directions for the enforcement of the law, but only to the extent provided by the Federal Act in question."[1] This passage from the report of the Joint Select Committee serves to elucidate the rationale of the division of the concurrent list into two parts. On a reference to the list of subjects coming within the purview of Part I of List III, it will be seen that they relate mostly to law and order, personal rights and status. Legislation pertaining to these matters will have to be given effect to either by the courts or provincial authorities who will be in charge of public prosecutions In this sphere, there is no question of instructions being issued by the federal authorities, either to the courts or to the provincial prosecuting authorities. But if we turn to the matters contained in Part II of List III, we find subjects like factories, welfare of labour, trade unions and industrial and labour disputes, the prevention of extension from one unit to another of infectious or contagious diseases, electricity, etc. Where the Federal Legislature deems it expedient to enter the concurrent field pertaining to any of these matters, it stands to reason that it should have the power to give directions to the Provinces as to the carrying into execution therein of any Act passed by it with reference to any of these topics. That is the reason why Section 126, Sub-section (2) expressly provides that " the executive authority of the Federation shall also extend to the giving of directions to a Province as to the carrying into execution therein of any Act of the Federal Legislature which relates to a matter specified in Part II of the Concurrent Legislative List and authorizes the giving of such directions "

122. (1) The executive authority of every Province and Federated State shall be so exercised as to secure respect for the laws of the Federal Legislature which apply in that Province or State.

(2) The reference in Sub-section (1) of this section to laws of the Federal Legislature shall, in relation to any Province, include a reference to any existing Indian Law applying in that Province.

[1] *J P C. Report*, Volume I, pp 120-121

(3) Without prejudice to any of the other provisions of this part of this Act, in the exercise of the executive authority of the Federation in any Province or Federated State regard shall be had to the interests of that Province or State

123. (1) The Governor-General may direct the Governor of any Province to discharge as his agent, either generally or in any particular case, such functions in and in relation to the tribal areas as may be specified in the direction

(2) If in any particular case it appears to the Governor General necessary or convenient so to do, he may direct the Governor of any Province to discharge as his agent such functions in relation to defence, external affairs, or ecclesiastical affairs as may be specified in the direction.

(3) In the discharge of any such functions the Governor shall act in his discretion.

124. (1) Notwithstanding anything in this Act, the Governor-General may, with the consent of the Government of a Province or the Ruler of a Federated State, entrust either conditionally or unconditionally to that Government or Ruler, or to their respective officers, functions in relation to any matter to which the executive authority of the Federation extends

(2) An Act of the Federal Legislature may, notwithstanding that it relates to a matter with respect to which a Provincial Legislature has no power to make laws, confer powers and impose duties upon a Province or officers and authorities thereof.

(3) An Act of the Federal Legislature which extends to a Federated State may confer powers and impose duties upon the State or officers and authorities thereof to be designated for the purpose by the Ruler.

(4) Where by virtue of this section powers and duties have been conferred or imposed upon a Province or Federated State or officers or authorities thereof, there shall be paid by the Federation to the Province or State such sum as may be agreed, or, in default of agreement, as may be determined by an arbitrator appointed by the Chief Justice of India, in respect of any extra costs of administration incurred by the Province or State in connection with the exercise of those powers and duties.

125. (1) Notwithstanding anything in this Act, agreements may, and, if provision has been made in that behalf by the Instrument of Accession of the State, shall, be made between the Governor-General and the Ruler of a Federated State for the exercise by the Ruler or his officers of functions in relation

to the administration in his State of any law of the Federal Legislature which applies therein.

(2) An agreement made under this section shall contain provisions enabling the Governor-General in his discretion to satisfy himself, by inspection or otherwise, that the administration of the law to which the agreement relates is carried out in accordance with the policy of the Federal Government and, if he is not so satisfied, the Governor-General, acting in his discretion, may issue such directions to the Ruler as he thinks fit.

(3) All courts shall take judicial notice of any agreement made under this section.

126. (1) The executive authority of every Province shall be so exercised as not to impede or prejudice the exercise of the executive authority of the Federation, and the executive authority of the Federation shall extend to the giving of such directions to a Province as may appear to the Federal Government to be necessary for that purpose.

(2) The executive authority of the Federation shall also extend to the giving of directions to a Province as to the carrying into execution therein of any Act of the Federal Legislature which relates to a matter specified in Part II of the Concurrent Legislative List and authorizes the giving of such directions :

Provided that a Bill or amendment which proposes to authorize the giving of any such directions as aforesaid shall not be introduced into or moved in either Chamber of the Federal Legislature without the previous sanction of the Governor-General in his discretion.

(3) The executive authority of the Federation shall also extend to the giving of directions to a Province as to the construction and maintenance of means of communication declared in the direction to be of military importance :

Provided that nothing in this sub-section shall be taken as restricting the power of the Federation to construct and maintain means of communication as part of its functions with respect to naval, military and air force works.

(4) If it appears to the Governor-General that in any Province effect has not been given to any directions given under this section, the Governor-General, acting in his discretion, may issue as orders to the Governor of that Province either the directions previously given or those directions modified in such manner as the Governor-General thinks proper.

(5) Without prejudice to his powers under the last preceding sub-section, the Governor-General, acting in his discretion, may

at any time issue orders to the Governor of a Province as to the manner in which the executive authority thereof is to be exercised for the purpose of preventing any grave menace to the peace or tranquillity of India or of any part thereof.

127. The Federation may, if it deems it necessary to acquire any land situate in a Province for any purpose connected with a matter with respect to which the Federal Legislature has power to make laws, require the Province to acquire the land on behalf, and at the expense, of the Federation or, if the land belongs to the Province, to transfer it to the Federation on such terms as may be agreed or, in default of agreement, as may be determined by an arbitrator appointed by the Chief Justice of India

128. (1) The executive authority of every Federated State shall be so exercised as not to impede or prejudice the exercise of the executive authority of the Federation so far as it is exercisable in the State by virtue of a law of the Federal Legislature which applies therein.

(2) If it appears to the Governor-General that the Ruler of any Federated State has in any way failed to fulfil his obligations under the preceding sub-section, the Governor-General, acting in his discretion, may after considering any representations made to him by the Ruler issue such directions to the Ruler as he thinks fit :

Provided that, if any question arises under this section as to whether the executive authority of the Federation is exercisable in a State with respect to any matter or as to the extent to which it is so exercisable, the question may, at the instance either of the Federation or the Ruler, be referred to the Federal Court for determination by that Court in the exercise of its original jurisdiction under this Act.

Broadcasting

129. (1) The Federal Government shall not unreasonably refuse to entrust to the Government of any Province or the Ruler of any Federated State such functions with respect to broadcasting as may be necessary to enable that Government or Ruler—

(*a*) to construct and use transmitters in the Province or State ;

(*b*) to regulate, and impose fees in respect of, the construction and use of transmitters and the use of receiving apparatus in the Province or State :

Provided that nothing in this sub-section shall be construed as requiring the Federal Government to entrust to any such Government or Ruler any control over the use of transmitters constructed or maintained by the Federal Government or by persons authorized by the Federal Government, or over the use of receiving apparatus by persons so authorized.

(2) Any functions so entrusted to a Government or Ruler shall be exercised subject to such conditions as may be imposed by the Federal Government, including, notwithstanding anything in this Act, any conditions with respect to finance, but it shall not be lawful for the Federal Government so to impose any conditions regulating the matter broadcast by, or by authority of, the Government or Ruler.

(3) Any Federal Laws which may be passed with respect to broadcasting shall be such as to secure that effect can be given to the foregoing provisions of this section.

(4) If any question arises under this section whether any conditions imposed on any such Government or Ruler are lawfully imposed, or whether any refusal by the Federal Government to entrust functions is unreasonable, the question shall be determined by the Governor-General in his discretion.

(5) Nothing in this section shall be construed as restricting the powers conferred on the Governor-General by this Act for the prevention of any grave menace to the peace or tranquillity of India or any part thereof, or as prohibiting the imposition on Governments or Rulers of such conditions regulating matter broadcast as appear to be necessary to enable the Governor-General to discharge his functions in so far as he is by or under this Act required in the exercise thereof to act in his discretion or to exercise his individual judgment.

Interference with Water Supplies

130. If it appears to the Government of any Governor's Province or to the Ruler of any Federated State that the interests of that Province or State, or of any of the inhabitants thereof, in the water from any natural source of supply in any Governor's or Chief Commissioner's Province or Federated State, have been, or are likely to be, affected prejudicially by—

(*a*) any executive action or legislation taken or passed, or proposed to be taken or passed ; or

(*b*) the failure of any authority to exercise any of their powers, with respect to the use, distribution or control of water from that source, the Government or Ruler may complain to the Governor-General.

131. (1) If the Governor-General receives such a complaint as aforesaid, he shall, unless he is of opinion that the issues involved are not of sufficient importance to warrant such action, appoint a Commission consisting of such persons having special knowledge and experience in irrigation, engineering, administration, finance or law, as he thinks fit, and request that Commission to investigate in accordance with such instructions as he may give to them, and to report to him on, the matters to which the complaint relates, or such of those matters as he may refer to them.

(2) A Commission so appointed shall investigate the matters referred to them and present to the Governor-General a report setting out the facts as found by them and making such recommendations as they think proper.

(3) If it appears to the Governor-General upon consideration of the Commission's report that anything therein contained requires explanation, or that he needs guidance upon any point not originally referred by him to the Commission, he may again refer the matter to the Commission for further investigation and a further report.

(4) For the purpose of assisting a Commission appointed under this section in investigating any matters referred to them, the Federal Court, if requested by the Commission so to do, shall make such orders and issue such letters of request for the purposes of the proceedings of the Commission as they may make or issue in the exercise of the jurisdiction of the court.

(5) After considering any report made to him by the Commission, the Governor-General shall give such decision and make such order, if any, in the matter of the complaint as he may deem proper :

Provided that if, before the Governor-General has given any decision, the Government of any Province or the Ruler of any State affected request him so to do, he shall refer the matter to His Majesty in Council and His Majesty in Council may give such decision and make such order, if any, in the matter as he deems proper.

(6) Effect shall be given in any Province or State affected to any order made under this section by His Majesty in Council or the Governor-General, and any Act of a Provincial Legislature or of a State which is repugnant to the order shall, to the extent of the repugnancy, be void.

(7) Subject as hereinafter provided the Governor-General, on application made to him by the Government of any Province, or the Ruler of any State affected, may at any time, if after a

reference to, and report from, a Commission appointed as aforesaid he considers it proper so to do, vary any decision or order given or made under this section :

Provided that, where the application relates to a decision or order of His Majesty in Council and in any other case if the Government of any Province or the Ruler of any State affected request him so to do, the Governor-General shall refer the matter to His Majesty in Council, and His Majesty in Council may, if he considers proper so to do, vary the decision or order.

(8) An order made by His Majesty in Council or the Governor-General under this section may contain directions as to the Government or persons by whom the expenses of the Commission and any costs incurred by any Province, State or persons in appearing before the Commission are to be paid, and may fix the amount of any expenses or costs to be so paid, and so far as it relates to expenses or costs, may be enforced as if it were an order made by the Federal Court.

(9) The functions of the Governor-General under this section shall be exercised by him in his discretion.

132. If it appears to the Governor-General that the interests of any Chief Commissioner's Province, or of any of the inhabitants of such a Province, in the water from any natural source of supply in any Governor's Province or Federated State have been or are likely to be affected prejudicially by—

(*a*) any executive action or legislation taken or passed, or proposed to be taken or passed ; or

(*b*) the failure of any authority to exercise any of their powers, with respect to the use, distribution or control of water from that source, he may, if he in his discretion thinks fit, refer the matter to a Commission appointed in accordance with the provisions of the last preceding section and thereupon those provisions shall apply as if the Chief Commissioner's Province were a Governor's Province and as if a complaint with respect to the matter had been made by the Government of that Province to the Governor-General.

133. Notwithstanding anything in this Act, neither the Federal Court nor any other court shall have jurisdiction to entertain any action or suit in respect of any matter if action in respect of that matter might have been taken under any of the three last preceding sections by the Government of a Province, the Ruler of a State or the Governor-General.

134. The provisions contained in this Part of this Act with respect to interference with water supplies shall not apply in relation to any Federated State the Ruler whereof has declared

in his Instrument of Accession that those provisions are not to apply in relation to his State.

Inter-Provincial Co-operation

135. If at any time it appears to His Majesty upon consideration of representations addressed to him by the Governor-General that the public interests would be served by the establishment of an Inter-Provincial Council charged with the duty of—

(*a*) inquiring into and advising upon disputes which may have arisen between Provinces ;

(*b*) investigating and discussing subjects in which some or all of the Provinces, or the Federation and one or more of the Provinces, have a common interest ; or

(*c*) making recommendations upon any such subject and, in particular, recommendations for the better co-ordination of policy and action with respect to that subject,

it shall be lawful for His Majesty in Council to establish such a Council, and to define the nature of the duties to be performed by it and its organization and procedure.

An Order establishing any such Council may make provision for representatives of Indian States to participate in the work of the Council.

This section makes provision for the constitution of an Inter-Provincial Council to inquire into and advise upon disputes which may have arisen between the Provinces ; or to investigate and discuss subjects in which some or all of the Provinces, or the Federation and one or more of the Provinces, have a common interest ; or for making recommendations upon any subject and, in particular, recommendations for the better co-ordination of policy and action with respect to that subject. The wordings of this section indicate that the Inter-Provincial Council need not be a permanent body but an *ad hoc* committee which is brought into existence for the express purpose of dealing with any of the matters specified in the section. It will evidently be a flexible organization created to meet the exigencies of the situation. That a provision of this character was necessary in the constitution cannot be gainsaid. In the course of the working of the constitutional machinery, there are bound to be important differences or disputes between one Province and another, of a non-legal character, for the resolving of which a machinery has to be devised. Again, if co-ordination of policy in regard to any subject on the part of any two or

more of the units is considered expedient, then that cause would be better served by the units being brought together on a common forum. As the Joint Select Committee have pointed out in their report: "It is obvious that, if departments or institutions of co-ordination and research are to be maintained at the Centre in such matters as agriculture, forestry, irrigation, education, and public health, and if such institutions are to be able to rely on appropriations of public funds sufficient to enable them to carry on their work, the joint interest of the Provincial Governments in them must be expressed in some regular and recognized machinery of inter-governmental consultation."[1]

[1] *J P C Report*, Volume I, p 123

CHAPTER XV

FEDERAL FINANCE

I. *Introductory*

In almost every Federation, Federal finance involves the solution of a variety of difficult and perplexing problems, and the financial arrangements embodied in Federal Constitutions are always dictated by a spirit of compromise so as, not only to hold a fair balance between the competing claims of the Centre and the Units in regard to the allocation of resources, but also to reconcile, as far as possible, the differing viewpoints of the various contestants in other financial matters. That the framers of the new constitution for India had to face difficult problems in outlining a satisfactory and workable system of Federal finance, should not, therefore, occasion any surprise. Indeed, if anything, the problems which confronted those who had to construct the new Constitution for India were more complicated than those which had to be faced by persons who had to perform a similar task in other parts of the world; as the existence of the Indian States who had to be brought into the Federal framework added to the difficulties of the situation. On the whole, the scheme of Federal finance envisaged by the Government of India Act, 1935, represents a well-balanced and elastic scheme. It is probably the best that could have been devised under the limitations imposed by the difficulties of the situation.

Before considering the main features of the Federal financial system which the new Constitution embodies, it would, I believe, be useful to be in possession of certain outstanding facts which serve as a background for the new financial picture. In the chapter dealing with the Montagu-Chelmsford reforms, I have sketched the outlines of the financial system hitherto in force. In substance the distribution of resources between the Central and Provincial governments which has existed till recently in British India bore a close resemblance to a Federal allocation of resources, though that allocation was made under the devolution rules framed under the authority of the Government of India Act, and was not directly effected by the Act itself. The keynote of this allocation of resources was to secure an almost complete separation of the sources of revenue

to be placed at the disposal of the Centre and the Provinces. The main sources of Central Revenue were customs, income tax, salt, opium, currency and mint and contributions made by the States Railways which were yielding profits and thus making a contribution to the Central Exchequer, have, for some years past, ceased to bring a return.[1] The main sources of Revenue for the Provinces were land revenue, alcoholic excises, forests, irrigation, stamps, registration and the schedule taxes. It must be remembered that the expenditure to be borne by the Centre during normal times is of a fairly stationary character. Defence is the largest item in the expenditure side of the Central budget. The other important items of Central expenditure are debt charges, administration, pensions, civil works and subventions to Provinces The Provinces are in charge of activities which are vital to the interests of the people. On them rests the responsibility for providing adequate funds for such beneficent activities as public health, education, and agriculture. The Joint Select Committee observed that " the Provinces have rarely had means adequate for a full development of their social needs, while the Centre, with taxation at a normal level, has no greater margin than is requisite in view of the vital necessity for maintaining unimpaired both the efficiency of the defence services and the credit of the Government of India, which rests fundamentally upon the credit of India as a whole Centre and Provinces together. But the resources of the Centre comprise those which should prove most capable of expansion in a period of normal progress."[2]

While it is of the utmost importance to India as a whole, that the Central Government should be put in possession of sufficient resources to maintain its credit at a high level and to finance adequately the services entrusted to its charge; it is also clear, that the Provinces should be left with sufficient funds to maintain their social services at a high level of efficiency. It is true that, there is no limit to the amount of money that could be spent on the beneficent activities of government like health, education, and agriculture The amount of resources which the Provinces can command determine the limits to which they can travel for financing their nation-building activities. Under the scheme of allocation which has operated so far, the produce of income

[1] The position has, however, altered lately Sir James Grigg in his budget speech to the Indian Legislative Assembly, on February 26, 1938, stated, that the railways were expected to bring in a net surplus of 283 lakhs of rupees in the year 1937–38

[2] *J P C Report*, Volume I, p 161

tax collected in the various Provinces has gone entirely to the Central Exchequer. The sources of revenue which had been allotted to the Centre like customs, excise and income tax were precisely those items of revenue which, with the lifting of the economic depression which had hitherto reacted unfavourably on the finances of the Centre as well as the Provinces, would tend to show decisive improvement. Land revenue, probably the biggest item in the Provincial budgets, was an inelastic source of revenue for the Provinces. The other Provincial items, it was anticipated by the Joint Select Committee, would not respond so readily to an improvement in the economic conditions, as the Central revenues would. There was a general claim by the Provinces for the allocation to them of a substantial share of the proceeds of income tax. The Joint Select Committee accepted the fairness of this claim. Section 138 of the Act deals with the allocation to the Provinces of a share in the income tax proceeds. I propose to deal with the details of the arrangement contemplated in regard to this matter when I come to consider Section 138. The Indian States have made it clear, that they would not agree to the levy of Federal income tax in their territories. The first impression which would be formed by a person who views the attitude of the Indian States in this matter in isolation, would be, that it is unfair to the British Indian Provinces that they should be called upon to contribute to the Central Exchequer a substantial portion of the income tax levied in the Provinces, while the States themselves would make no similar contribution to that Exchequer. This would, in effect, appear to militate against the principle that the Units in a federation should make a uniform contribution to the Federal fisc. But, on a closer examination of the whole matter, it would be manifest that this is certainly not a correct view. The Joint Select Committee while adverting to this subject, have made the following important observations: "Some of the Federal expenditure will be for British-India purposes only, such as subsidies to deficit British-India Provinces; there has also been a controversy on the question whether the service of part of the pre-Federation debt should not fall on British India alone; and further, part of the proceeds of taxes on income is derived from subjects of Indian States, e.g., holders of Indian Government securities and shareholders in British-India companies. The States also make a contribution in kind to defence to which there is no counterpart in the Provinces of British India. It seems to us both unnecessary and undesirable to attempt any accurate balancing of these

factors or to determine on a basis of this kind what share of the income tax could equitably be retained by the Federation."[1] A meticulous balancing of the contributions made by the Units to the common pool so as to secure a perfect equality in that respect is impossible, especially in the circumstances which at present exist in India. It is undoubtedly true, that in view of the fact that the proceeds of income tax will have to be shared between the Federation and the Units while the levy is made by the Federal Legislature alone, the arrangement is open to the theoretical objection that there would be a blurring of responsibility. But the facts of the situation left no alternative to the framers of the constitution but to make income tax a divisible head of revenue. The same objection applies to the case of Federal excise and export duties which will be levied and collected by the Federation, but the produce of any of which, if an Act of the Legislature so provides, can be distributed either wholly or in part among the Provinces and such of the Federated States as have agreed to the imposition of such duty. In order, however, to safeguard the interests of the Units, Section 141 of the Act makes the previous consent of the Governor-General, in his discretion, necessary, for the introduction of any bill or amendment in either chamber of the Federal Legislature which imposes or varies any tax or duty in which the Provinces and Federated States are interested, or alters the principles of distribution among them of the produce of those duties or taxes

In order to start the British Indian Provinces on " an even keel " at the time of the inauguration of Provincial autonomy, several problems had to be resolved, the most notable of which was that which related to the deficit Provinces. Sind, which was constituted a new Province on April 1, 1936, was in need of immediate financial assistance, although it was anticipated that with the full development of the Lloyd Barrage project, the Province would be able to stand on its own legs. There was again, the case of some of the other Provinces like Orissa and Assam, which, as the Joint Select Committee pointed out, so far as could be forseen, would remain deficit areas, " in which there was no likelihood that revenue and expenditure could be made to balance under the general scheme of allocation of resources, present or proposed."[2] These Provinces were, therefore, in need of subventions from the Centre to balance their budgets. The case of the North-West Frontier Province

[1] *J P C, Report,* Volume I, p 163
[2] *J P C Report,* Volume I, p 166

was somewhat different from those of the other Provinces in regard to its need for financial assistance. In view of its strategic position, provision had to be made in the Budget of that Province for certain special items of expenditure, which could not strictly be treated as items of defence expenditure. As a matter of fact, provision had been made in the budget of the Government of India for 1936-37 for the grant of the following subventions. North-West Frontier Province was to receive one crore, Sind one crore and eight lakhs, and Orissa fifty lakhs of rupees. The Act has made provision by Section 142, for such sums as may be prescribed by His Majesty in Council to be charged on the revenues of the Federation in each year as grants in aid of the revenues of such Provinces as His Majesty may determine to be in need of assistance. Sir Otto Niemeyer was appointed by His Majesty's Government to conduct an inquiry, the terms of reference of which were, " to make recommendations to His Majesty's Government, after reviewing the present and prospective budgetary positions of the Government of India, and of the Governments of the Provinces on the matters which under Sections 138 (1) and (2), 140 (2) and 142 of the Government of India Act, 1935, have to be prescribed or determined by His Majesty in Council (subject to the approval of both Houses of Parliament) and on any ancillary matters arising out of the financial adjustment between the Government of India and the Provincial Governments regarding which His Majesty's Government may desire a report." One of the specific matters upon which he was asked to make recommendations was the sums to be charged on the Central revenues as grants in aid to the Provinces under Section 142 of the Act. Sir Otto Niemeyer submitted his report on April 6, 1936, and all the recommendations made by him on the points referred to him have been accepted in His Majesty's Order in Council styled the Government of India (Distribution of Revenues) Order, 1936. I do not propose to refer to the details of the subventions which will be granted by the Centre to the Provinces at this stage. I shall give those details, when I deal with Section 142 of the Act. The recommendations made by Sir Otto Niemeyer in regard to the allocation of taxes on income as well as the distribution of the Jute export duty, which have also been given effect to in the Order in Council adverted to above, will also be referred to, when I deal with Sections 138 and 142 of the Act. In the telegram sent by the Secretary of State to the Government of India soon after the submission of the Niemeyer Report, the Secretary of State

stated that the recommendations made by Sir Otto on the points referred to him were in the nature of a quasi-arbitral award and that he saw no reason to depart to any extent from them, and that he would be submitting a draft Order in Council to Parliament in regard to that matter.[1] The financial assistance to be given to some of the Provinces by way of subventions has already been referred to. The Provinces have also derived considerable assistance to their Exchequer by way of debt cancellation or consolidation and decentralization of balances. The scheme for the decentralization of balances and the concellation and consolidation of debt which formed an integral part of the whole plan of the initial financial arrangements recommended by Sir Otto Niemeyer, has been given effect to, by the new Devolution Rule 35 A That rule has been published in the Gazette of India (Extraordinary) of Friday, March 26, 1937.

The proposed entry of the Indian States into the Federation gave rise to a series of difficult problems, many of which had financial aspects also. These had to be adjusted to the mutual satisfaction of the British Government and the States concerned, before they could join in the co-operative framework of Federation It is important to realize, that the Federation which was going to be set up in India would involve a series of anomalies. That could not, of course, occasion any surprise, if one bore in mind, the fact, that the framers of the Constitution had no *tabula rasa* on which to write, but were confronted with a series of hard realities, many of which had their origin in the treaties which had been concluded by the Indian States with the East India Company when it was getting transformed from a trading corporation into a territorial power. These realities had to be faced and adjusted in a spirit of give and take. Considerations of space make it impossible to deal in this chapter with all the problems which have arisen in connection with the entry of the Indian States into the Federation. But I propose to refer briefly in this context to three of them, namely, (1) ceded territories, (2) land customs imposed by Indian States, and (3) maritime States and sea customs.

One of the important questions referred to the Indian States Enquiry Committee (Financial), presided over by the Right Honourable J. C. C. Davidson, was that relating to territories ceded by the States in return for specific military guarantees. The Committee was directed, in their terms of reference, " hav-

[1] *Correspondence between the Local Governments, the Government of India and the Secretary of State, on the recommendations of the Niemeyer Report*, p 37.

ing regard both to the circumstances of the original cession and to the financial and other conditions now obtaining, to express an opinion as to whether any financial adjustment should be made in favour of the State concerned as a part of the terms of its Federation." The Federal Finance Sub-Committee of the Round Table Conference, which was presided over by Lord Peel, accepted the principle that cash contributions levied from the States should gradually be abolished, as such levies were incompatible with the idea of a Federation [1] It is undoubtedly true, that tributes could have no place in a scheme of Federation involving the idea of an equality among those who enter into Federal partnership. The Indian States Enquiry Committee were of the view, that there was a close analogy between cash contributions and cessions of territory ; and that, if cash contributions were to be abolished, then, the States who had ceded their territories were also legitimately entitled to some amount of relief. The Committee at page 34 of their report have observed as follows : "An examination therefore of the supposed analogy between these two forms of contribution to military defence is a necessary preliminary to determining how far financial adjustment in the one case demands financial adjustment in the other. Our enquiries establish beyond all doubt that tributes and cessions of territory have, for the most part, a common origin, and that as often as not it was entirely a matter of chance whether a State paid tribute or ceded territory instead Although the circumstances in no one State illustrate the entire process of development, the course of events in most cases was very similar. In the earliest instances the obligation laid upon a State which entered into an alliance with the East India Company was simply to provide troops for mutual defence in time of war. In the next stage, owing to the inefficiency of the local levies, the latter were replaced by a force raised and officered by the Company at the expense of the allied State. Finally, owing to irregularity in the payment of the instalments intended to meet the cost of this force, it was arranged that for cash payments should be substituted a cession of territory estimated to bring in a net revenue equivalent to the sum annually required. We find it impossible, for instance, to draw any distinction between the origin and object of the Nizam's cessions in the Madras Presidency and the Cochin or Travancore tributes. So far, then, it would seem that, if a tribute-paying State has a claim to remission, a State which

[1] *Indian Round Table Conference (Second Session) Proceedings of Federal Structure Committee*, Vol II, p 958

has ceded territory is equally entitled to some form of relief. We cannot admit the argument that in the one case we are dealing with a transaction which is final and irrevocable while in the other the arrangement is open to revision in the light of modern conditions."

It may be that the analogy sought to be drawn between tributes and cessions of territory will not hold good in all cases. But the analogy between the case of a contribution levied from a State as payment for military protection and the case of cession by a State of territory estimated to yield a revenue equivalent to the cost of maintenance of an armed force for the military defence of that State in lieu of a cash payment, is too close to be overlooked. If any particular State which had ceded territories in order to defray the cost of a subsidiary force of a particular character (as so many regiments of cavalry, infantry and artillery) for the defence of the State was prepared to waive those specific military guarantees, there was very good reason either to retrocede the territories, or if that was not possible, to compensate that State in some other way for waiving those guarantees. And there could be no doubt whatever that if a State paying a cash contribution for military protection was entitled to an abolition of the levy, the State which had ceded territories under the circumstances already mentioned would also be entitled to some relief The Indian State Enquiry Committee (Financial) in their report have fully set out the problems which arise in connection with ceded territories and the conclusions at which they have arrived at in regard to them upon an investigation of the whole matter The committee recommended that the following annual credits be allowed in respect of the territory ceded by the undermentioned States :[1]

Baroda	...	. .	...	...	...	22·98 Lakhs
Gwalior	...	...	...	...	...	11.78 ,,
Indore	...	...	...	...	...	1.11 ,,
Sangli	...	...	...	...	...	1.10 ,,

The States concerned in the matter will have to come to an understanding with the British Government as to the sums to be allowed as credits in respect of ceded territories, when they execute the Instruments of Accession. Section 147, Sub-section (2) of the Act makes specific provision in regard to this matter. I shall deal with this later. The State of Hyderabad, it would appear, has asked that the military guarantee for which she had ceded territory, should

[1] *Report of the Indian States Enquiry Committee* (Financial), 1932, p 59

continue to be observed, and that she was therefore not claiming any credit on this account.

The Government of India Act, 1935, by Section 147, Subsection (2) not only makes provision for the award of such compensation as His Majesty considers proper, in respect of cession of territory made by a State in return for specific military guarantees, on condition that such guarantees should be waived by that State, but also provides for the grant of compensation even in cases of cession of territory by a State, in return for the discharge of the State from obligations to provide military assistance. In view of the fact that the Federal Government will be in charge of defence and will be provided with adequate resources to fulfil its responsibility in regard to that matter, all the units including Federated States shouldering the responsibility to contribute to the Federal Exchequer in accordance with the provisions of the Act, some financial adjustment was called for, even in cases of States which had ceded territories in return for their discharge from the obligation to provide military assistance to the British Government Section 147, Sub-section (2) provides for such adjustments also at the time of accession of a State to the Federation

The imposition of internal customs barriers by the Units of a Federation with its inevitable result of obstructing freedom of internal trade is, in theory, quite out of harmony with a scheme of Federation As a matter of fact, in every fully developed Federation, the imposition of barriers by the units of the federation against the free flow of trade is forbidden The regulation of tariffs and other restrictions on trade are matters which in such a Federation come under the control of the Federal Government. That is part of the price which the constituent units have to pay for forming a Federal Union. For instance, Section 92 of the Commonwealth of Australia Constitution Act, 1900, provides, that on the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free This section must be read in conjunction with Section 88 of the Act which provides that uniform duties of customs shall be imposed within two years after the establishment of the Commonwealth. So far as the British Indian Provinces are concerned, internal freedom of trade is secured by the provision contained in Section 297 of the Act, which prevents a Provincial Legislature or Government from passing any law or taking any executive action prohibiting or restricting the entry into, or export from,

that Province of goods of any class or description or to impose any tax, cess, toll or due which as between goods manufactured or produced in the Province and similar goods not so manufactured or produced discriminates in favour of the former, or which, in the case of goods manufactured or produced outside the Province, discriminates between goods manufactured or produced in one locality and similar goods manufactured or produced in another locality. Many Indian States levy customs duties at their frontiers on goods entering their territories. The revenue derived from these duties are of a substantial character and the States were naturally unwilling to abolish them, as such a course would have thrown their budgets completely out of gear. While, internal freedom of trade is an ideal to be aimed at, it may probably take many years before that ideal could be realized in India. The Joint Select Committee entertained the hope that the States would make every endeavour to find alternative sources of revenue to replace their internal customs duties and thus pave the way for their gradual abolition.

The problems which arise in connection with the entry of the maritime States into the Indian Federation are of an extremely complicated character. The Indian States Enquiry Committee (Financial) have examined many of these problems and made their recommendations. That the maritime States are entitled to levy customs duties on goods imported from abroad and unloaded at their ports, cannot be, and is not, disputed. Nor could it be disputed that the States have full freedom to levy such customs duties at their own rates unless they have voluntarily agreed to adopt the British Indian rates. The history of the Kathiawar ports, which has been given at some length in the report of the Indian States Enquiry Committee (Financial), is instructive as indicating the manner in which conflicts have frequently arisen between the Indian States in that region and the Government of India. I shall not enter into that history, interesting as it is.

That many adjustments become necessary before the maritime States can take their place in the scheme of Federation, is obvious. The Joint Select Committee while referring to this matter, have made the following observations, at page 169 of their report, (Volume I): "The general principle which we should like to see applied in the case of maritime States which have a right to levy sea customs is that they should be allowed to retain only so much of the customs duties which they collect as is properly attributable to dutiable goods consumed in their

own State ; but we recognize that treaty rights may not make it possible in all cases to attain this ideal. But if insistence upon treaty or other rights in any particular case makes such an arrangement (perhaps with certain adjustments or modifications) impossible, then it seems to us that the question will have to be seriously considered whether the State could properly be admitted into the Federal System. It is unnecessary to emphasize the importance of securing that there is a genuine uniformity in the rates of customs duties levied respectively at State ports and at the ports of British India " If logic alone were to determine the issue, the maritime States would have to surrender the revenue derived from sea customs to the Federation. The reasons are fairly obvious. The customs receipts under the scheme of allocation of resources belong to the Federation The duties collected at the various British Indian Provinces would enure to the benefit of the Central Exchequer. The land-locked Indian States also contribute to the Central revenues since they absorb dutiable goods in the same way as the British Indian Provinces do If customs are to belong to the Federation, then, they must go to the Central revenues, no matter where those duties are collected, whether at British Indian ports or Indian State ports The Central revenues of which the proceeds of customs duties will form a very substantial part, will be utilized for rendering services for all the Federal Units Hence, if the principle that Federal Units should contribute equally to the Federal Exchequer has to be applied, there could be no doubt that the maritime States would have to surrender their existing rights in regard to sea customs also. But a number of the maritime States derive substantial revenues from this source, and very naturally they are not prepared to surrender a source of revenue which has helped to expand beneficent activities within their own territories. Moreover, from their point of view, the surrender of this revenue would be too heavy a price to pay for becoming constituent units of the Federation. Now the choice lies between two courses. Are they to be excluded from the Federation because the retention on their part of customs revenue would, in strict theory, militate against the principles which are at the basis of a Federal Union ? Or, are they to be allowed to come into the Federation upon terms which, while allowing them to enjoy a substantial part of the revenues derived from the levy of customs, would, at the same time, correlate the customs machinery of the State ports with the customs machinery of the British Indian ports. The Joint Select Committee, very properly, are in

favour of the latter course, provided of course suitable terms could be arranged between the States concerned and the Crown in regard to this matter. The passage from the report of that Committee which I have extracted, indicates, the principles upon which the Committee would like those adjustments to be made.

II. *Distribution of Revenues between the Federation and the Federal Units*

Now I shall proceed to deal with some of the salient features of the financial system which the new constitution will bring into existence. The first topic to be considered will be the allocation of resources between the Federation and the Federal Units.

The taxes and duties which occur in the Federal Legislative List are given below .

1. Duties of customs, including export duties.

2. Duties of excise on tobacco and other goods manufactured or produced in India except—

(*a*) alcoholic liquors for human consumption ;

(*b*) opium, Indian hemp and other narcotic drugs and narcotics ; non-narcotic drugs ;

(*c*) medicinal and toilet preparations containing alcohol, or any substance included in sub-paragraph (*b*).

3. Corporation tax.

4. Taxes on income, other than agricultural income.

5. Taxes on the capital value of the assets, exclusive of agricultural land, of individuals and companies ; taxes on the capital of companies.

6. Duties in respect of succession to property other than agricultural land.

7. The rates of stamp duty in respect of bills of exchange, cheques, promissory notes, bills of lading, letters of credit, policies of insurance, proxies and receipts.

8. Terminal taxes on goods or passengers carried by railway or air ; taxes on railway fares or freights.

All the taxes and duties mentioned above will be levied on the authority of Federal enactments. But it should not be supposed that the produce of all these taxes and duties will enure to the benefit of the Federal Exchequer. That position will become clear from what follows hereafter. The net proceeds of some of these taxes and duties which are levied in any financial year, except in so far as they represent proceeds attributable to Chief Commissioners' Provinces, will not form

part of the revenues of the Federation, but will be assigned to the Provinces and to the Federated States, if any, within which those duties and taxes are leviable in that year, in accordance with such principles of distribution as may be formulated by Act of the Federal Legislature. To this class belong the following duties and taxes, namely, (1) duties in respect of succession to property other than agricultural land, (2) such stamp duties as are mentioned in the Federal Legislative List, that is to say, stamp duty levied on bills of exchange, cheques, promissory notes, bills of lading, letters of credit, policies of insurance proxies and receipts, (3) terminal taxes on goods or passengers carried by railway or air, (4) taxes on railway fares and freights. It is, however, open to the Federal Legislature, to increase any of the taxes and duties above referred to, by a surcharge for Federal purposes, and, in such an event, the whole proceeds of such surcharge will go to the Federation. Section 137 of the Act provides for these matters. The proceeds of taxes on income, other than agricultural income, will be shared between the Federation on the one hand and the Provinces, and the Federated States, if any, in which that tax is leviable, on the other. The details concerning the time when the units will begin to get a share of the income-tax revenue, the method of distribution among them and other cognate matters will be considered under Section 138, which deals with taxes on income. The Federal Legislature may increase the taxes on income by a surcharge for Federal purposes. Section 140 provides that duties on salt, Federal duties of excise and export duties are to be levied and collected by the Federation, but that if an Act of the Federal Legislature so provides, there shall be paid out of the revenues of the Federation to the Provinces and to the Federated States, if any, to which the Act imposing the duty extends, sums equivalent to the whole or any part of the net proceeds of that duty, so that those sums shall be distributed among the Provinces and those States, in accordance with such principles of distribution as may be formulated by the Act. These form a group of duties, the net proceeds of which may be returned at the discretion of the Federation either wholly or in part to the units in which such duties are leviable, the intention of the Federation to so return, being expressed in an Act of the Federal Legislature. The proceeds of the other taxes and duties, not coming within any of the categories mentioned above, will wholly belong to the Federation.

Corporation tax, which is defined in Section 311, Sub-section 2) of the Act, and which would be very much akin to the exist-

ing super tax on the profits of companies, cannot be levied by the Federation in any Federated State until ten years have elapsed from the establishment of the Federation.

Apart from the revenue which the Federal Government will derive from the proceeds of taxes and duties, it will have other resources also. Some of the more important of the latter category of resources will be given here. (1) Revenue derived from public property vested in the Federal Government like lands, buildings and any other real property belonging to it; (2) Revenue from Federal enterprises like railways, posts and telegraphs, salt and opium manufacture and other Federal undertakings; (3) Profits from Federal currency, revenue from Federal investments or loans, and Federal lotteries; (4) Fines and penalties accruing from any of the Federal subjects; (5) Port, pilotage, and lighthouse dues, and fees levied on registration of companies.

The following taxes, duties, cesses and other levies occur in the Provincial Legislative List:

(1) Land Revenue.

(2) Duties of excise on the following goods manufactured or produced in the Province and countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India—

(*a*) alcoholic liquors for human consumption;

(*b*) opium, Indian hemp and other narcotic drugs and narcotics; non-narcotic drugs;

(*c*) medicinal and toilet preparations containing alcohol or any substance included in Sub-paragraph (*b*).

(3) Taxes on agricultural income.

(4) Taxes on lands and buildings, hearths and windows.

(5) Duties in respect of succession to agricultural land.

(6) Taxes on mineral rights, subject to any limitations imposed by any Act of the Federal Legislature relating to mineral development.

(7) Capitation taxes.

(8) Taxes on professions, trades, callings and employments.

(9) Taxes on animals and boats.

(10) Taxes on sale of goods and on advertisements.

(11) Cesses on the entry of goods into a local area for consumption, use or sale therein.

(12) Taxes on luxuries, including taxes on entertainments, amusements, betting and gambling.

(13) The rates of stamp duty in respect of documents other

than those specified in the provisions of List I with regard to rates of stamp duty.

(14) Dues on passengers and goods carried on inland waterways.

(15) Tolls.

Of course, it is open to the Provincial Legislatures to confer sources of revenue coming within their competence to bodies of their own creation like municipal bodies, District Boards, and similar institutions. Apart from the sources of Provincial revenue already mentioned, the Provinces will have other resources also. A few of the more important of these will be mentioned here. (1) Income derived from public property vested in the Provincial Governments like lands, buildings, forests, mines, and other real property, (2) Revenue from Provincial enterprises like irrigation and electric projects, (3) Revenue from Provincial investments or loans; (4) Fines and penalties accruing from provincial subjects.

136. Subject to the following provisions of this chapter with respect to the assignment of the whole or part of the net proceeds of certain taxes and duties to Provinces and Federated States, and subject to the provisions of this Act with respect to the Federal Railway Authority, the expression "revenues of the Federation" includes all revenues and public moneys raised or received by the Federation, and the expression "revenues of the Province" includes all revenues and public moneys raised or received by a Province.

137. Duties in respect of succession to property other than agricultural land, such stamp duties as are mentioned in the Federal Legislative List, terminal taxes on goods or passengers carried by railway, or air, and taxes on railway fares and freights, shall be levied and collected by the Federation, but the net proceeds in any financial year of any such duty or tax, except in so far as those proceeds represent proceeds attributable to Chief Commissioners' Provinces, shall not form part of the revenues of the Federation, but shall be assigned to the Provinces and to the Federated States, if any, within which that duty or tax is leviable in that year, and shall be distributed among the Provinces and those States in accordance with such principles of distribution as may be formulated by Act of the Federal Legislature:

Provided that the Federal Legislature may at any time increase any of the said duties or taxes by a surcharge for Federal purposes and the whole proceeds of any such surcharge shall form part of the revenues of the Federation.

138. (1) Taxes on income other than agricultural income

shall be levied and collected by the Federation, but a prescribed percentage of the net proceeds in any financial year of any such tax, except in so far as those proceeds represent proceeds attributable to Chief Commissioners' Provinces or to taxes payable in respect of Federal emoluments, shall not form part of the revenues of the Federation, but shall be assigned to the Provinces and to the Federated States, if any, within which that tax is leviable in that year, and shall be distributed among the Provinces and those States in such manner as may be prescribed :

Provided that—

(*a*) the percentage originally prescribed under this sub-section shall not be increased by any subsequent Order in Council ;

(*b*) the Federal Legislature may at any time increase the said taxes by a surcharge for Federal purposes and the whole proceeds of any such surcharge shall form part of the revenues of the Federation.

(2) Notwithstanding anything in the preceding sub-section, the Federation may retain out of the moneys assigned by that sub-section to Provinces and States—

(*a*) in each year of a prescribed period such sum as may be prescribed , and

(*b*) in each year of a further prescribed period a sum less than that retained in the preceding year by an amount, being the same amount in each year, so calculated that the sum to be retained in the last year of the period will be equal to the amount of each such annual reduction .

Provided that—

(i) neither of the periods originally prescribed shall be reduced by any subsequent Order in Council ;

(ii) the Governor-General in his discretion may in any year of the second prescribed period direct that the sum to be retained by the Federation in that year shall be the sum retained in the preceding year, and that the second prescribed period shall be correspondingly extended, but he shall not give any such direction except after consultation with such representatives of Federal, Provincial and State interests as he may think desirable, nor shall he give any such direction unless he is satisfied that the maintenance of the financial stability of the Federal Government requires him so to do.

(3) Where an Act of the Federal Legislature imposes a surcharge for Federal purposes under this section, the Act shall provide for the payment by each Federated State in which taxes on income are not leviable by the Federation of a contribution

to the revenues of the Federation assessed on such basis as may be prescribed with a view to securing that the contribution shall be the equivalent, as near as may be, of the net proceeds which it is estimated would result from the surcharge if it were leviable in that State, and the State shall become liable to pay that contribution accordingly.

(4) In this section—

"taxes on income" does not include a corporation tax,

"prescribed" means prescribed by His Majesty in Council; and

"Federal emoluments" includes all emoluments and pensions payable out of the revenues of the Federation or of the Federal Railway Authority in respect of which income tax is chargeable.

The following paragraphs of the Government of India (Distribution of Revenues) Order, 1936, make provision for such of those matters which, under Section 138 of the Act, had been left over for future determination and adjustment under an Order in Council:

5. The percentage which under Sub-section (1) of Section 138 of the Act is to be prescribed by His Majesty in Council shall be fifty per cent., and the sums falling to be distributed under that sub-section in any year among the Provinces shall be distributed as follows:

	Per cent.
Madras	15
Bombay	20
Bengal	20
The United Provinces	15
The Punjab	8
Bihar	10
The Central Provinces and Berar	5
Assam	2
The North-West Frontier Province	1
Orissa	2
Sind	2

6. (1) The first of the periods to be prescribed by His Majesty in Council under Sub-section (2) of the said Section 138 shall be five years from the commencement of Part III of the Act, and the sum to be retained by the Federation under that sub-section shall, in each of those years, be either the whole of the moneys assigned by Sub-section (1) of the said section to Provinces and States, or such part thereof as will together with—

(*a*) the Federation's share of the divisible net proceeds of the taxes on income for that year ; and

(*b*) the sum, if any, to be brought into account by the Federation under Sub-paragraph (3) of this paragraph, amount to thirteen crores of rupees, whichever is the less.

(2) In this paragraph, " the divisible net proceeds of the taxes on income," means the net proceeds of the taxes on income to which the said Section 138 relates, except in so far as they represent proceeds attributable to Chief Commissioner's Provinces or to taxes payable in respect of Federal emoluments, or proceeds of any surcharge for Federal purposes.

(3) The sum, if any, to be brought into account by the Federation in any year for the purposes of Sub-paragraph (1) of this paragraph shall be a sum to be ascertained by applying to the accounts of the railways, with such alterations in accounts as are necessitated by the separation of Burma, the principles laid down in the Resolution of the Legislative Assembly of September 20, 1924, and ascertaining in accordance with those principles what sum, if any, would be the net amount payable for that year under Clauses (2) and (3) of that Resolution to general revenues out of the net receipts of the railways :

Provided that for the purpose of ascertaining the net amount so payable to general revenues, borrowings from the depreciation fund before the commencement of Part III of the Act shall be deemed not to be repayable, and arrears of contributions to general revenues for any year before the commencement of the said Part III shall be deemed not to be payable

7. The second period to be prescribed by His Majesty in Council under Sub-section (2) of the said Section 138, shall be five years from the expiration of the first period prescribed thereunder.

A few words, by way of explanation, may, perhaps, be added. As I have already indicated in the introductory paragraphs of this chapter, the Joint Select Committee recognized the fairness of the demand made on behalf of the Provinces to a substantial share in the proceeds of income tax. The provisions of the Order in Council adverted to above construed along with the section prescribe what percentage of the net proceeds of income tax will become allottable to the Provinces, the manner in which the share of income tax allotted to the Provinces will be distributed among them, and the period of time which it will take for the Provinces to reap the full benefit of their share of income tax. During two successive " prescribed periods," the Provinces will only be getting a partial benefit. As a matter of

fact, it may well happen that during the first of these two periods, the Provinces may not be able to get any part of the income tax proceeds unless the Railways begin to make a substantial contribution to the general budget or the proceeds of income tax show a marked improvement This will become clear from what follows hereafter. Out of " the divisible net proceeds of the taxes on income," fifty per cent. will not form part of the revenues of the Federation but become divisable among the Provinces. But the Provinces will not be entitled to the whole of the fifty per cent. of the divisible pool during two prescribed periods of five years each. During the first five years from the commencement of Part III of the Act (i e the date of the establishment of Provincial Automony) the Federation will be entitled, in each of those years, to retain either the whole of the moneys assigned by Sub-section (1) of the section to the Provinces or such part thereof, as will, together with the Federation's share of the divisible net proceeds of the taxes on income, and the contribution made by the Railways to the General Budget, amount to thirteen crores of rupees, whichever is less The rationale behind this provision has been explained by Sir Otto Niemeyer in his Indian Financial Enquiry report. Adopting the budget estimate of receipts from all forms of income tax for 1936-37, 15·7 crores of rupees as the starting point for the calculation, and after making allowance for the cost of collection, and the prospective separation of Burma, Sir Otto Niemeyer arrived at the figure 13·6 crores of rupees. From this he deducted $1\frac{3}{4}$ crores, being the sum pertaining to the wholly Federal heads of corporation tax, Chief Commissioners' Provinces and Federal emoluments, and arrived at the figure 12 crores as the sum divisible between the Centre and the Units. Sir Otto was clear on the point, that in the years immediately following the introduction of Provincial autonomy, it would be impossible for the Centre to relinquish a sum so large as six crores, as quite apart from the shrinkage of revenue due to the separation of Burma, the Centre would in this period have to meet new demands like subventions proposed for some of the Provinces and the cost of new Federal Institutions. In view of these considerations Sir Otto Niemeyer stated as follows : " The power of the Central Government to surrender a share of its revenues will in fact depend largely on the extent to which its main expansive revenue head, viz. Income tax, progresses, and on the extent to which the Railways move towards attaining a surplus, as contemplated by the Railway administration at the time of the Percy Committee. It is in my

view very desirable to give both the Central Government and the Provinces an interest in securing these results and a share in their advantages if and as soon as they are achieved. I recommend therefore that, the initial prescribed period under Section 138 (2) (*a*) being five years the prescribed sum which during that period the Centre may in any year retain out of the assigned 50 per cent. shall be the whole or such sum as is necessary to bring the proceeds of the 50 per cent. share accruing to the Centre together with any General Budget receipts from the railways up to 13 crores, whichever is less "[1] This recommendation of Sir Otto has been carried into legal effect by Paragraph 6 of the Distribution of Revenues Order in Council.[2]

Under Paragraph 7 of the Order in Council, the second period referred to in Sub-section (2) of Section 138 of the Act has been fixed at five years from the expiration of the first period prescribed under the same sub-section. During the second prescribed period, the Centre will " relinquish to the Provinces by equal steps so much of the Provincial share as it is retaining in the last year of the first period " Under the second proviso to Sub-section (2) (*b*) of Section 138, the Governor-General, after such consultation with the Federal, Provincial or State interests, as he may think desirable, if the financial stability of the Federation so demands, exercise his delaying power by which he may direct that in any year of the second prescribed period the sum to be retained in that year shall be the sum retained in the preceding year, and that the second prescribed period shall be correspondingly extended.

With regard to the manner in which the Provincial share of the divisible pool has to be distributed among the Provinces, Paragraph 5 of the Order in Council gives effect to the recommendation made in that regard by Sir Otto Niemeyer.

139. (1) Corporation tax shall not be levied by the Federation in any Federated State until ten years have elapsed from the establishment of the Federation.

(2) Any Federal Law providing for the levying of corporation tax shall contain provisions enabling the Ruler of any Federated State in which the tax would otherwise be leviable to elect that the tax shall not be levied in the State, but that in lieu thereof

[1] Sir Otto Niemeyer, " Indian Financial Enquiry Report," p 12.

[2] The Budget presented to the Indian Legislative Assembly on February 26, 1938, expects a surplus under railways and the excess over 13 Crores of 138

there shall be paid by the State to the revenues of the Federation a contribution as near as may be equivalent to the net proceeds which it is estimated would result from the tax if it were levied in the State.

(3) Where the Ruler of a State so elects as aforesaid, the officers of the Federation shall not call for any information or returns from any corporation in the state, but it shall be the duty of the Ruler thereof to cause to be supplied to the Auditor-General of India such information as the Auditor-General may reasonably require to enable the amount of any such contribution to be determined.

If the Ruler of a State is dissatisfied with the determination as to the amount of the contribution payable by his State in any financial year, he may appeal to the Federal Court, and if he establishes to the satisfaction of that Court that the amount determined is excessive, the Court shall reduce the amount accordingly and no appeal shall lie from the decision of the Court on the appeal

140. (1) Duties on salt, Federal duties of excise and export duties shall be levied and collected by the Federation but, if an Act of the Federal Legislature so provides, there shall be paid out of the revenues of the Federation to the Provinces and to the Federated States, if any, to which the Act imposing the duty extends, sums equivalent to the whole or any part of the net proceeds of that duty, and those sums shall be distributed among the Provinces and those States in accordance with such principles of distribution as may be formulated by the Act.

(2) Notwithstanding anything in the preceding sub-section, one half, or such greater proportion as His Majesty in Council may determine, of the net proceeds in each year of any export duty on jute or jute products shall not form part of the revenues of the Federation, but shall be assigned to the Provinces or Federated States in which jute is grown in proportion to the respective amounts of jute grown therein.

Paragraph 8 of the Government of India (Distribution of Revenues) Order, 1936, provides as follows :

"The proportion of the net proceeds in each year of any export on jute or jute products which under Sub-section (2) of Section 140 of the Act is to be assigned to the Provinces or Federated States in which jute is grown shall be sixty-two and one half per cent."

141. (1) No Bill or amendment which imposes or varies any tax or duty in which Provinces are interested, or which varies the meaning of the expression, "agricultural income," as

defined for the purposes of the enactments relating to Indian income tax, or which affects the principles on which under any of the foregoing provisions of this chapter moneys are or may be distributable to Provinces or States, or which imposes any such Federal surcharge as is mentioned in the foregoing provisions of this chapter, shall be introduced or moved in either Chamber of the Federal Legislature except with the previous sanction of the Governor-General in his discretion.

(2) The Governor-General shall not give his sanction to the introduction of any Bill or the moving of any amendment imposing in any year any such Federal surcharge as aforesaid, unless he is satisfied that all practicable economies and all practicable measures for otherwise increasing the proceeds of Federal taxation or the portion thereof retainable by the Federation would not result in the balancing of Federal receipts and expenditure on revenue account in that year.

(3) In this section the expression " tax or duty in which Provinces are interested " means—

(*a*) a tax or duty the whole or part of the net proceeds whereof are assigned to any Province , or

(*b*) a tax or duty by reference to the net proceeds whereof sums are for the time being payable out of the revenues of the Federation to any Provinces.

142. Such sums as may be prescribed by His Majesty in Council shall be charged on the revenues of the Federation in each year as grants in aid of the revenues of such Provinces as His Majesty may determine to be in need of assistance, and different sums may be prescribed for different Provinces

Provided that, except in the case of the North-West Frontier Province, no grant fixed under this section shall be increased by a subsequent Order, unless an address has been presented to the Governor-General by both Chambers of the Federal Legislature for submission to His Majesty praying that the increase may be made.

Under Paragraph 9 of the Government of India (Distribution of Revenues) Order, 1936, it is provided, that there shall be charged on the revenues of the Federation as grants in aid of the revenues of the Provinces mentioned in the schedule to the order, the sums specified in that schedule in relation to those Provinces respectively, in each of the years so specified.

Schedule

Grants to certain Provinces

1. The United Provinces : 25 lakhs of rupees in each year of

the first five years from the commencement of Part III of the Act.

2. Assam : 30 lakhs of rupees in each year.

3. The North-West Frontier Province : 100 lakhs of rupees in each year

4. Orissa : In the first year after the commencement of Part III of the Act, 47 lakhs of rupees ; in each of the next four succeeding years, 43 lakhs of rupees ; and in every subsequent year, 40 lakhs of rupees.

5. Sind : In the first year after the commencement of Part III of the Act, 110 lakhs of rupees ; in each of the next nine years, 105 lakhs of rupees ; in each of the next twenty years, 80 lakhs of rupees ; in each of the next five years, 65 lakhs of rupees , in each of the next five years, 60 lakhs of rupees ; and in each of the next five years, 55 lakhs of rupees.

143. (1) Nothing in the foregoing provisions of this chapter affects any duties or taxes levied in any Federated State otherwise than by virtue of an Act of the Federal Legislature applying in the State

(2) Any taxes, duties, cesses or fees which, immediately before the commencement of Part III of this Act, were being lawfully levied by any Provincial Government, municipality or other local authority or body for the purposes of the Province, municipality, district or other local area under a law in force on the first day of January, nineteen hundred and thirty-five, may, notwithstanding that those taxes, duties, cesses or fees are mentioned in the Federal Legislative List, continue to be levied and to be applied to the same purposes until provision to the contrary is made by the Federal Legislature.

144. (1) In the foregoing provisions of this chapter " net proceeds " means in relation to any tax or duty the proceeds thereof reduced by the cost of collection, and for the purposes of those provisions the net proceeds of any tax or duty, or of any part of any tax or duty, in or attributable to any area shall be ascertained and certified by the Auditor-General of India, whose certificates shall be final.

(2) Subject as aforesaid, and to any other express provision of this chapter, an Act of the Federal Legislature may, in any case where under this Part of this Act the proceeds of any duty or tax are, or may be, assigned to any Province or State, or a contribution is, or may be, made to the revenues of the Federation by any State, provide for the manner in which the proceeds of any duty or tax and the amount of any contribution are to be calculated, for the times in each year and the manner at and in

which any payments are to be made, for the making of adjustments between one financial year and another, and for any other incidental or ancillary matters.

III. *The Crown and the States*

145. There shall be paid to His Majesty by the Federation in each year the sums stated by His Majesty's Representative for the exercise of the functions of the Crown in its relations with Indian States to be required, whether on revenue account or otherwise, for the discharge of those functions, including the making of any payments in respect of any customary allowances to members of the family or servants of any former Ruler of any territories in India.

146. All cash contributions and payments in respect of loans and other payments due from or by any Indian State which, if this Act had not been passed, would have formed part of the revenues of India, shall be received by His Majesty, and shall, if His Majesty has so directed, be placed at the disposal of the Federation, but nothing in this Act shall derogate from the right of His Majesty, if he thinks fit so to do, to remit at any time the whole or any part of any such contributions or payments

147. (1) Subject to the provisions of Sub-section (3) of this section, His Majesty may, in signifying his acceptance of the Instrument of Accession of a State, agree to remit over a period not exceeding twenty years from the date of the accession of the State to the Federation any cash contributions payable by that State.

(2) Subject as aforesaid, where any territories have been voluntarily ceded to the Crown by a Federated State before the passing of this Act--

(*a*) in return for specific military guarantees, or

(*b*) in return for the discharge of the State from obligations to provide military assistance,

there shall, if His Majesty, in signifying his acceptance of the Instrument of Accession of that State, so directs, be paid to that State, but in the first-mentioned case on condition that the said guarantees are waived, such sums as in the opinion of His Majesty ought to be paid in respect of any such cession as aforesaid.

(3) Notwithstanding anything in this section—

(*a*) every such agreement or direction as aforesaid shall be such as to secure that no such remission or payment shall be made by virtue of the agreement or direction until the Provinces have begun to receive moneys under the section of this chapter

relating to taxes on income, and, in the case of a remission, that the remission shall be complete before the expiration of twenty years from the date of the accession to the Federation of the State in question, or before the end of the second prescribed period referred to in Sub-section (2) of the said section, whichever first occurs ; and

(*b*) no contribution shall be remitted by virtue of any such agreement save in so far as it exceeds the value of any privilege or immunity enjoyed by the State ; and

(*c*) in fixing the amount of any payments in respect of ceded territories, account shall be taken of the value of any such privilege or immunity.

(4) This section shall apply in the case of any cash contributions the liability for which has before the passing of this Act been discharged by payment of a capital sum or sums, and accordingly His Majesty may agree that the capital sum or sums so paid shall be repaid either by instalments or otherwise, and such repayments shall be deemed to be remissions for the purposes of this section.

(5) In this chapter " cash contributions " means—

(*a*) periodical contributions in acknowledgment of the suzerainty of His Majesty, including contributions payable in connection with any arrangement for the aid and protection of a State by His Majesty, and contributions in commutation of any obligation of a State to provide military assistance to His Majesty, or in respect of the maintenance by His Majesty of a special force for service in connection with a State, or in respect of the maintenance of local military forces or police, or in respect of the expenses of an agent ;

(*b*) periodical contributions fixed on the creation or restoration of a State, or on a re-grant or increase of territory, including annual payments for grants of land on perpetual tenure or for equalization of the value of exchanged territory ;

(*c*) periodical contributions formerly payable to another State but now payable to His Majesty by right of conquest, assignment or lapse.

(6) In this chapter " privilege or immunity " means any such right, privilege, advantage or immunity of a financial character as is hereinafter mentioned, that is to say—

(*a*) rights, privileges or advantages in respect of, or connected with, the levying of sea customs or the production and sale of untaxed salt ;

(*b*) sums receivable in respect of the abandonment or surrender of the right to levy internal customs duties, or to pro-

duce or manufacture salt, or to tax salt or other commodities or goods in transit, or sums receivable in lieu of grants of free salt ;

(*c*) the annual value to the Ruler of any privilege or territory granted in respect of the abandonment or surrender of any such right as is mentioned in the last preceding paragraph ;

(*d*) privileges in respect of free service stamps or the free carriage of State mails on Government business ;

(*e*) the privilege of entry free from customs duties of goods imported by sea and transported in bond to the State in question ; and

(*f*) the right to issue currency notes,

not being a right, privilege, advantage or immunity surrendered upon the accession of the State, or one which, in the opinion of His Majesty, for any other reason ought not to be taken into account for the purposes of this chapter

(7) An Instrument of Accession of a State shall not be deemed to be suitable for acceptance by His Majesty, unless it contains such particulars as appear to His Majesty to be necessary to enable due effect to be given to the provisions of this and the next but one succeeding sections, and in particular provision for determining from time to time the value to be attributed for the purposes of those provisions to any privilege or immunity the value of which is fluctuating or uncertain.

This important section deals with the financial adjustments to be made between the Crown and an Indian State, when His Majesty accepts the Instrument of Accession executed by that State. The section only provides the framework within which adjustments have to be made, leaving it to each individual State to secure by negotiation the adjustments which are appropriate to it, having regard to the circumstances existing in that State. In the introductory paragraphs of this chapter, I had occasion to deal with some of these adjustments, as for example, those relating to ceded territories and sea customs. The observations made in regard to them provide the necessary data for understanding the reasons for making those adjustments

The cash contributions of the character defined in Sub-section (5) of this section will be remitted over a period not exceeding twenty years. But the whole of the cash contribution payable by a State may not be qualified for remission, if the State is in enjoyment of any " privilege or immunity " of a financial character, and of the kind mentioned in Sub-section (6). If the State concerned is in enjoyment of any such privilege or immunity, the value thereof will be fixed, and what will rank for remission will be only that amount of contribution as

exceeds the value of such privilege or immunity. That is provided for in Clause (*b*) of Sub-section (3). It is, however, open to His Majesty not to take into account any such privilege or immunity, if he so directs for any reason.

The territories ceded by an Indian State, either in return for specific military guarantees, or in return for the discharge of the State from obligations to provide military assistance, will be evaluated and the amount to be paid to the State will be fixed, subject to the condition that in the first mentioned case the State agrees to waive the said guarantees. Having regard to the language of Clause (*c*) of Sub-section (3), which prescribes that in fixing the amount of any payments in respect of ceded territories, account shall be taken of the value of any privilege or immunity, I think, the net amount which will be fixed as payment for the ceded territories will be arrived at, after adjusting the value put upon any privilege or immunity enjoyed by the State towards the value fixed for the ceded territories.

Sums which have been recovered from any State in commutation of its liability to pay cash contributions, by the payment of a capital sum or sums, will be deemed to be remissions for the purposes of this section, that is to say, these sums will be placed on a par with cash contributions, and in fixing the amounts which will rank for remission, and in determining when they will be remitted, the principles applicable to the latter will apply to the former also.

The way in which the above principles will work, will be clear, if I should give here two illustrations taken from page 154 of the Report of Indian States Enquiry Committee, 1932 (Financial).

" (1) State C is entitled to a credit of Rs. 5 lakhs annually on account of a cash contribution ; it also enjoys immunities of the annual value of Rs. 3 lakhs.

The maximum remission to which State C will be entitled will be Rs. 2 lakhs so long as the value of its immunities remains unchanged.

" (2) State D is entitled to a credit of Rs. 4 lakhs annually on account of ceded territories ; it also enjoys immunities of the annual value of Rs. 10 lakhs.

" State D will continue to enjoy its immunity, but will receive nothing on account of its ceded territories so long as the value of the immunity is not less than Rs. 4 lakhs annually."

It may be mentioned, in this context, that Sub-section (7) makes provision for defining in the Instrument of Accession of a State the principles upon which the value to be attributed to

any privilege or immunity the value of which is fluctuating or uncertain, shall be computed.

Sub-section (3) (*a*) provides that the remission or payment of the kind hereinbefore referred to, shall not be made until the Provinces have begun to receive moneys under Section 138 (Income tax), and that the remission shall be complete before the expiration of twenty years from the date of accession to the Federation of the State in question, or before the end of the second prescribed period referred to in Sub-section (2) of Section 138, whichever first occurs

It is important to observe that the section takes into account three specific items to constitute the credit side of the State in the balance sheet. They are, as already mentioned, (1) cash contributions, (2) value of ceded territories, (3) amount paid in commutation of cash contributions. On the debit side will come the values representing the immunities and privileges enjoyed by a State. The credits and debits which are appropriate to the particular State will be taken into account in determining the quantum of remission or payment, if any, to be made to it. The Indian States Enquiry Committee, 1932, at page 153 of their report in explanation of the rationale of these credits and debits, observe as follows : " We do not, however, intend to suggest that a State which enters Federation can continue in the enjoyment of privileges or immunities which are definitely inconsistent with the Federal ideal and at the same time claim remission of tribute or other contributions on the ground that these are of a feudal character or are unknown in other Federations. We recommend, therefore, that, whenever it is proposed to remit a contribution of this kind, the value of any privilege or immunity from ordinary Federal burdens shall be set off against the proposed credit and no remission or payment made unless the credit exceeds the debit, and then only to the extent of the balance."

There may be States which have no credits at all but have only debits. The question arises whether such States can come into the Federation, without surrendering the privileges and immunities the continued enjoyment of which would be inconsistent with the Federal ideal. In referring to this aspect of the problem the Indian States Enquiry Committee, 1932 (Financial) have made the following important observations at page 153 of their report : " Though it is natural and indeed inevitable that a State's credits should be set off against its own debits, there are some States who have only credits and others only debits to their account. It is scarcely to be supposed that

a State will be willing to enter Federation if it has much to lose and nothing to gain, as must clearly be the case if it is to be debited with the full value of its immunities and has no credits on the other side of the account. These immunities or privileges are in the great majority of cases secured to the State by Treaty, and we are not prepared to recommend that a State should be compelled to choose between exclusion from Federation and complete surrender of its existing rights. The anomalies of the present situation have their roots in the past, and their existence must be recognized. Central revenues will not be affected thereby to any greater extent than they are at present, and this is clearly a case where insistence upon uniformity will not only fail to advance the cause of Federation but might gravely prejudice it."

148. Any payments made under the last preceding section and any payments heretofore made to any State by the Governor-General in Council or by any Local Government under any agreements made with that State before the passing of this Act, shall be charged on the revenues of the Federation or on the revenues of the corresponding Province under this Act, as the case may be.

149. Where under the foregoing provisions of this chapter there is made in any year by the Federation to a Federated State any payment or distribution of, or calculated by reference to, the net proceeds of any duty or tax, the value in and for that year of any privilege or immunity enjoyed by that State in respect of any former or existing source of revenue from a similar duty or tax or from goods of the same kind, being a privilege or immunity which has not been otherwise taken into account shall, if and in so far as the Act of the Federal Legislature under which the payment or distribution is made so provides, be set off against the payment or distribution.

IV. *The Reserve Bank of India*

The Reserve Bank of India was constituted by an Act of the Indian Legislature passed in the year 1934 (Act No. II of 1934), in order " to regulate the issue of bank notes and the keeping of reserves with a view to securing monetary stability in British India, and generally to operate the currency and credit system of the country to its advantage." The original share capital of the Bank is five crores of rupees divided into shares of one hundred rupees each. Separate registers of shareholders are to be maintained at Bombay, Calcutta, Delhi, Madras and Rangoon. The general superintendence and direction of the affairs

and business of the Bank is entrusted to a Central Board of Directors The Central Board is to consist of a Governor and two Deputy Governors, four directors to be nominated by the Governor-General in Council, and eight directors to be elected by the shareholders on the various registers, and one government official to be nominated by the Governor-General in Council.

Under Section 152 (1) of the Government of India Act, 1935, the functions of the Governor-General in respect of the following matters are to be exercised by him in his discretion :

(*a*) The appointment and removal from office of the Governor and Deputy Governors of the Reserve Bank of India, the approval of their salaries and allowances, and the fixing of their terms of office ;

(*b*) The appointment of an officiating Governor or Deputy Governor of the Bank ;

(*c*) The supersession of the Central Board of the Bank and any action consequent thereon , and

(*d*) the liquidation of the Bank.

Under Sub-section (2) of the same section the Governor-General has to exercise his individual judgment in nominating directors of the Reserve Bank of India and in removing from office any director nominated by him.

153. No Bill or amendment which affects the coinage or currency of the Federation or the constitution or functions of the Reserve Bank of India shall be introduced into or moved in either Chamber of the Federal Legislature without the previous sanction of the Governor-General in his discretion.

V. *Miscellaneous Financial Provisions*

150. (1) No burden shall be imposed on the revenues of the Federation or the Provinces except for the purposes of India or some part of India.

(2) Subject as aforesaid, the Federation or a Province may make grants for any purpose, notwithstanding that the purpose is not one with respect to which the Federal or the Provincial Legislature, as the case may be, may make laws.

151. (1) Rules may be made by the Governor-General and by the Governor of a Province for the purpose of securing that all moneys received on account of the revenues of the Federation or of the Province, as the case may be, shall, with such exceptions, if any, as may be specified in the rules, be paid into the public account of the Federation or of the Province, and the

rules so made may prescribe, or authorize some person to prescribe, the procedure to be followed in respect of the payment of moneys into the said account, the withdrawal of moneys therefrom, the custody of moneys therein, and any other matters connected with or ancillary to the matters aforesaid.

(2) In the exercise of his powers under this section the Governor-General or a Governor shall exercise his individual judgment.

154. Property vested in His Majesty for purposes of the government of the Federation shall, save in so far as any Federal law may otherwise provide, be exempt from all taxes imposed by, or by any authority within, a Province or Federated State.

Provided that, until any Federal Law otherwise provides, any property so vested which was immediately before the commencement of Part III of this Act liable, or treated as liable, to any such tax, shall, so long as that tax continues, continue to be liable, or to be treated as liable, thereto

155. (1) Subject as hereinafter provided, the Government of a Province and the Ruler of a Federated State shall not be liable to Federal taxation in respect of lands or buildings situate in British India or income accruing, arising or received in British India:

Provided that—

(*a*) where a trade or business of any kind is carried on by or on behalf of the Government of a Province in any part of British India outside that Province or by a Ruler in any part of British India, nothing in this sub-section shall exempt that Government or Ruler from any Federal taxation in respect of that trade or business, or any operations connected therewith, or any income arising in connection therewith, or any property occupied for the purposes thereof;

(*b*) nothing in this sub-section shall exempt a Ruler from any Federal taxation in respect of any lands, buildings or income being his personal property or personal income.

(2) Nothing in this Act affects any exemption from taxation enjoyed as of right at the passing of this Act by the Ruler of an Indian State in respect of any Indian Government securities issued before that date.

Sections 154 and 155 prescribe the limits of exemption of Federal property from Provincial or State taxation and Provincial or State property and income from Federal taxation. With these sections may be compared the corresponding provisions of the Canadian and Australian Acts. Section 125 of the British North America Act, 1867, provides as follows: "No lands or property belonging to Canada or any Province shall be

liable to taxation." Section 114 of the Commonwealth of Australia Constitution Act, 1900, prescribes as follows: "A State shall not, without the consent of the Parliament of the Commonwealth, raise or maintain any naval or military force, or impose any tax on property of any kind belonging to the Commonwealth, nor shall the Commonwealth impose any tax on property of any kind belonging to a State."

It will be noticed on a reference to Section 154 that the language is expressed in such wide terms that Federal property, except in so far as any Federal Law may otherwise provide, will be exempt from all taxes imposed by, or by any authority within a Province or Federated State. Federal property would therefore be immune from the levy of a municipal rate also, unless such property was liable, or treated as liable to such levy, prior to the commencement of Part III of the Act. The proviso to Section 154 was intended to preserve the *status quo* until the Federal Legislature chose to provide otherwise. In *Municipal Council of Sydney* v *The Commonwealth*[1] it was held by the High Court of Australia that to levy a municipal rate upon Commonwealth property is to "impose a tax" within the meaning of Section 114 of the Commonwealth of Australia Constitution Act.

Section 154 only provides that property vested in the Crown for purposes of the Government of the Federation will be exempt from Provincial or State taxation. It neither exempts any interest of a private individual in Federal property, nor any property belonging to a private individual but let to the Crown in the right of the Federation from liability to Provincial or State taxation. This principle has been recognized in Canada as applicable to Section 125 of the British North America Act, and it is submitted that the same principle would apply to Section 154 of the Government of India Act also. Three Canadian cases decided by the Privy Council will be referred to in order to illustrate the scope of this principle.

In *Smith* v. *Council of the Rural Municipality of Vermillion Hills*,[2] the appellant who held from the Crown two leases of lands situated in the Province of Saskatchewan, but vested in the Crown in the right of the Dominion, was assessed to tax under the Saskatchewan Statutes in respect of land leased to him. The leases conferred upon the appellant the exclusive right to graze cattle upon the lands. It was contended on behalf of the appellant, that the levy of the tax was *ultra vires*

[1] (1904) 1 C L R 208. Cited in Kerr, p. 152.
[2] (1916) 2 A C 569

as the tax was sought to be imposed on the land itself, which belonged to the Crown in right of Canada, and not on any individual who was interested in it and that, therefore, it infringed the rule laid down in Section 125 of the British North America Act which prevented lands belonging to Canada from being taxed by the Provinces. For the respondents it was argued that what was taxed was only the interest of the appellant as a tenant of the land and not the land itself. The Privy Council held, that the statutes could be read as imposing the tax upon the appellant's interest in the land, and that, therefore, they did not violate the rule laid down in Section 125. The appellant's contention was therefore rejected.

City of Montreal v. *Attorney-General for Canada.*[1] The minister of Railways and Canals for Canada representing the Crown had by indenture demised to one Andrew Baile, a coal merchant, a parcel of Crown lands, situated in the City of Montreal for the term of five years subject to the payment of a specified rent. Article 362a added to the City of Montreal Charter by a Provincial enactment 7 Edward VII c. 63, Article 19, provided that persons occupying for commercial or industrial purposes, Crown buildings or lands, should be taxed as if they were the actual owners, and rendered liable to pay the annual and special assessments, the taxes and other municipal dues. Under the power so conferred the Crown premises, which had been demised to the said Andrew Baile, were assessed on their capitalized value, and a demand was made on the occupant. The Montreal Corporation brought an action against the occupant to recover the assessment payable. The occupant, Andrew Baile, did not defend the action, but the Attorney-General of Canada intervened in the proceedings and claimed that Article 362a was *ultra vires* of the Quebec Legislature, in so far as it applied to occupants of lands belonging to the Crown in the right of the Dominion, as it virtually authorized the taxation of Crown lands which was forbidden by Section 125 of the British North America Act. The Privy Council overruled the contention advanced on behalf of the Dominion of Canada, holding, that as the tenant was liable only so long as his occupancy lasted, the taxation was in respect of his interest as lessee, and therefore it was not a tax levied on Crown lands. Lord Parmoor delivering the judgment of their Lordships, has made the following observations at page 142: "The question to be determined is the simpler one, whether the taxation which is impeached, is assessed on the interest of the occupant, and imposed on that

[1] (1923) A C 136.

interest. In the opinion of their Lordships the interest of an occupant consists in the benefit of the occupation to him during the period of his occupancy, and does not depend on the length of his tenure. The annual assessment, to which objection is taken, is an assessment for which the tenant is only liable so long as his occupancy continues and which ceases so soon as his occupancy is determined. If on the cessation of his tenancy the Crown chooses to leave the land unoccupied or to occupy the land by an official acting in his official capacity, there would be no further liability to taxation under Article 362a of the Charter affecting either the land or the Crown "

City of Halifax v. *Estate of J P. Fairbanks.*[1] The respondent estate owned premises which it let to the Crown represented by the Minister of Railways to be used as a Ticket Office of the Canadian Northern Railway. The City of Halifax was entitled to levy under its charter a business tax payable by every person occupying real property for the purpose of any trade, profession or calling for purposes of gain, and assessed on 50 per cent. of the capital value of the property. By Section 394 of the City's Charter it was provided that property let to the Crown or to any person, corporation or association exempt from taxation, shall be deemed to be in the occupation of the owner thereof for business or residential purposes, as the case may be, and he shall be assessed and rated for household tax or business tax, according to the purpose for which it was occupied. The levy was contested by the respondent estate on two important grounds, namely, (1) that the business tax was an indirect tax on the tenant and therefore beyond the powers of the Provincial Legislature in Canada, as the Provinces under Section 92, Head 2, of the British North America Act, could only levy " direct taxation"; (2) that it was a tax on property belonging to Canada and hence of no effect in view of Section 125 of the British North America Act. The first ground of objection was the more important of the two grounds ; but its consideration need not detain us, as we are only concerned with the second ground, based upon Section 125 of the British North America Act. Viscount Cave, L.C., who delivered the judgment of the Privy Council, while referring to the argument based upon Section 125, observed at page 122, as follows : " In the course of the argument for the respondent estate it was suggested that an occupation by the Crown cannot be held to be for purposes of gain, and accordingly the premises in question were not assessable to the business tax ; but in their Lordships' view there is

[1] (1928) A C 117.

no substance in this argument. A business is undoubtedly carried on upon the premises, though on behalf of the Crown, and they are therefore within the ambit of the tax. It was also urged that the tax in dispute is a tax on property belonging to Canada, and so is void under Section 125 of the British North America Act ; but their Lordships do not consider that a tax on the owner of premises let to the Crown in the right of the Dominion can be held to be tax on the property of Canada."

156. Where under the provisions of this Act the expenses of any court or commission, or the pension payable to or in respect of a person who has served under the Crown in India, are charged on the revenues of the Federation or the revenues of a Province, then if—

(*a*) in the case of a charge on the revenues of the Federation, the court or commission serves any of the separate needs of a Province, or the person has served wholly or in part in connection with the affairs of a Province , or

(*b*) in the case of a charge on the revenues of a Province, the court or commission serves any of the separate needs of the Federation or another Province, or the person has served wholly or in part in connection with the affairs of the Federation or another Province,

there shall be charged on and paid out of the revenues of the Province or, as the case may be, the revenues of the Federation or of the other Province, such contribution in respect of the expenses or pension as may be agreed, or as may in default of agreement be determined by an arbitrator to be appointed by the Chief Justice of India.

157. (1) The Federation and every Province shall secure that there are from time to time in the hands of the Secretary of State sufficient moneys to enable him to make such payments as he may have to make in respect of any liability which falls to be met out of the revenues of the Federation or of the Province as the case may be

(2) Without prejudice to their obligations under the preceding sub-section, the Federation and every Province shall secure that there are from time to time in the hands of the Secretary of State and the High Commissioner sufficient moneys to enable payment to be made of all pensions payable out of the revenues of the Federation or the Province, as the case may be, in the United Kingdom or through officers accounting to the Secretary of State or to the High Commissioner.

158. (1) His Majesty in Council may make such provision as may appear to him to be necessary or proper for defining and

regulating the relations between the monetary systems of India and Burma and for purposes connected with or ancillary to those purposes, and in particular, but without prejudice to the generality of this section, such provision as may appear to His Majesty to be necessary or proper for the purpose of giving effect to any arrangements with respect to the said matters made before the commencement of Part III of this Act with the approval of the Secretary of State by the Governor of Burma in Council with the Governor-General in Council or any other persons.

(2) Any sums required by an Order under this section to be paid by the Federation shall be charged on the revenues of the Federation

In pursuance of the power granted by this section, His Majesty in Council has promulgated The India And Burma (Burma Monetary Arrangements) Order, 1937

159. His Majesty in Council may make provision for the grant of relief from any Federal tax on income in respect of income taxed or taxable in Burma.

160. With a view to preventing undue disturbance of trade between India and Burma in the period immediately following the separation of India and Burma and with a view to safeguarding the economic interests of Burma during that period, His Majesty may by Order in Council give such directions as he thinks fit for those purposes with respect to the duties which are, while the Order is in force, to be levied on goods imported into or exported from India or Burma and with respect to ancillary and related matters

The India and Burma (Trade Regulation) Order, 1937, which has been issued by His Majesty in Council in pursuance of the powers conferred by Section 160, makes certain provisions with a view to prevent undue disturbance of trade between India and Burma in the period immediately following the separation of India and Burma and in order to safeguard the economic interests of Burma during that period.

VI. *Borrowing*

161. Upon the commencement of Part III of this Act all powers vested in the Secretary of State in Council of borrowing on the security of the revenues of India shall cease and determine, but nothing in this section affects the provisions of Part XIII of this Act with respect to borrowing in sterling by the Secretary of State.

162. Subject to the provisions of Part XIII of this Act with respect to borrowing in sterling, the executive authority of the Federation extends to borrowing upon the security of the revenues of the Federation within such limits, if any, as may from time to time be fixed by Act of the Federal Legislature and to the giving of guarantees within such limits, if any, as may be so fixed

163. (1) Subject to the provisions of this section, the executive authority of a Province extends to borrowing upon the security of the revenues of the Province within such limits, if any, as may from time to time be fixed by the Act of the Provincial Legislature and to the giving of guarantees within such limits, if any, as may be so fixed

(2) The Federation may, subject to such conditions, if any, as it may think fit to impose, make loans to, or, so long as any limits fixed under the last preceding section are not exceeded, give guarantees in respect of loans raised by any Province, and any sums required for the purpose of making loans to a Province shall be charged on the revenues of the Federation

(3) A Province may not without the consent of the Federation, borrow outside India, nor without the like consent raise any loan if there is still outstanding any part of a loan made to the Province by the Federation or by the Governor-General in Council, or in respect of which a guarantee has been given by the Federation or by the Governor-General in Council

A consent under this sub-section may be granted subject to such conditions, if any, as the Federation may think fit to impose.

(4) A consent required by the last preceding sub-section shall not be unreasonably withheld, nor shall the Federation refuse, if sufficient cause is shown, to make a loan to, or to give a guarantee in respect of a loan raised by, a Province, or seek to impose in respect of any of the matters aforesaid any condition which is unreasonable, and, if any dispute arises whether a refusal of consent, or a refusal to make a loan or to give a guarantee, or any condition insisted upon, is or is not justifiable, the matter shall be referred to the Governor-General and the decision of the Governor-General in his discretion shall be final.

164. The Federation may, subject to such conditions, if any, as it may think fit to impose, make loans to, or, so long as any limits fixed under the last but one preceding section are not exceeded, give guarantees in respect of loans raised by, any Federated State.

165. (1) The Colonial Stock Acts, 1877 to 1900, shall, not-

withstanding anything to the contrary in those Acts, apply in relation to sterling stock issued after the establishment of the Federation and forming part of the public debt of the Federation as they apply in relation to stock forming part of the public debt of any British Possession mentioned in those Acts, so however that nothing in Section 20 of the Colonial Stock Act, 1877, shall be construed as compelling a person desirous of bringing proceedings to proceed in the manner therein specified and that, until Parliament otherwise determines, any conditions prescribed by the Treasury under Section 2 of the Colonial Stock Act, 1900, shall be deemed to have been complied with with respect to all such stock so issued by the Federation

(2) The expression "colonial stock" in Section 11 of the Trusts (Scotland) Act, 1921, shall include any stock in relation to which the said Acts apply by virtue of this section.

(3) In Paragraph (*d*) of Sub-section (1) of Section 1 of the Trustee Act, 1925, the words, "or any other securities the interest in sterling whereon is payable out of and charged on, the revenues of India" shall be repealed:

Provided that, notwithstanding anything in this Act, any securities which by virtue of the said words were immediately before the commencement of Part III of this Act securities in which a trustee might invest trust funds shall continue to be securities in which a trustee may invest such funds.

VII *Audit and Accounts*

166. (1) There shall be an Auditor-General of India, who shall be appointed by His Majesty and shall only be removed from office in like manner and on the like grounds as a judge of the Federal Court

(2) The conditions of service of the Auditor-General shall be such as may be prescribed by His Majesty in Council, and he shall not be eligible for further office under the Crown in India after he has ceased to hold his office:

Provided that neither the salary of an Auditor-General nor his rights in respect of leave of absence, pension or age of retirement shall be varied to his disadvantage after his appointment.

(3) The Auditor-General shall perform such duties and exercise such powers in relation to the accounts of the Federation and of the Provinces as may be prescribed by, or by rules made under, an Order of His Majesty in Council, or by any subsequent Act of the Federal Legislature varying or extending such an Order:

Provided that no Bill or amendment for the purpose afore-

said shall be introduced or moved without the previous sanction of the Governor-General in his discretion.

(4) The salary, allowances and pension payable to or in respect of an Auditor-General shall be charged on the revenues of the Federation, and the salaries, allowances and pensions payable to or in respect of members of his staff shall be paid out of those revenues.

Provision has also been made by Section 167 for the appointment by His Majesty of an Auditor-General for any Province to perform the same duties and to exercise the same powers in relation to the audit of the accounts of the Province as would be performed and exercised by the Auditor-General of India, if an Auditor-General of the Province had not been appointed, provided that the Provincial Legislature of that Province after the expiration of two years from the commencement of Part III of the Act has passed an Act charging the salary of an Auditor-General for that Province on the revenues of the Province The appointment of an Auditor-General of a Province can only be made after the expiry of at least three years from the date of the Act of the Provincial Legislature by which provision is made for such an appointment

168. The accounts of the Federation shall be kept in such form as the Auditor-General of India may, with the approval of the Governor-General, prescribe and, in so far as the Auditor-General of India may, with the like approval, give any directions with regard to the methods or principles in accordance with which any accounts of Provinces ought to be kept, it shall be the duty of every Provincial Government to cause accounts to be kept accordingly.

169. The reports of the Auditor-General of India relating to the accounts of the Federation shall be submitted to the Governor-General, who shall cause them to be laid before the Federal Legislature, and the reports of the Auditor-General of India or of the Auditor-General of the Province, as the case may be, relating to the accounts of a Province shall be submitted to the Governor of the Province, who shall cause them to be laid before the Provincial Legislature.

Section 170 provides for the appointment of an Auditor of Indian Home Accounts by the Governor-General in his discretion. The Auditor of Home accounts shall perform such duties and exercise such powers in relation to transactions in the United Kingdom affecting the revenues of the Federation, of the Federal Railway authority, or of any Province, as may be prescribed by, or by rules made under, an Order of His Majesty

in Council, or by any Act of the Federal Legislature varying or extending such order. No bill or amendment to vary or extend such Order shall be introduced or moved without the previous sanction of the Governor-General in his discretion. The reports of the Auditor of Indian Home Accounts relating to such transactions shall be submitted to the Auditor-General of India, or, in the case of transactions affecting the revenues of a Province which has an Auditor-General, to the Auditor-General of the Province, and shall be included by any such Auditor-General in the reports which under this part of the Act (i.e. Part VII), he is required to submit to the Governor-General or, as the case may be, to the Governor. The Auditor of Indian Home Accounts will be subject to the general superintendence of the Auditor-General of India

171. The accounts relating to the discharge of the functions of the Crown in its relations with Indian States shall be audited by the Auditor-General of India, or, in so far as those accounts concern transactions in the United Kingdom, by the Auditor of Indian Home Accounts acting on his behalf and under his general superintendence, and the Auditor-General of India shall make to the Secretary of State annual reports on the accounts so audited by him or on his behalf.

CHAPTER XVI

PROPERTY, CONTRACTS, LIABILITIES AND SUITS

THE creation of autonomous Provinces and a Federal Centre, with their respective functions demarcated in the Constitution itself, necessarily involved a series of important adjustments in the system of government which has so far functioned in British India. Hitherto, in every legal proceeding which might have been instituted by or against any governmental authority in British India, the " Secretary of State in Council," as a statutory corporation, could alone be the plaintiff or defendant. Every contract or assurance entered into by any government in British India also had to be in the name of that Statutory body. It would probably be sufficient to cite only one provision of the Consolidated Government of India Act, to illustrate the principle that the power in regard to contracts, property and liabilities was centralized in the Secretary of State in Council, and any power that might have been exercised in relation thereto, either by the Government of India or any Local Government, was only by way of delegation from that authority and on its behalf Section 30, Sub-section (1) prescribed that " the Governor-General in Council and any Local Government may, on behalf and in the name of the Secretary of State in Council, and subject to such provisions or restrictions as the Secretary of State in Council, with the concurrence of a majority of votes at a meeting of the Council of India, prescribes, sell and dispose of any real or personal estate whatsoever in British India, within the limits of their respective governments, for the time being vested in His Majesty for the purposes of the government of India, or raise money on any such real or personal estate by way of mortgage, or otherwise, and make proper assurances for any of these purposes, and purchase or acquire any property in British India within the said respective limits, and make any contract for the purposes of this Act."

This centralized power and authority were, no doubt, in harmony with a unitary form of Government. But they would certainly not be in consonance with a Federal system, which postulates the existence of freedom on the part of the Provinces and the Centre to order their own affairs in the sphere

of activity marked out for them in the Constitution, in the manner which seems to them best. The allocation of functions also involves the allocation of properties which shall belong to them respectively. The Federation and the Provinces must also be free to enter into, in their own names, contracts and assurances incidental to the performance of their functions, and be able to sue and be sued in their own names in regard to all claims which might arise in their allotted fields of activity. The new Act makes provision for all these matters The Act defines what properties hitherto vesting in the Crown for the purposes of the Government of India, shall hereafter belong to the Crown in the right of the Federation and the Crown in the right of the Provinces. It also confers on the Provinces and the Federation the power to enter into contracts and assurances in their own names, in all matters within their competence. The Federation may sue or be sued in the name of the Federation of India while any Provincial Government may sue and be sued in the name of the Province.

The Act contains special provisions dealing with existing contracts of the Secretary of State in Council, and liabilities arising in regard to loans, guarantees and other financial obligations of the Secretary of State in Council outstanding immediately before the commencement of Part III of the Act.

172. (1) All lands and buildings which immediately before the commencement of Part III of this Act were vested in His Majesty for the purposes of the Government of India shall as from that date—

(*a*) in the case of lands and buildings which are situate in a Province, vest in His Majesty for the purposes of the government of that Province unless they were then used, otherwise than under a tenancy agreement between the Governor-General in Council and the Government of that Province, for purposes which thereafter will be purposes of the Federal Government or of His Majesty's Representative for the exercise of the functions of the Crown in its relations with Indian States, or unless they are lands and buildings formerly used for such purposes as aforesaid, or intended or formerly intended to be so used, and are certified by the Governor-General in Council or, as the case may be, His Majesty's Representative, to have been retained for future use for such purposes, or to have been retained temporarily for the purpose of more advantageous disposal by sale or otherwise ,

(*b*) in the case of lands and buildings which are situate in a Province but do not by virtue of the preceding paragraph vest

in His Majesty for the purposes of the government of that Province, and in the case of lands and buildings which are situate in India elsewhere than in a Province, vest in His Majesty for the purposes of the government of the Federation or for the purposes of the exercise of the functions of the Crown in its relations with Indian States, according to the purpose for which they were used immediately before the commencement of Part III of this Act ; and

(*c*) in the case of lands and buildings which are situate elsewhere than in India (except lands and buildings situate in Burma or Aden), vest in His Majesty for the purposes of the government of the Federation or, if they were immediately before the commencement of Part III of this Act used for purposes of the department of the Secretary of State in Council, for the purposes of His Majesty's Government in the United Kingdom

(2) Except with the consent of the Governor-General, effect shall not be given to any proposal for the sale of any lands or buildings which by virtue of this section are vested in His Majesty for the purposes of His Majesty's Government in the United Kingdom or to any proposal for the diversion of any such lands and buildings to uses not connected with the discharge of the functions of the Crown in relation to India or Burma.

(3) The lands and buildings vested in His Majesty by virtue of this section for the purpose of His Majesty's Government in the United Kingdom shall be under the management of the Commissioners of Works, and, subject to the provisions of Sub-section (2) of this section, the provisions of the Acts relating to the Commissioners of Works shall apply in relation to those lands and buildings as if they had been acquired by the Commissioners in pursuance of those Acts

(4) The provisions of this section shall apply in relation to the contents of buildings vested in His Majesty for the purposes of His Majesty's Government in the United Kingdom, other than any money or securities, as they apply in relation to the buildings themselves :

Provided that, in the case of such articles and classes of articles as may be agreed upon between the Secretary of State and the Governor-General, the provisions of Sub-section (2) of this section shall not apply and, notwithstanding anything in Sub-section (3) of this section, the contents of those buildings shall be under the control of the Secretary of State.

(5) Any question which may arise within the five years next

following the commencement of Part III of this Act as to the purposes for which any lands or buildings are by virtue of this section vested in His Majesty may be determined by His Majesty in Council.

173. (1) Subject to the provisions of this and the last preceding section, all property vested in His Majesty which by virtue of any delegation from the Secretary of State in Council or otherwise is immediately before the commencement of Part III of this Act in the possession or under the control of, or held on account of, the Governor-General in Council or any Local Government shall, as from the commencement of Part III of this Act, vest in His Majesty—

(*a*) for the purposes of the Government of the Federation ; or

(*b*) for the purposes of the exercise of the functions of the Crown in its relations with Indian States , or

(*c*) for the purposes of the Government of a Province, according as the purposes for which the property was held immediately before the commencement of Part III of this Act will thereafter be purposes of the Government of the Federation, purposes of His Majesty's Representative for the exercise of the said functions of the Crown or purposes of the Government of a Province :

Provided that—

(i) all moneys which immediately before the commencement of Part III of this Act were in the public account of which the Governor-General in Council was custodian shall be vested in His Majesty for the purposes of the Government of the Federation ,

(ii) all credits and debits of the Local Government of any Governor's Province (other than Burma) in account with the Governor-General in Council shall be deemed to be credits and debits of the corresponding Province under this Act in account with the Federation

(2) Subject as aforesaid, all other property vested in His Majesty and under the control of the Secretary of State in Council immediately before the commencement of Part III of this Act shall as from the commencement of Part III of this Act vest in His Majesty for the purposes of the Government of the Federation, for the purposes of the exercise of the functions of the Crown in its relations with Indian States or for the purposes of the Government of a Province, according as the Secretary of State may determine having regard to the circumstances of the case, and the Secretary of State shall have power to and shall deal with the property accordingly.

(3) In this section " property " includes money, securities

bank balances and movable property of any description.

(4) Arrears of any taxes outstanding immediately before the commencement of Part III of this Act shall be deemed to be due to and may be recovered by the Federal Government or a Provincial Government according as the proceeds of any such tax imposed after the commencement of Part III of this Act would be due to and recoverable by the Federal Government or the Provincial Government.

(5) This section shall apply in relation to any equipment stores, moneys, bank balances and other property held in connection with His Majesty's Indian forces stationed in Burma (not being forces raised in Burma) as it applies in relation to property held for purposes which will be purposes of the Government of the Federation, but, save as aforesaid, nothing in this section applies to any property situate in Burma or Aden, or to arrears of taxes in Burma or Aden, or to any property which by virtue of any delegation from the Secretary of State in Council or otherwise is, immediately before the commencement of Part III of this Act, in the possession or under the control of, or held on account of, the Local Government of Burma or Aden.

(6) Nothing in this section shall affect any adjustments made or to be made by or under this Act by reason of the creation before the commencement of Part III of this Act of the Provinces of Orissa and Sind.

174. Subject as hereinafter provided, any property in India accruing to His Majesty by escheat or lapse, or as *bona vacantia* for want of a rightful owner, shall, if it is property situate in a Province, vest in His Majesty for the purposes of the government of that Province, and shall in any other case vest in His Majesty for the purposes of the government of the Federation:

Provided that any property which at the date when it accrued to His Majesty was in the possession or under the control of the Federal Government or the Government of a Province shall, according as the purposes for which it was then used or held were purposes of the Federation or of a Province, vest in His Majesty for the purposes of the government of the Federation or for the purposes of the government of that Province.

It is likely that difficulties will arise in construing the expression, "property situate in a Province" which occurs in this section. With regard to immovable property situate in a particular Province or tangible movable property found therein, the position is clear. Such property being property situate in that Province will enure to the benefit of His Majesty for the

purposes of the government of that Province. But the position is not easy with regard to intangible property like simple contract debts, shares, specialty debts and the like. The domicile of the person who last owned the property will not determine the question which Province is to benefit, as the test laid down by the section is, what is the Province in which that property was situate? In construing the term "property situate in a Province," assistance may be derived from cases which have arisen in connection with the levy of succession duties, as similar expressions are to be found in the taxing statutes under which such duties have been claimed. It is submitted that the principles laid down in these cases are fully applicable to cases which might arise under this section.

With regard to shares in a joint stock company the crucial test in determining the locale of the shares is, where could the ownership of the shares have been effectively dealt with? In *Brassard* v. *Smith*,[1] the question related to the taxability to succession duties under the Quebec Succession Duty Act, of certain shares owned by one Mr. Wiley Smith, who at the time of his death was domiciled in the Province of Nova Scotia. The shares in question pertained to the Royal Bank of Canada, which was a corporation incorporated and carrying on business under the Dominion Bank Acts. The head office of the bank was at Montreal in the Province of Quebec The bank had power by statute to maintain in any Province in which it had resident shareholders and in which it had one or more branches or agencies, a registry office at which alone shares held by residents in that Province could validly be transferred. The Royal Bank had opened such an office in Halifax, and the shares of the deceased had been registered there and the certificate therefor held by the deceased in Halifax, Nova Scotia. Succession duty under the Quebec Succession Duty Act was leviable upon "property actually situate within the Province." It was contended for the appellant, the collector of succession duties in the Province of Quebec, that as the head office of the bank was at Montreal in Quebec, the situs of the shares was in Montreal, Quebec. The respondents who were the administrators appointed by the Probate Court of Halifax in Nova Scotia opposed the levy of duty under the Quebec Succession Duty Act, on the ground that the situs of the shares was in Halifax and not in Montreal and this contention was upheld by the Privy Council. Lord Dunedin in delivering the judgment of their Lordships of the Privy Council has stated, at

[1] (1925) A.C. 371.

page 376, as follows : " Their Lordships consider that the question was really settled by *Attorney-General* v. *Higgins*.[1] Baron Martin in that case says in so many words : ' It is clear that the evidence of title to these shares is the register of shareholders and, that being in Scotland, this property is located in Scotland.' It is quite true that in that case the head office as well as the register was in Scotland, but in their Lordships' view it is impossible to hold that in that case the position of the head office was the dominant factor merely on the strength of a phrase used by the reporter of the Attorney-General's argument, and a casual reference made to the case by Lord Esher in a subsequent case of *Attorney-General* v. *Lord Sudeley*.[2] In the present case Duff, J , dealing no doubt with the ' no local situation ' argument said as follows . ' And the Chief Baron's judgment, I think, points to the essential element in determining situs in the case of intangible chattels for the purpose of probate jurisdiction as ' the circumstance that the subjects in question could be effectively dealt with within the jurisdiction ' This is, in their Lordships' opinion, the true test Where could the shares be effectively dealt with ? The answer in the case of these shares is in Nova Scotia only, and that answer solves the question "

See also, *Erie Beach Company, Ltd* v *Attorney-General for Ontario*,[3] where the principle laid down in *Brassard* v *Smith* was applied.

The rule applicable to an ordinary contract debt is, that its locale is the place where the debtor for the time being resides. The following passage from the judgment of their Lordships of the Privy Council delivered by Lord Field in *Commissioner of Stamps* v. *Hope*,[4] makes this principle clear : " Now a debt *per se*, although a chattel and part of the personal estate which the probate confers authority to administer, has, of course, no absolute existence ; but it has been long established by the courts of this country, and is a well-settled rule governing all questions as to which court can confer the required authority, that a debt does possess an attribute of locality, arising from and according to its nature, and the distinction drawn and well settled has been and is whether it is a debt by contract or a debt by specialty. In the former case, the debt being merely a chose in action—money to be recovered from the debtor and nothing more—could have no other local existence than the personal residence of the debtor, where the assets to satisfy it

[1] 2 H. and N 339.
[2] (1896) 1 Q B. 354
[3] (1930) A.C. 161.
[4] (1891) A C 476, pp 481–482.

would presumably be, and it was held therefore to be *bona notabilia* within the area of the local jurisdiction within which he resided ; but this residence is of course of a changeable and fleeting nature, and depending upon the movements of the debtor, and inasmuch as a debt under seal or specialty had a species of corporeal existence by which its locality might be reduced to a certainty, and was a debt of a higher nature than one by contract, it was settled in very early days that such a debt was *bona notabilia* where it was 'conspicuous,' i.e , within the jurisdiction within which the specialty was found at the time of death : See Wentworth on the Office of Executors, ed. 1763, pp 45, 47, 60."

Debts due from the Crown, and debts arising under Statute are specialties and are locally situate in the Province in which they are at the death of the holder. This principle has been laid down in a Canadian case which went up to the Privy Council. The case was *Royal Trust Co.* v. *Attorney-General for Alberta* [1] The question which arose for consideration in this case was, whether certain bonds issued by the Dominion Government of Canada under the War Appropriation Acts of 1915, 1916 and 1917, of which at the time of his death William Roper Hull, late of the City of Calgary, was owner, were within the meaning of the Succession Duties Act (R.S. of Alberta, 1922) property of his, passing on his death, " situate within the Province " and therefore subject to the duties payable under the Statute The deceased died domiciled in Alberta, and the bonds were in his possession there at the time of his death. The Supreme Court of Alberta held that though the government bonds in question were not under seal, they have the character of specialty by reason of the statutory liability which they established, and consequently they must be included among obligations classed in law as, " specialties," which have their situation in point of liability to taxation where they were found in possession of the testator at his death They held that the bonds were liable to pay succession duty under the Alberta Statute. The appellants attacked this decision on two grounds. They contended that the bonds not being securities under seal, could not be regarded as specialties so as to invest them with a peculiar local situation, and as personal obligations their situs must be decided with reference to the place where they could be effectively dealt with. As the register of bond-holders was at Ottawa and the title had to be completed by registration, the bonds were situate in the Province of Ontario.

[1] (1930) A C. 144.

Lord Merrivale in delivering the judgement of their Lordships of the Privy Council rejected the appellants' contention and made the following observations which are to be found at pages 150-151 : " Were the bonds in question, then, debts by specialty ? They were not under seal , but that does not conclude the matter. The Sign manual and—far less immediate than that—the signature of an officer of State, or of the Household, must have sufficiently evidenced what Wentworth calls, 'a debt due from the King' Here we have an instrument certain in itself—an obligation of the Sovereign authority of the Dominion authenticated in the manner prescribed by the Legislature . . . In their Lordships' opinion the Statutory obligations of the Dominion of Canada evidenced by the bonds here in question are specialities, and at the time of the testator's death had their local situation at his place of residence in Alberta " They also held that the argument founded upon the analogy of the bonds in question to shares in a joint stock company had to fail as the bonds were statutory bonds and not shares.

With regard to a mortgage effected on immovable property, the Privy Council, in a Canadian case, have held that the debt secured by the mortgage was property situate in the province where the mortgage deed had been registered *Toronto General Trusts Corporation* v *The King* [1] In this case a person who was domiciled in the Province of Ontario had taken a mortgage of land in the Province of Alberta According to the provisions of the Act a mortgage after registration had to be retained at the office of the registrar of titles The mortgage was executed in duplicate, the registrar and the mortgagee each retaining one of the documents. The document retained by the mortgagee was in his possession at the time of his death in Ontario. The Privy Council held that the debt secured by the mortgage was property of the mortgagee in Alberta and consequently it was liable to succession duty under the Alberta Succession Duties Act, 1914.

The proviso clause contemplates, I think, cases of the kind hereinafter mentioned. Supposing A leases out a building of which he is the owner and situated in province B, to be used as a Post Office, If A were to die without any heirs then the property will escheat to His Majesty in the right of the Federal Government and not to Province B as the building was being used for a Federal purpose at the time it escheated. If on the other hand the building was leased for locating a school, then it would escheat to His Majesty in the right of the Province. It

[1] (1919) A.C. 679.

is possible to think of other cases which will come under the proviso to this section.

175. (1) The executive authority of the Federation and of a Province shall extend, subject to any Act of the appropriate Legislature, to the grant, sale, disposition or mortgage of any property vested in His Majesty for the purposes of the government of the Federation or of the Province, as the case may be, and to the purchase or acquisition of property on behalf of His Majesty for those purposes respectively, and to the making of contracts:

Provided that any land or building used as an official residence of the Governor-General or a Governor shall not be sold, nor any change made in the purposes for which it is being used, except with the concurrence, in his discretion, of the Governor-General or the Governor, as the case may be

(2) All property acquired for the purposes of the Federation or of a Province or of the exercise of the functions of the Crown in its relations with Indian States, as the case may be, shall vest in His Majesty for those purposes.

(3) Subject to the provisions of this Act with respect to the Federal Railway Authority, all contracts made in the exercise of the executive authority of the Federation or of a Province shall be expressed to be made by the Governor-General, or by the Governor of the Province, as the case may be, and all such contracts and all assurances of property made in the exercise of that authority shall be executed on behalf of the Governor-General or Governor by such persons and in such manner as he may direct or authorize

(4) Neither the Governor-General, nor the Governor of a Province, nor the Secretary of State shall be personally liable in respect of any contract or assurance made or executed for the purposes of this Act, or for the purposes of the Government of India Act or of any Act repealed thereby, nor shall any person making or executing any such contract or assurance on behalf of any of them be personally liable in respect thereof.

176. (1) The Federation may sue or be sued by the name of the Federation of India and a Provincial Government may sue or be sued by the name of the Province, and, without prejudice to the subsequent provisions of this chapter, may, subject to any provisions which may be made by Act of the Federal or a Provincial Legislature enacted by virtue of powers conferred on that Legislature by this Act, sue or be sued in relation to their respective affairs in the like cases as the Secretary of State in Council might have sued or been sued if this Act had not been passed.

(2) Rules of court may provide that, where the Federation, the Federal Railway Authority, or a Province sue or are sued in the United Kingdom, service of all proceedings may be effected upon the High Commissioner for India or such other representative in the United Kingdom of the Federation, Authority or Province, as may be specified in the rules.

This section makes specific provision for the Federation and the Provinces to sue and be sued in their respective names. In view of the creation of autonomous Provinces and a Federal Centre, the arrangement which operated so far, under a unitary form of government, whereby the Secretary of State in Council could alone be the plaintiff or defendant in every litigation in which either the local or central government was concerned, had to be modified to meet the new conditions The Federation and the Provinces will now be able to sue and be sued in relation to their respective affairs, in their own names

In regard to the nature of the claims which the Federation and the Provinces could prosecute as plaintiffs or for which they would be liable to be sued as defendants, Sub-section (1) of this section provides that, without prejudice to the subsequent provisions of this chapter, they would be able to sue or be sued in relation to their respective affairs in like cases as the Secretary of State in Council might have sued or been sued if the new Act had not been passed, subject, however, to any alterations which may be made in that position by Acts passed by the Federal or Provincial Legislatures, in pursuance of powers which have been conferred upon them by the New Act

In regard to the claims which could have been pursued as against the Secretary of State in Council, it would be necessary to refer to the provision contained in Sub-section (2) of Section 32 of the consolidated Government of India Act which provided that "every person shall have the same remedies against the Secretary of State in Council as he might have had against the East India Company if the Government of India Act, 1858, and this Act had not been passed."

Broadly speaking, the Secretary of State in Council as the successor of the East India Company, was liable to be sued in regard to all claims for which (1) a private individual or a trading corporation could have been sued, or (2) any specific statutory provision had been made.

In the leading case of *Peninsular and Oriental Steam Navigation Co.* v. *Secretary of State*,[1] the question of the liability of the Secretary of State in Council for injuries caused to a horse

[1] 5 Bom H.C.R. Appx. A, p. 1.

belonging to the plaintiffs by reason of the negligent conduct of certain workmen employed under the government in the construction of a dockyard at Kidderpore arose for consideration. Sir Barnes Peacock, C J., who decided the case drew a distinction between acts done in the course of a business or undertaking carried on by government, which would have rendered a private individual liable to be sued, and acts done in connection with the exercise of governmental powers which could not be exercised save by the sovereign or a person to whom such powers had been delegated He held that the plaintiffs could maintain an action for damages in the circumstances alleged, as the negligence complained of was committed by the servants of government in carrying on an ordinary business, which was not in any way connected with the exercise of governmental power

Lord Haldane, L C , in delivering the judgment of the Privy Council, in the case of *Secretary of State* v *Moment*[1] observed that Sir Barnes Peacock had correctly stated the principles applicable to the liability of the Secretary of State in Council as the successor of the East India Company to be sued in tort

The cases of *Ross* v *Secretary of State* ,[2] *Secretary of State* v. *Cockcraft* ,[3] and *Shivabhajan Durga Prasad* v. *Secretary of State*[4] illustrate the application of the principle mentioned above

The case of *Kessoram Poddar* v. *Secretary of State*[5] was a case which arose in connection with the liability of the Secretary of State in Council to be sued in respect of a contract entered into in the capacity of a sovereign The plaintiff firm sued the Secretary of State in Council for damages sustained by it, by reason of the latter's failure and neglect to pay for or take delivery of certain goods bought from the plaintiff. The goods had been contracted to be purchased in pursuance of commandeering orders issued under the power vested in Government by the Defence of India (Consolidation) Act, 1915. Chotzner, J. held that as " a commandeering order is one which no one but Government can make, and being an act of the Sovereign power, the Secretary of State evidently cannot be sued in respect of it."

Sometimes the plea of " an act of State " has been successfully urged in certain cases in which the East India Company, or the Secretary of State for India in Council, has been sued in

[1] 40 Cal. 391
[2] 37 Mad 55 ; affirmed on appeal in 39 Mad 781
[3] 39 Mad 351.
[4] 28 Bom 314.
[5] 54 Cal. 969

regard to acts done in its sovereign capacity. In the case of *Secretary of State* v. *Kamachee Boye Sahaba*[1] it was decided that the act of the East India Company, as trustees of the Crown, and acting in a sovereign capacity, in seizing the Raj of Tanjore, from motives of State, could not be made the subject of a civil proceeding in a municipal court. Lord Kingsdown in delivering the judgment of the Privy Council has observed, at page 540, as follows "The result, in their Lordships' opinion, is, that the property now claimed by the Respondent has been seized by the British Government, acting as a Sovereign power, through its delegate the East India Company, and that the act so done, with its consequences, is an act of State over which the Supreme Court of Madras has no jurisdiction Of the propriety or justice of that act, neither the court below nor the Judicial Committee have the means of forming, or the right of expressing, if they had formed, any opinion. It may have been just or unjust, politic or impolitic, beneficial or injurious, taken as a whole, to those whose interests are affected These are considerations into which their Lordships cannot enter It is sufficient to say that, even if a wrong has been done, it is a wrong for which no municipal court of justice can afford a remedy."

In *Bhagawan Singh* v *Secretary of State for India in Council*,[2] it was decided that the seizure of an estate in the Punjab, which seizure had been made in the right of conquest, must be considered as an act of State, which could not be questioned in a municipal court.

In the important case of *Attorney-General* v. *De Keyser's Royal Hotel*,[3] it has been decided that, where the prerogative right of the King is regulated by statute, then that right is superseded to that extent by the operation of that statute. In this case, certain part of the premises of De Keyser's Royal Hotel was taken possession of during the war, by the War Office, for purposes connected with the Defence of the realm. The owners of the hotel applied by way of Petition of Right for compensation for such compulsory occupation The Crown resisted the claim of the suppliant on the ground that such compulsory occupation was in the exercise of the royal prerogative, and that, in consequence, there was no right to compensation. The court found that possession had been taken under the Defence of Realm Regulations passed under the powers granted by the Defence of Realm Consolidation Act,

[1] 7 Moore's Indian Appeals, 476 [2] (1874) L R 2 Ind. App Cas 38.
[3] (1920) A C 508.

1914. Provision had been made under the statute for the payment of compensation in such cases. It was decided that the suppliant had a statutory right to compensation.

177. (1) Without prejudice to the special provisions of the next succeeding section relating to loans, guarantees and other financial obligations, any contract made before the commencement of Part III of this Act by, or on behalf of, the Secretary of State in Council shall, as from that date—

(*a*) if it was made for purposes which will after the commencement of Part III of this Act be purposes of the Government of a Province, have effect as if it had been made on behalf of that Province, and

(*b*) in any other case have effect as if it had been made on behalf of the Federation,

and references in any such contract to the Secretary of State in Council shall be construed accordingly, and any such contract may be enforced in accordance with the provisions of the next but one succeeding section.

(2) This section does not apply in relation to contracts solely in connection with the affairs of Burma or Aden, or solely for purposes which will after the commencement of Part III of this Act be purposes of His Majesty's Representative for the exercise of the functions of the Crown in its relations with Indian States.

178. (1) All liabilities in respect of such loans, guarantees and other financial obligations of the Secretary of State in Council as are outstanding immediately before the commencement of Part III of this Act and were secured on the revenues of India shall, as from that date, be liabilities of the Federation and shall be secured upon the revenues of the Federation and of all the Provinces.

(2) All enactments relating to any such loans, guarantees and other financial obligations of the Secretary of State in Council as aforesaid shall, in relation to those loans, guarantees and obligations, continue to have effect with the substitution therein, except in so far as the context otherwise requires, of references to the Secretary of State for references to the Secretary of State in Council, and with such other modifications and such adaptations as His Majesty in Council may deem necessary.

(3) No deduction in respect of taxation imposed by or under any existing Indian Law or any law of the Federal or a Provincial Legislature shall be made from any payment of principal or interest in respect of any securities, the interest whereon is

payable in sterling, being a payment which would, but for the provisions of this Act, have fallen to be made by the Secretary of State in Council.

(4) If in the case of any Local Government in India there are outstanding immediately before the commencement of Part III of this Act any loans or other financial obligations secured upon the revenues of the Province, all liabilities in respect of those loans and obligations shall, as from that date, be liabilities of the Government of, and shall be secured upon the revenues of, the corresponding Province under this Act

(5) Any liabilities in respect of any such loan, guarantee or financial obligation as is mentioned in this section may be enforced in accordance with the provisions of the next succeeding section.

(6) The provisions of this section apply to the liabilities of the Secretary of State in Council in respect of the Burma Railways three per cent Debenture Stock, but, save as aforesaid, do not apply to any liability solely in connection with the affairs of Burma or Aden.

179. (1) Any proceedings which, if this Act had not been passed, might have been brought against the Secretary of State in Council may, in the case of any liability arising before the commencement of Part III of this Act or arising under any contract or statute made or passed before that date, be brought against the Federation or a Province, according to the subject matter of the proceedings, or, at the option of the person by whom the proceedings are brought, against the Secretary of State, and any sum ordered to be paid by way of debt, damages or costs in any such proceedings, and any costs or expenses incurred in or in connection with the defence thereof, shall be paid out of the revenues of the Federation or the Province, as the case may be, or, if the proceedings are brought against the Secretary of State, out of such revenues as the Secretary of State may direct.

The provisions of this sub-section shall apply with respect to proceedings arising under any contract declared by the terms thereof to be supplemental to any such contract as is mentioned in those provisions as they apply in relation to the contracts so mentioned.

(2) If at the commencement of Part III of this Act any legal proceedings are pending in the United Kingdom or in India to which the Secretary of State in Council is a party, the Secretary of State shall be deemed to be substituted in those proceedings for the Secretary of State in Council, and the provisions of

Sub-section (1) of this section shall apply in relation to sums ordered to be paid, and costs or expenses incurred, by the Secretary of State or the Secretary of State in Council in or in connection with any such proceedings as they apply in relation to sums ordered to be paid in, and costs or expenses incurred in or in connection with the defence of, proceedings brought against the Secretary of State under the said Sub-section (1).

(3) Any contract made in respect of the affairs of the Federation or a Province by or on behalf of the Secretary of State after the commencement of Part III of this Act may provide that any proceedings under that contract shall be brought in the United Kingdom by or against the Secretary of State and any such proceedings may be brought accordingly, and any sum ordered to be paid by the Secretary of State by way of debt, damages or costs in any such proceedings, and any costs or expenses incurred by the Secretary of State in or in connection therewith, shall be paid out of the revenues of the Federation or the Province, as the case may be.

(4) Nothing in this section shall be construed as imposing any liability upon the Exchequer of the United Kingdom in respect of any debt, damages, costs or expenses in or in connection with any proceedings brought or continued by or against the Secretary of State by virtue of this section, or as derogating from the provisions of Sub-section (1) of the last preceding section.

(5) This section does not apply in relation to contracts or liabilities solely in connection with the affairs of Burma or Aden, other than liabilities which are by this Act made liabilities of the Federation, or to contracts or liabilities for purposes which will, after the commencement of Part III of this Act, be purposes of His Majesty's Representative for the exercise of the functions of the Crown in its relations with Indian States.

180. (1) Any contract made before the commencement of Part III of this Act by or on behalf of the Secretary of State in Council solely in connection with the exercise of the functions of the Crown in its relations with Indian States shall, as from the commencement of Part III of this Act, have effect as if it had been made on behalf of His Majesty and references in any such contract to the Secretary of State in Council shall be construed accordingly.

(2) Any proceedings which if this Act had not been passed might have been brought by or against the Secretary of State in Council in respect of any such contract as aforesaid may be brought by or against the Secretary of State and if at the commencement of Part III of this Act any proceedings in

respect of any such contract are pending in the United Kingdom or in India to which the Secretary of State in Council is a party, the Secretary of State shall be deemed to be substituted in those proceedings for the Secretary of State in Council.

(3) Any contract made after the commencement of Part III of this Act on behalf of His Majesty solely in connection with the exercise of the said functions of the Crown shall, if it is such a contract as would have been legally enforceable by or against the Secretary of State in Council, be legally enforceable by or against the Secretary of State.

(4) Any sums ordered to be paid by the Secretary of State by way of debt, damages or costs in any such proceedings as are mentioned in this section and any costs or expenses incurred by him in or in connection with the prosecution or defence thereof shall be deemed to be sums required for the discharge of the functions of the Crown in its relations with Indian States, and any sum received by the Secretary of State by virtue of any such proceedings shall be paid or credited to the Federation.

CHAPTER XVII

THE FEDERAL RAILWAY AUTHORITY

ONE of the important features of the new constitution is the vesting of the administrative control over the Federal Railways in India in a Statutory body called "The Federal Railway authority," leaving it to the Federal Legislature to exercise a general control over railway policy. The provisions relating to the constitution, powers, and functions of this Authority, and those pertaining to certain other railway matters are contained in Part VIII of the Act and the Eighth Schedule. Section 182 lays down the method by which, and the extent to which, the provisions contained in the Eighth Schedule could be amended by the Federal Legislature. It provides as follows: "(1) Not less than three-sevenths of the members of the Authority shall be persons appointed by the Governor-General in his discretion, and the Governor-General shall in his discretion appoint a member of the Authority to be the President thereof. (2) Subject as aforesaid, the provisions of the Eighth Schedule to this Act, as supplemented or amended by any Act of the Federal Legislature for the time being in force, shall have effect with respect to the appointment, qualifications and conditions of service of members of the Authority, and with respect to the Authority's proceedings, executive staff and liability to income-tax: Provided that, except with the previous sanction of the Governor-General in his discretion, there shall not be introduced into, or moved in, either Chamber of the Federal Legislature any Bill or any amendment for supplementing or amending the provisions of the said Schedule"

The Eighth Schedule among other things, provides for the following matters: The Federal Railway Authority, which shall be a body corporate may sue and be sued in that name and shall consist of seven members appointed by the Governor-General. A person shall not be qualified to be appointed or to be a member of the Authority —(*a*) unless he has had experience in commerce, industry, agriculture, finance, or administration; or (*b*) if he is, or within the twelve months last preceding has been (i) a member of the Federal or any Provincial Legislature; or (ii) in the service of the Crown in India, or (iii) a railway official in India. At the head of the executive staff of the Authority there will be a Chief Railway Commissioner, with

experience in Railway administration, who will be appointed by the Governor-General exercising his individual judgment after consultation with the Authority. The Chief Railway Commissioner will be assisted in the performance of his duties by a financial Commissioner, who will be appointed by the Governor-General, and by such additional Commissioners, being persons with experience in railway administration, as the Authority on the recommendation of the Chief Commissioner may appoint. The Authority will not be liable to pay Indian income tax or super tax on any of its income, profits or gains. The Authority must entrust all their moneys which is not immediately needed to the Reserve Bank of India and employ that bank as their agents for all transactions in India relating to remittances, exchange and banking, and the bank has to undertake the custody of such moneys and such agency transactions on the same terms and conditions as those upon which they undertake the custody of moneys belonging to, or agency transactions for the Federal Government.

181. (1) The executive authority of the Federation in respect of the regulation and the construction, maintenance and operation of railways shall be exercised by a Federal Railway Authority (hereinafter referred to as " the Authority.")

(2) The said executive authority extends to the carrying on in connection with any Federal railways of such undertakings as, in the opinion of the Authority, it is expedient should be carried on in connection therewith and to the making and carrying into effect of arrangements with other persons for the carrying on by those persons of such undertakings :

Provided that, as respects their powers under this sub-section, the Authority shall be subject to any relevant provisions of any Federal, Provincial or existing Indian Law, and to the relevant provisions of the law of any Federated State, but nothing in this sub-section shall be construed as limiting the provisions of Part VI of this Act regulating the relations of the Federation with Provinces and States.

(3) Notwithstanding anything in this section, the Federal Government or its officers shall perform, in regard to the construction, equipment, and operation of railways such functions for securing the safety both of members of the public and of persons operating the railways, including the holding of inquiries into the causes of accidents, as in the opinion of the Federal Government should be performed by persons independent of the Authority and of any railway administration.

So much of Part X of this Act as provides that powers in relation to railway services of the Federation shall be exercised by the Authority shall not apply in relation to officers of the Federal Government employed in the performance of any of the functions mentioned in this sub-section.

Sub-section (3) was added on to the section when the Government of India Bill was passing through the Committee stage in the House of Commons Sir Samuel Hoare, in explaining the object of this amendment, stated as follows : " It was pointed out that the clause in its present form might imply that the Federal Government would not be responsible for the safety of railways ; that any safety provisions with regard to the Indian railways would depend entirely on the Federal Railway Board. I think it will be the view of the hon. members that questions of safety ought to be taken out of the control of a board whose principal interest is to run the railways on business lines and make a good return on the capital The new sub-section will make the Federal Government responsible for the safety of railways just as the Government are responsible for the safety of railways in this country. Here the Board of Trade are responsible and in the case of India it is the Federal Ministry of Communications "[1]

Sub-section (1) of Section 183 provides that the Authority in discharging their functions under this Act shall act on business principles, due regard being had by them to the interests of agriculture, industry, commerce and the general public, and in particular shall make provision for meeting out of their receipts on revenue account all expenditure to which such receipts are applicable under the provisions of this Part of this Act

186. (1) The Authority shall establish, maintain and control a fund (which shall be known as the " Railway Fund ") and all moneys received by the Authority, whether on revenue account or on capital account, in the discharge of their functions and all moneys provided, whether on revenue account or on capital account, out of the revenues of the Federation to enable them to discharge those functions shall be paid into that Fund, and all expenditure, whether on revenue account or on capital account, required for the discharge of their functions shall be defrayed out of that Fund :

Provided that nothing in this sub-section shall prevent the Authority from establishing and maintaining separate provident funds for the benefit of persons who are or have been employed in connection with railways.

[1] *Official Report, House of Commons:* April 1, 1935, Volume 300, Column 34.

(2) The receipts of the Authority on revenue account in any financial year shall be applied in—

(*a*) defraying working expenses ;

(*b*) meeting payments due under contracts or agreements to railway undertakings ;

(*c*) paying pensions, and contributions to provident funds ;

(*d*) repaying to the revenues of the Federation so much of any pensions and contributions to provident funds charged by this Act on those revenues as is attributable to service on railways in India ;

(*e*) making due provision for maintenance, renewals, improvements and depreciation ,

(*f*) making to the revenues of the Federation any payments by way of interest which they are required by this Part of this Act to make ; and

(*g*) defraying other expenses properly chargeable against revenue in that year.

(3) Any surpluses on revenue account shown in the accounts of the Authority shall be apportioned between the Federation and the Authority in accordance with a scheme to be prepared, and from time to time reviewed, by the Federal Government, or, until such a scheme has been prepared, in accordance with the principles which immediately before the establishment of the Authority regulated the application of surpluses in railway accounts, and any sum apportioned to the Federation under this sub-section shall be transferred accordingly and shall form part of the revenues of the Federation.

(4) The Federation may provide any moneys, whether on revenue account or capital account, for the purposes of the Railway Authority, but, where any moneys are so provided, the provision thereof shall be deemed to be expenditure and shall accordingly be shown as such in the estimates of expenditure laid before the Chambers of the Legislature.

190. (1) The accounts of the receipts and expenditure of the Authority shall be audited and certified by or on behalf of, the Auditor-General of India.

(2) The Authority shall publish annually a report of their operations during the preceding year and a statement of accounts in a form approved by the Auditor-General.

The Act provides for the constitution of a Railway Rates Committee and a Railway Tribunal and defines the functions which they are to discharge.

191. The Governor-General may from time to time appoint a Railway Rates Committee to give advice to the Authority in

connection with any dispute between persons using, or desiring to use, a railway and the Authority as to rates or traffic facilities which he may require the Authority to refer to the Committee.

192. A Bill or amendment making provision for regulating the rates or fares to be charged on any railway shall not be introduced or moved in either Chamber of the Federal Legislature except on the recommendation of the Governor-General.

193. (1) It shall be the duty of the Authority and every Federated State so to exercise their powers in relation to the railways with which they are respectively concerned as to afford all reasonable facilities for the receiving, forwarding, and delivering of traffic upon and from those railways, including the receiving, forwarding, and delivering of through traffic at through rates, and as to secure that there shall be between one railway system and another no unfair discrimination, by the granting of undue preferences or otherwise, and no unfair or uneconomic competition

(2) Any complaint by the Authority against a Federated State or by a Federated State against the Authority on the ground that the provisions of the preceding sub-section have not been complied with shall be made to and determined by the Railway Tribunal.

194. If the Authority, in the exercise of any executive authority of the Federation in relation to interchange of traffic, or maximum or minimum rates and fares, or station or service terminal charges, give any direction to a Federated State, the State may complain that the direction discriminates unfairly against the railways of the State, or imposes on the State an obligation to afford facilities which are not in the circumstances reasonable, and any such complaint shall be determined by the Railway Tribunal

195. (1) The Governor-General acting in his discretion shall make rules requiring the Authority and any Federated State to give notice in such cases as the rules may prescribe of any proposal for constructing a railway or for altering the alignment or gauge of a railway, and to deposit plans.

(2) The rules so made shall contain provisions enabling objections to be lodged by the Authority or by a Federated State on the ground that the carrying out of the proposal will result in unfair or uneconomic competition with a Federal railway or a State railway, as the case may be, and, if an objection so lodged is not withdrawn within the prescribed time, the Governor-General shall refer to the Railway Tribunal the

question whether the proposal ought to be carried into effect, either without modification or with such modification as the Tribunal may approve, and the proposal shall not be proceeded with save in accordance with the decision of the Tribunal.

(3) This section shall not apply in any case where the Governor-General in his discretion certifies that for reasons connected with defence effect should, or should not, be given to a proposal.

196. (1) There shall be a Tribunal (in this Act referred to as " the Railway Tribunal ") consisting of a President and two other persons to be selected to act in each case by the Governor-General in his discretion from a panel of eight persons appointed by him in his discretion, being persons with railway, administrative, or business experience.

(2) The President shall be such one of the judges of the Federal Court as may be appointed for the purpose by the Governor-General in his discretion after consultation with the Chief Justice of India and shall hold office for such period of not less than five years as may be specified in the appointment, and shall be eligible for reappointment for a further period of five years or any less period :

Provided that, if the President ceases to be a judge of the Federal Court, he shall thereupon cease to be President of the Tribunal and, if he is for any reason temporarily unable to act, the Governor-General in his discretion may after the like consultation appoint another judge of the Federal Court to act for the time being in his place.

(3) It shall be the duty of the Railway Tribunal to exercise such jurisdiction as is conferred on it by this Act, and for that purpose the Tribunal may make such orders, including interim orders, orders varying or discharging a direction or order of the Authority, orders for the payment of compensation or damages and of costs and orders for the production of documents and the attendance of witnesses, as the circumstances of the case may require, and it shall be the duty of the Authority and of every Federated State and of every other person or authority affected thereby to give effect to any such order.

(4) An appeal shall lie to the Federal Court from any decision of the Railway Tribunal on a question of law, but no appeal shall lie from the decision of the Federal Court on any such appeal.

(5) The Railway Tribunal or the Federal Court, as the case may be, may, on application made for the purpose, if satisfied that in view of an alteration in the circumstances it is proper so to do, vary or revoke any previous order made by it.

(6) The President of the Railway Tribunal may, with the approval of the Governor-General in his discretion, make rules regulating the practice and procedure of the Tribunal and the fees to be taken in proceedings before it.

(7) Subject to the provisions of this section relating to appeals to the Federal Court, no court shall have any jurisdiction with respect to any matter with respect to which the Railway Tribunal has jurisdiction.

(8) There shall be paid out of the revenues of the Federation to the members of the Railway Tribunal other than the President such remuneration as may be determined by the Governor-General in his discretion, and the administrative expenses of the Railway Tribunal, including any such remuneration as aforesaid, shall be charged on the revenues of the Federation, and any fees or other moneys taken by the Tribunal shall form part of those revenues

The Governor-General shall exercise his individual judgment as to the amount to be included in respect of the administrative expenses of the Railway Tribunal in any estimates of expenditure laid by him before the Chambers of the Federal Legislature.

197. (1) Without prejudice to the general provisions of this Act with respect to rights and liabilities under contracts made by or on behalf of the Secretary of State in Council, the provisions of this section shall have effect with respect to any contract so made with a railway company which immediately before the commencement of Part III of this Act was operating a railway in British India

(2) If a dispute arises under any such contract between the railway company concerned and either the Authority or the Federal Government, and if the matter in dispute is of such a nature that under the contract the company might require, or, but for some provision of this Act, might have required, it to be submitted to arbitration, the dispute shall be deemed to have arisen between the company and the Secretary of State, and the provisions of the contract relating to the determination of such a dispute shall have effect with the substitution of the Secretary of State for the Secretary of State in Council.

Any award made in an arbitration under the foregoing provisions of this section and any settlement of the dispute agreed to by the Secretary of State with the concurrence of his advisers shall be binding on the Federal Government and the Authority, and any sum which the Secretary of State may become liable or may so agree to pay by way of debt, damage or costs, and any costs or expenses incurred by him in connection with the

matter, shall be paid out of the revenues of the Federation and shall be charged on those revenues but shall be a debt due to the Federation from the Authority.

198. If and in so far as His Majesty's Representative for the exercise of the functions of the Crown in its relations with Indian States may entrust to the Authority the performance of any functions in relation to railways in an Indian State which is not a Federated State, the Authority shall undertake the performance of those functions.

CHAPTER XVIII

THE FEDERAL COURT

In making provision for the establishment of a Federal Court in the Constitution Act itself, the Government of India Act, 1935, follows the precedents set by the Constitution of the United States of America, and the Commonwealth of Australia Constitution Act, 1900, which, respectively, make provision for the setting up of a Supreme Court in the United States of America, and a High Court in Australia. In Canada, however, the Supreme Court is the creation of a Dominion Statute of the year 1875 (38 Victoria, c. 11), under the power granted to the Dominion Parliament, by Section 101 of the British North America Act, 1867. The essential functions of a Federal Court, in a Federal Constitution, are, to act as the interpreter and guardian of the Constitution, and to serve as a tribunal for the adjudication of justiciable disputes that may arise between the Centre and the Units, or between the Constituent Units themselves It is intended by the framers of the new Constitution for India, that the Indian Federal Court, like its compeers elsewhere, should perform similar functions. The Federal Court under the Government of India Act, 1935, will exercise four kinds of jurisdiction It will, in the first place, have an original jurisdiction in any dispute between two or more of the following contestants, that is to say, the Federation, any of the Provinces or any of the Federated States. The effect of Sub-section (1) of Section 204 read along with the proviso to it is, that a dispute to which a Federated State is a party, will come within the purview of the original jurisdiction of the Federal Court only when such a dispute not only involves a question on which the existence or extent of a legal right depends, but also concerns or arises from one or other of the matters coming within the proviso. The original jurisdiction of the Federal Court, in other cases, that is to say, when the dispute arises between the Federation and the Provinces, or the Provinces *inter se,* is wider, as the criterion upon which its jurisdiction is determined, is according to Section 204, Sub-section (1), simply whether the dispute involves any question (whether of law or fact) on which the existence or extent of a legal right depends, without any other restriction being imposed as in the case of a dispute to which a State is a party. Section 204 which

defines the original jurisdiction of the Federal Court, is a very important section and will be considered in detail later. The second class of jurisdiction of the Federal Court relates to the appellate jurisdiction which it will exercise in appeals from cases decided by the High Courts in British India and in the Federated States involving what may be compendiously described as constitutional questions. Sections 205 and 207 of the Act deal with this class of appellate jurisdiction. The third kind of jurisdiction is the advisory jurisdiction, under which the Federal Court may be called upon to answer any question of law, which may be referred to it by the Governor-General, which in his opinion is of such a nature and of such public importance that it is expedient to obtain the opinion of the Federal Court thereon. Provision for the exercise of this jurisdiction is made in Section 213 of the Act. These three categories of jurisdiction may appropriately be termed the Federal Jurisdiction of the Federal Court. In the immediate future, at any rate, the original, appellate, and advisory jurisdiction, of the nature above mentioned, will be the only classes of jurisdiction which the Federal Court will exercise. But Section 206 of the Act provides for the Federal Court being invested with jurisdiction to hear appeals in such civil cases decided by the High Courts in British India, as may be prescribed by an Act of the Federal Legislature. The effect of this provision is to make the Federal Court, when its appellate jurisdiction is extended by an Act of the Federal Legislature under the terms of this section, not only a Federal Court but also a court of appeal in ordinary civil cases decided by the British Indian High Courts. The section also prescribes that when the appellate jurisdiction of the Federal Court is enlarged, the Federal Legislature would be competent to make consequential provision by its Act for the abolition in whole or in part of direct appeals in civil cases from High Courts in British India to His Majesty in Council, either with or without special leave. This is the fourth type of jurisdiction.

200. (1) There shall be a Federal Court consisting of a Chief Justice of India and such number of other judges as His Majesty may deem necessary, but unless and until an address has been presented by the Federal Legislature to the Governor-General for submission to His Majesty praying for an increase in the number of judges, the number of puisne judges shall not exceed six.

(2) Every judge of the Federal Court shall be appointed by His Majesty by warrant under the Royal Sign Manual and

shall hold office until he attains the age of sixty-five years:

Provided that—

(*a*) a judge may by resignation under his hand addressed to the Governor-General resign his office;

(*b*) a judge may be removed from his office by His Majesty by warrant under the Royal Sign Manual on the ground of misbehaviour or of infirmity of mind or body, if the Judicial Committee of the Privy Council, on reference being made to them by His Majesty, report that the judge ought on any such ground to be removed.

(3) A person shall not be qualified for appointment as a judge of the Federal Court unless he—

(*a*) has been for at least five years a judge of a High Court in British India or in a Federated State; or

(*b*) is a barrister of England or Northern Ireland of at least ten years standing, or a member of the Faculty of Advocates in Scotland of at least ten years standing; or

(*c*) has been for at least ten years a pleader of a High Court in British India or in a Federated State or of two or more such Courts in succession:

Provided that—

(i) a person shall not be qualified for appointment as Chief Justice of India unless he is, or when first appointed to judicial office was, a barrister, a member of the Faculty of Advocates or a pleader, and

(ii) in relation to the Chief Justice of India, for the references in Paragraphs (*b*) and (*c*) of this sub-section to ten years there shall be substituted references to fifteen years.

In computing for the purposes of this sub-section the standing of a barrister or a member of the Faculty of Advocates, or the period during which a person has been a pleader, any period during which a person has held judicial office after he became a barrister, a member of the Faculty of Advocates or a pleader, as the case may be, shall be included

(4) Every person appointed to be a judge of the Federal Court shall, before he enters upon his office, make and subscribe before the Governor-General or some person appointed by him an oath according to the form set out in that behalf in the Fourth Schedule to this Act.

201. The judges of the Federal Court shall be entitled to such salaries and allowances, including allowances for expenses in respect of equipment and travelling upon appointment, and to such rights in respect of leave and pensions, as may from time to time be fixed by His Majesty in Council:

Provided that neither the salary of a judge nor his rights in respect of leave of absence or pension shall be varied to his disadvantage after his appointment.

Paragraph 5 of the Government of India (Federal Court) Order, 1937, provides that the pay of the Chief Justice shall be Rs. 7,000 a month, and that of the other judges Rs. 5,500 a month.

202. If the Office of Chief Justice of India becomes vacant, or if the Chief Justice is, by reason of absence or for any other reason, unable to perform the duties of his office, those duties shall, until some person appointed by His Majesty to the vacant office has entered on the duties thereof, or until the Chief Justice has resumed his duties, as the case may be, be performed by such one of the other judges of the court as the Governor-General may in his discretion appoint for the purpose.

203. The Federal Court shall be a court of record and shall sit in Delhi and at such other place or places, if any, as the Chief Justice of India may, with the approval of the Governor-General, from time to time appoint.

204. (1) Subject to the provisions of this Act, the Federal Court shall, to the exclusion of any other court, have an original jurisdiction in any dispute between any two or more of the following parties, that is to say, the Federation, any of the Provinces or any of the Federated States, if and in so far as the dispute involves any question (whether of law or fact) on which the existence or extent of a legal right depends :

Provided that the said jurisdiction shall not extend to—

(*a*) a dispute to which a State is a party, unless the dispute—

(i) concerns the interpretation of this Act or of an Order in Council made thereunder, or the extent of the legislative or executive authority vested in the Federation by virtue of the Instrument of Accession of that State ; or

(ii) arises under an agreement made under Part VI of this Act in relation to the administration in that State of a law of the Federal Legislature, or otherwise concerns some matter with respect to which the Federal Legislature has power to make laws for that State ; or

(iii) arises under an agreement made after the establishment of the Federation, with the approval of His Majesty's Representative for the exercise of the functions of the Crown in its relations with Indian States, between that State and the Federation or a Province, being an agreement which expressly provides that the said jurisdiction shall extend to such a dispute ;

(*b*) a dispute arising under any agreement which expressly provides that the said jurisdiction shall not extend to such a dispute.

(2) The Federal Court in the exercise of its original jurisdiction shall not pronounce any judgment other than a declaratory judgment.

This section defines the original jurisdiction of the Federal Court. It would be interesting to compare the original jurisdiction of the Federal Court in India with the original jurisdiction of the Australian High Court, as that would go to show that the Indian Federal Court exercises an original jurisdiction which is much more limited in character than that of the Australian High Court Under Section 75 of the Commonwealth of Australia Constitution Act, the High Court is invested with original jurisdiction in all matters, (i) arising under any treaty, (ii) affecting consuls or other representatives of other countries, (iii) in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party, (iv) between States, or between residents of different States or between a State and a resident of another State, (v) in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth. This jurisdiction of the Australian High Court is based on the constitution itself and is independent of Commonwealth legislation But Section 76 of the Act empowers the Parliament to make laws conferring original jurisdiction on the High Court in certain other matters prescribed therein As Dr. Donald Kerr in his treatise on *The Law of the Australian Constitution* has pointed out, at page 236, to the matters enumerated in Section 75 as coming within the original jurisdiction of the Australian High Court, " the Commonwealth Parliament has added (in accordance with the powers given to it by Section 76 of the Constitution) all matters arising under the Constitution or involving its interpretation ; of admiralty or maritime jurisdiction ; trials of indictable offences against Commonwealth Laws (Judiciary Act, 1903-1915, Section 30) ; matters involving questions as to the limits *inter se* of the constitutional powers of the Commonwealth and the States, or of any two or more States (Judiciary Act, 1903-7, Section 38 a)." Section 40 A of the Judiciary (Amending) Act, 1907, provides, that when in any cause pending in the Supreme Court of a State there arises any question as to the limits *inter se* of the constitutional powers of the Commonwealth and those of any State or States, or as to the limits *inter se* of the constitutional powers of any two or more states, it shall

be the duty of the court to proceed no further in the cause, and the cause is automatically, and without order of the High Court removed to the High Court.[1] It will be noticed that Section 204 of the Government of India Act, 1935, confines the original jurisdiction of the Federal Court only to disputes to which the Federation and any one or more of the constituent units of the Federation are parties ; or to which two or more of the constituent units of the Federation are parties The Federation can sue, and be sued, in the ordinary courts of a Province or a Federated State when only a private litigant is concerned in a dispute But in Australia the position is different, as under Section 75 (iii) of the Australian Act, in all matters in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth is a party, it is only the High Court of Australia, and not the State Courts, that can exercise jurisdiction. Again, under the Australian Constitution, when any matter arises between a State and a resident of another State, or between citizens of different States, the proper forum for its adjudication is the High Court of Australia. Section 204 of the Indian Act does not extend the original jurisdiction of the Federal Court to cover matters of the kind mentioned above. Of course, there are several other points of difference between the original jurisdiction exercised by the Australian High Court and that conferred on the Indian Federal Court , but it seems unnecessary to dwell on this aspect any further. It will, however, be noticed that, like the Australian High Court, which, in its original jurisdiction takes cognisance of disputes arising between the Commonwealth and a State, or a State and a State ; the Indian Federal Court, under Section 204 of the Government of India Act, will deal with disputes arising between the Federation and a Province (or State) or between one Province and another.

It would tend towards clearness to examine this section from two different points of view. In the first place, the section may be considered in relation to the disputes which will come within its purview, when the Federation and one or more of the Provinces, or the Provinces themselves, are concerned in a dispute. We leave aside, in considering the section from this standpoint, disputes to which a Federated State may be a party. In the second place we may consider the disputes which will come within the ambit of the original jurisdiction of the Federal Court, when a Federated State is one of the parties to the dispute.

Before we take up the first class of disputes for consideration,

[1] *Report of the Royal Commission on the Australian Constitution*, 1929, p. 89.

certain preliminary observations become necessary in order to grasp the essential nature of the issues that we are likely to meet with when dealing with this topic. Though there is only one Crown and that an indivisible one for the whole of the British Empire, the rights and obligations of the Crown not only may, but really do, vary with locality. In fact, the self-government of the different parts of the British Empire involves the notion, that the King acts through different agencies in different parts of his Dominions. As Isaacs, J. has observed in *Commonwealth* v. *Colonial Combing, etc., Co.*,[1] " the basic principle of the law of the Empire is that the King is indistinguishably the King of the whole Empire, but that the springs of royal action differ with locality." The case of *Attorney-General* v. *Great Southern Railway Co. of Ireland*,[2] where a claim against the Crown in respect of the Irish Free State which was sought to be prosecuted in England by Petition of Right was negatived, illustrates the principle that the Crown representing the Irish Free State has rights and duties, which are different from those of the Crown representing the United Kingdom. Just as the Crown has rights in respect of the United Kingdom, and different rights in respect of Canada, even in Canada itself there are different aspects of the Crown as representing the Dominion and the various Provinces. The British North America Act, 1867, recognizes the fact that the Dominion and the Provinces are separate entities, having different rights and duties. The Dominion and the Provinces perform distinct functions, own separate properties, have separate purses, and act through different legislative and executive organs. They are, therefore, distinct right and duty-bearing units. Similar considerations also apply to the Commonwealth and the States, under the Commonwealth of Australia Constitution Act, 1900. The Commonwealth and the States are distinct entities, with rights and duties of their own When distinct political authorities like the Dominion and the Provinces in Canada, or the Commonwealth and the States in Australia, exercise distinct functions, it is inevitable that conflicts should arise between those authorities, when their interests come into clash. The Crown in the right of the Dominion of Canada might, as it very often does, come into conflict with the Crown in the right of one or more of the Provinces. Suits between the Commonwealth and State and State and State have arisen in Australia. In Canada, suits between Dominion and Province and Province and Province have also come up for adjudication.

[1] (1922), 31 C L.R. 421, p 438 [2] (1925) A C. 754.

It is no doubt true that there are differences in the sources of jurisdiction of the Federal Tribunals in Canada and Australia Sir William Harrison Moore, in the article which he has contributed to the *Journal of Comparative Legislation*, in the year 1935, under the title," The Federations and suits between Governments, "(Vol. XVII, Third Series, p. 163 at p 169) has pointed out the differences in the sources of jurisdiction of the Federal Tribunals in Canada and Australia: " There are differences in the sources of jurisdiction between the Supreme Court of Canada and the High Court of Australia, and there are differences in their respective Constitutions which may have a bearing both on jurisdiction and law The jurisdiction of the High Court of Australia springs from the Constitution itself and cannot be abridged by any action of the legislature, Commonwealth or State, and this extends to whatever implications may attach to jurisdiction. In Canada there are concurrent legislative acts of Dominion and Provinces whereby the Crown in right of each is submitted to the jurisdiction of the Supreme Court, and while the Crown in any such right cannot claim immunity from proceedings while the act of its own legislature remains in force, the repeal of the act would be a valid withdrawal from submission to the Court."[1]

In Halsbury's *Laws of England*, Vol XI, Second Edition, at p. 198, it is stated as follows . " When a Provincial Legislature passes an Act agreeing that the Supreme Court and the Exchequer Court, or the Supreme Court alone, shall have jurisdiction in controversies (1) between the Dominion and a Province ; (2) between the Province and any other agreeing Province ; (3) as to the validity of an Act of the Parliament of Canada ; (4) as to the validity of a Provincial Act, then the special jurisdiction is to be exercised by the Supreme and Exchequer courts. In (1) and (2) the jurisdiction may be exercised by the Exchequer Court with an appeal to the Supreme Court ; in (3) and (4) the jurisdiction is vested in the Supreme Court alone. Ontario, Nova Scotia, Saskatchewan and British Columbia have passed Acts accordingly."

Under the Government of India Act, 1935, the Federation and each of the Provinces are recognized as distinct units, possessing rights and owing obligations. The Federation has distinct powers (legislative and executive), owns property, has a separate purse, and acts through legislative and executive

[1] In *Province of Ontario* v *Dominion of Canada*, (1909), 42 S.C R 1, there are observations on the position in the absence of legislation, Duff, J., P 19, cf. S C. 39, S.C.R. 14, 44 Idington, J.

organs of its own. The autonomous Provinces like the Federation will have their own powers (legislative and executive), purses, properties, and legislative and executive organs. Each Provincial unit is independent of the other, and the Provinces are also independent of the Federation in the provincial field. As in Canada and in Australia, and indeed as in all Federations, conflicts between Federation and Province, or Province and Province are bound to arise when their interests clash. When such conflicts arise, there must be a tribunal to resolve them. Hence the essential need for a Federal Court in all Federations. The Indian Federal Court is the tribunal created by the Constitution Act itself, to entertain disputes that might arise between the Federation and a Province, or between one Province and another

The original jurisdiction of the Federal Court which springs from the Constitution itself, and which can be neither extended nor abridged by an Act either of the Federal or a Provincial Legislature, would, it would seem, be of a compulsory character so long as there is a dispute involving any question of the existence or extent of a legal right, arising between the Federation and a Province, or between one Province and another. That view appears to follow from the fact that the section expressly provides that the Federal Court shall, to the exclusion of any other court, have an original jurisdiction in all disputes of the nature mentioned above

In exercising its original jurisdiction, the Federal Court will, it would seem, have to act upon recognized legal principles, and not in accordance with its own notions of what may appear to be fair or equitable under the circumstances of the case. A similar principle was enunciated by the Privy Council in an important Canadian case where the parties to the dispute were the Dominion of Canada and the Province of Ontario. Lord Loreburn in delivering the judgment of the Privy Council in that case, *Dominion of Canada* v. *Province of Ontario*,[1] observed as follows . " Their Lordships are of opinion that in order to succeed the appellants must bring their claim within some recognized legal principle. The Court of Exchequer, to which, by statutes both of the Dominion and the Province, a jurisdiction has been committed over controversies between them, did not thereby acquire authority to determine those controversies only according to its own view of what in the circumstances might be thought fair. It may be that, in questions between a Dominion comprising various Provinces of which the laws are

[1] (1910) A.C. 637, p. 645.

not in all respects identical on the one hand, and a particular Province with laws of its own on the other hand, difficulty will arise as to the legal principle which is to be applied. Such conflicts may always arise in the case of States or Provinces within a union. But the conflict is between one set of legal principles and another. In the present case it does not appear to their Lordships that the claim of the Dominion can be sustained on any principle of law that can be invoked as applicable." Though these observations were made with reference to the Court of Exchequer in Canada, which derives its jurisdiction to entertain disputes between the Dominion and a Province by concurrent legislative acts of both of them, the principle enunciated by Lord Loreburn, appears to be of equal application, to a court like the Indian Federal Court, which derives its jurisdiction from the Constitution Act itself, as both these tribunals are judicial tribunals, whose justice must primarly be according to legal principles and not according to discretion.

The facts out of which the case above referred to arose were these. By a treaty dated October 3, 1873, concluded between Her late Majesty Queen Victoria by her Commissioners named in the treaty on the one part, and the Salteaux tribe of the Ojibeway Indians of the other part, the Indian tribe surrendered all the rights and privileges which they had in favour of the Dominion of Canada over lands embracing an area of approximately 55,000 square miles, in consideration of certain payments and other rights reserved under the said treaty. When the treaty was made, it had not been ascertained that any part of the area forming the subject-matter of the arrangement was included within the Province of Ontario , but at the time of this controversy, it was common ground that the greater part of this area lay within the boundaries of the Province of Ontario. In making this treaty, the Dominion Government was acting upon the rights conferred upon it under the Constitution. They acted on their own responsibility and not in concert with the Government of Ontario. It was also conceded that the motive which induced the Dominion to enter into this transaction was not any special benefit to Ontario, but a motive of policy in the interests of the Dominion as a whole. But, by the extinguishment of the rights of the Indians in its territory, the Province of Ontario stood to gain. The claim put forward on behalf of the Dominion was, that Ontario should recoup the Dominion for so much of the burden undertaken by the Dominion under the treaty towards the Salteaux tribe as could be attributed to the lands in Ontario which had been released from

the Indian interest under the terms of the treaty. The Privy Council was of the view that the Dominion Government, in the transaction represented by the treaty, did not act as agent for the Province, that it acted with a view to great national interests, and without the consent of the Province and in the belief that the lands were not within that Province. They added that this was really a case in which expenditure independently incurred by one party for its own reasons, had resulted in direct advantage to another It may be, they said, as a matter of fair play between the two Governments, the Province ought to be liable for some part of this outlay, but that there was no basis for such a claim as a matter of law. They accordingly held that the claim for contribution made by the Dominion against the Province of Ontario, could not be rested on any legal principle, and that the action must therefore fail.

It will be noticed that the section which deals with the original jurisdiction of the Federal Court provides, that the court shall have an original jurisdiction in any dispute arising between the parties mentioned therein, " if and in so far as the dispute involves any question (whether of law or fact) on which the existence or extent of a legal right depends." Now, when a dispute arises between the Federation and a Province, or one Province and another, the question naturally arises, what is the law which governs their relations in such a case, and with reference to which the existence or extent of the rights of those parties has to be ascertained ? The question admits of no simple answer. The position, in fact, is full of difficulties. The appeal in such cases may have to be to the paramount law of the Constitution, or a Federal or Provincial law, or even to international law as the exigencies of the case require. There can be no one single or simple rule which could be applied in all cases. As Justice Butler of the Supreme Court of the United States has observed in a recent case *Connecticut* v. *Massachusetts* [1] " For the decision of suits between States, Federal, State and international law is considered and applied by this court as the exigencies of the particular case may require." It is no doubt true that a large part of the disputes that may arise between the Federation and a Province or one Province and another, may present parallels to cases arising between private individuals, and the law that would be applicable to determine the respective rights of private litigants in such cases in ordinary courts, may be equally applicable to suits between Governments in the Federal Court in analogous circum-

[1] (1931) 282 U S. 660 = 75 L.Ed. 602, p. 607.

stances. But disputes arising between Governments, might sometimes present no analogy whatsoever to private litigations, and even if they did, principles different from those applied to private rights may occasionally have to be applied. In the case of *Connecticut* v. *Massachusetts*,[1] already referred to, which related to a dispute regarding the rights of two States in a stream passing through their territories, it was observed that " the determination of the relative rights of contending States in respect of the use of streams flowing through them does not depend upon the same considerations and is not governed by the same rules of law that are applied in such States for the solution of similar questions of private right." I am mentioning this case, in order to call attention to the fact, that in disputes arising between Governments, principles applicable to similar questions in matters of private right between individuals, though generally applicable, may, in certain cases, have to be departed from. It may, however, be mentioned that so far as complaints relating to interference with water supplies are concerned, a special procedure has been created by the Government of India Act, 1935, to deal with such disputes, and the jurisdiction of the Federal Court and other courts expressly excluded therefrom. (See Sections 130 to 133.)

When problems arise in the case of disputes between governments which present novel aspects, and which cannot be resolved either by reference to the paramount law of the Constitution, or a Federal or Provincial law, the Court must have recourse to principles enunciated in comparable cases in other Federal systems or in analogous disputes between sovereign communities in international law. That the Indian Federal Court would have such a power appears to follow from the fact that Section 204 which uses the expression " legal right " makes no reference to the system of law from which that right has to be derived. The section imposes no restriction on the Federal Court, that the law from which that legal right is to be drawn, must only be the law of the Constitution, or a Federal law or a Provincial law.

Sir William Harrison Moore, in the article which he has contributed to the *Journal of Comparative Legislation*, in the year 1935, (Third Series, Vol. XVII, p. 163 at pp. 207–209), under the title, " The Federations and suits between Governments," has made the following interesting observations on the relevance of international law in disputes between governments : " In the attempt to fit principles and rules to the

[1] (1931) 282 U.S. 660 = 75 L Ed. 602, p. 607.

relations of governments, in recognition of the factors introduced by their special nature and responsibilities as compared with individuals, international law may become relevant. It is, of course, itself very largely—some have thought too largely—the product of an adaptation of principles and rules of private law to the international relation, and the statute of the permanent court of International Justice now specifies the general principles of law recognized by civilized nations as a part of the material for decision.[1] Municipal courts, in the course of administering justice between man and man, may find it necessary to take account of public international law, just as it may be necessary through private international law to have direct recourse to some foreign law. . . In a jurisdiction like that of the High Court of Australia or the Supreme Court of Canada, the search for the appropriate rule for the decision of cases between governments, the departures from or adaptation of the rule of individuals must increase the occasions when recourse must be had to international law, not as an authority in any formal sense, still less as a different regime superseding the national law, but as material from which enlightenment and assistance may be gained as to the principles held for law where relations are those of political communities, and therefore relevant to the ascertainment of the national law appropriate to the situation of the parties before the court. The weight of relevant factors which have no predetermined authority cannot, of course, be standardized, but it is increased in proportion to similarity in circumstances, and therefore the practice in other federal systems and the reasons on which it is founded will have a special value."

Sir William Harrison Moore in the course of the same article in the *Journal of Comparative Legislation* (Third Series, Vol. XVII at pp 163–165), has examined at great length the law to be applied in suits between governments in a Federation. The following passage, extracted from that instructive article, shows the difficulties which arise in this connection : " If the law cannot live without the King, it cannot be gainsaid that it has difficulties in accommodating the various employments of the Crown. And where the Crown acts through different instruments, executive and legislative, and legislative instruments are independent of each other in whole or in part, we are brought to the question—What is the law itself ? What is the

[1] For illustrations of recourse by the Permanent Court of International Justice to accepted principles of law common to national and international courts, " general conceptions of law " See Lauterpacht, *Development of International Law*, pp 82–3.

law to which the Supreme Court of Canada or the High Court of Australia turns in its original jurisdiction in controversies or matters between these high parties, and which the Privy Council applies where appeals in such cases are brought to it? . . . In some cases, of course, it is obvious: both in the Canadian and Commonwealth Constitutions there are specific provisions which are meaningless except as creating rights and duties if there is a legal *persona* to which they can be attributed and a tribunal for defining and ascertaining their content whenever difference should make that necessary. In both cases provisions of this sort have been added to by later amendments of the Constitutions, notably in Canada in 1907 and 1930.[1] In such cases the immediate appeal is to a law of acknowledged paramount authority, to which each is subject and which cannot be altered or varied by the legislative power of either: the only question is as to the interpretation and application of specific provisions of that law. But where the matter in dispute cannot thus be resolved by reference to the text of a written paramount rule, where is the relevant law to be sought, what is its source, the authority which maintains the obligation of its precepts, the will on which its continuance depends? We have a tribunal, bound to act upon 'legal principles,' and limited by such principles, is there a corresponding legislative power which can declare them, or are we, as in international law, faced with a law without a legislature? And, if there be no competent legislature or the competent legislature has not declared its will, what is the nature and character of the law to be applied? It has been insisted, not merely that the jurisdiction involves the application of 'legal principles,'[2] but that the law must be one to which the parties are alike subject,[3] which indeed appears obvious, for the very notion of a judicial determination imports some standard other than the mere will of a party. Since Dominion and Province, Commonwealth and State are not merely right and duty-bearing entities but law-making authorities whose will is embodied in the statutes they make, the law of any of them might appear to be excluded from the submission of their controversies to the determination of a

[1] (B N Acts 1907 and 1930) and in Australia in 1928 (embodied in the Constitution as S 105 A The Financial agreement under this section was the subject of proceedings in the High Court of Australia in Re *The State of New South Wales, ex parte The Commonwealth* (1932), 47 C L R 58, and *State of New South Wales* v *Commonwealth* (1932), 46 C L R 155, 235, 246)

[2] *Dominion of Canada* v *Province of Ontario* (1910), A C 637, 645, *South Australia* v. *Victoria* (1911) 12 C L R 667.

[3] *South Australia* v *Victoria*, Ibid., p 715, *Commonwealth* v *New South Wales* (1923) 32 C.L R. 200, 206

judicial tribunal.[1] Yet this is not so ; in many cases the law applied is the law of the Dominion or of the litigant Province, the Commonwealth or the litigant State,[2] and so far is it from being true that both are necessarily excluded that a passage—certainly of doubtful import—in a Privy Council judgment suggests that the choice is in all cases limited to the one or the other.[3] It is evident that the appeal to 'legal principles' is ambiguous where there are various standards or systems of law which may be in competition. The only general answer that can be given beyond the obvious and ambiguous answer that the court applies its own law is that no single and simple rule exists for uniform application in all manner of cases. In the comparable conditions in the United States, it has been said that 'the submission by the Sovereigns or States to a court of law or equity of a controversy between them without prescribing any rule of decision, gives power to decide according to the appropriate law of the case, which depends on the subject matter, the source and nature of the claims of the parties, and the law which governs them. From the time of such submission the question ceases to be a political one to be decided by the *Sic Volo Sic Jubeo* of political power ; it comes to the court to be decided by its judgment, legal discretion and solemn consideration of the rules of law appropriate to its nature as a judicial question depending on the exercise of judicial power ; and it is bound to act by known and settled principles of national or municipal jurisprudence as the case requires.'[4] In a later case, the Supreme Court of the United States declares : 'Sitting as it were as an international as well as a domestic tribunal, we apply Federal law, state law and international law as the exigencies of the particular case may demand.'[5] More recently still, in a suit for determining the proportions of the public debt to be borne respectively by a parent State and a new State formed out of it the court pointed out that in such a quasi-international controversy there was no municipal code governing the matter, and that neither congress nor either State alone could by its law dispose of the controversy. They added that such controversies must be considered in 'an

[1] "From the time of such submission the question ceases to be a political one to be decided by the *Sic Volo Sic Jubeo* of political power". *Rhode Island* v *Massachusetts* (1838) 12 Peters at p 737

[2] Cf *A -G. for Manitoba* v *A -G for Canada* (1903) 34 S C.R 287, (1904) A C. 799 ; *A -G for Canada* v *A -G for Quebec* (1929) S C R 557, (1932) A C. 514.

[3] *Dominion of Canada* v *Province of Ontario* (1910) A C 637, 645.

[4] *Rhode Island* v. *Massachusetts* (1838) 12 Peters at p 737.

[5] *Kansas* v *Colorado* (1901) 185 U S 146. See also (1906) 206 U S. 46, p 97

untechnical spirit'.[1] While much may be learnt from the manner in which such matters have been dealt with in the tribunals of other Federal States,[2] particularly in one whose legal notions and methods are derived from the same stock as our own, there are differences in the several constitutions demanding a discriminating recourse to them. This was remarked on by the High Court of Australia in *South Australia* v. *Victoria*."[3]

Sir William Harrison Moore has contributed a very interesting article on, " Suits between States within the British Empire" in the year 1925, to the *Journal of Comparative Legislation and International Law* (Third Series, Vol. VII, Part IX, p 155). This article may be read with considerable profit.

It may be useful to examine briefly some of the principles which have been applied by the High Court of Australia to determine its jurisdiction to entertain suits between Commonwealth and State or between State and State. The word " matters " which occurs in Section 75 of the Commonwealth of Australia Constitution Act, has been interpreted by the High Court of Australia to mean, matters which are of a like nature to those which arise between individuals and which are capable of determination according to legal principles. In the case of *South Australia* v. *Victoria*,[4] Griffith, C. J., has stated as follows : " In my opinion, a matter between States, in order to be justiciable, must be such that a controversy of like nature could arise between individual persons, and must be such that it can be determined on principles of law." The High Court of Australia has accordingly jurisdiction to entertain an action by one State, against another, on the basis of an alleged trespass on the territory of the former by the latter. In the case already referred to, *South Australia* v. *Victoria*,[5] O'Connor, J. has observed as follows : " . . . . I entertain no doubt that, if the British Government, by one of His Majesty's Ministers, were to enter into possession of a portion of the South Australian public lands, contrary to South Australian laws, His Majesty's Minister would be liable to be dispossessed by writ of intrusion at the suit of the State of South Australia, just as any other intruder would be liable." In *Commonwealth of Australia* v.

[1] *Virginia* v. *West Virginia* 220 U S 1 , *In re Southern Rhodesia* (1919) A C. 211, 244

[2] For disputes between Cantons in Switzerland, see *American Journal of International Law*, Vol. III, p. 88. (Max Huber) and Vol XV, p 152 (Schindler).

[3] (1911) 12 C.L.R 667.

[4] (1911) 12 C.L R. 667, p. 675.

[5] 12 C.L R. 667, p. 711.

New South Wales,[1] an action was brought by the Commonwealth for damages for a collision occurring in Sydney harbour, between boats belonging to the Commonwealth and New South Wales. It was held that the action was maintainable. It is true that under the New South Wales statute, there was a right of suit against the State in tort. Moreover, no exception was made against the Commonwealth to sue under the Statute. The Court, however, did not base its decision on any right conferred by the New South Wales law, but upon the principle that the word, " matters " referred to all claims referable to a legal standard of right, including torts, and that inasmuch as a subject would have had a remedy against another subject in the like circumstances, the action was properly constituted. According to this principle, there would be a right of action in tort against Victoria, even though the law of that State makes no provision in tort against the State

Dr Donald Kerr, in his treatise on *The Law of the Australian Constitution*, at pp 238–239, in dealing with the original jurisdiction of the High Court of Australia, has made the following observations · " The High Court has compulsive jurisdiction against a State under Section 75, i.e., the jurisdiction of the High Court over a State is not dependent on the consent of the State against which proceedings are instituted.[2] This jurisdiction would apply to all controversies relating to the ownership of property or arising out of contracts,[3] and to a breach of some constitutional declaration of right or duty created by the Constitution, e g ,[4] to a breach by a State of Section 90 (customs and excise duties) , or to the raising by a State of military forces (Section 114). Similarly the High Court would have compulsive jurisdiction against the Commonwealth, if the Commonwealth were to tax State property, or to make a railway in a State without that State's consent [5] When a State law infringes the Federal Constitution, or is in conflict with a Federal law, the Commonwealth and the Attorney-General for the Commonwealth may maintain an action against the State in the High Court for a declaration that the State law is invalid and for an injunction restraining the State from proceeding to enforce the same.[6] In *Commonwealth* v. *The State of*

[1] (1923) 32 C L R 200

[2] *The Commonwealth* v *New South Wales* (1923) 32 C L R 200, p. 205, per Knox, C J

[3] *South Australia* v *Victoria* (1911), 12 C L.R 667, p. 675

[4] *The Commonwealth* v. *New South Wales*, Supra, p 213, per Isaacs, Rich, and Starke, J J [5] *Ibid*

[6] *The Commonwealth* v *The State of Queensland* (1920) 29 C L R 1 , *Attorney-General for New South Wales* v. *Brewery Employees' Union* (1908), 6 C L R 469

Queensland (supra), Isaacs and Rich, J. J. said: 'The plaintiffs represent the people of Australia, including those of them that are in Queensland, but in that sense Queensland is not a separate part of the Commonwealth, the rights of Australians there which are sought to be protected are rights not referable to the Queensland Constitution, but are rights of a larger citizenship arising under and protected by the Australian Constitution. Under that Constitution paramountcy is conferred upon Commonwealth legislation throughout any area it lawfully covers. State authority in opposition to that legislation is unlawful.' Higgins, J. dissented (at p 23), relying on the United States principle that the illegality or unconstitutionality of a State or municipal tax is not of itself a ground for equitable relief in Federal Courts."[1]

In the year 1932 an interesting question arose between the Dominion of Canada and the Province of Quebec. The case is reported as *In re Silver Brothers, Limited. Attorney-General for Quebec* v *Attorney-General for Canada*[2] The proceedings arose out of a bankruptcy in the Province of Quebec, declaring a company called Messrs. Silver Brothers, Ltd., bankrupt. The Government of the Dominion of Canada filed with the trustee in bankruptcy a claim for a certain amount, being the sales tax imposed in virtue of the Special War Revenue Act, and due from the estate of the bankrupt The Government of the Province of Quebec also filed with the trustee a claim for a certain amount being the arrears due from the insolvent, as corporation tax imposed under the provision of Article 1345 of the Revised Statutes of Quebec, 1909. The moneys realized from the sale of the insolvent estate were insufficient to meet both the claims. Hence there was competition between the two Governments in regard to this matter By Section 17 of the Dominion Statute, Special War Revenue Act, the liability to the Crown of any person or corporation for the excise taxes imposed under it, was to constitute a first charge on the assets of such person or corporation and was to rank for payment in priority to all other claims of whatsoever kind, except administration expenses. Article 1357 of the Revised Statutes of Quebec, already referred to, provided that all sums due to the Crown in virtue of the section should constitute a privileged debt, ranking immediately after law costs. Each Government claimed priority over the other. Section 16 of the Interpretation Act of Canada provided that no provision in any Act was

[1] See *Boise Artesian Water Co* v *Boise City*, 213 U S 276
[2] (1932) A C 514

to affect the Crown, unless it was expressly stated therein, that the Crown was to be bound thereby. The argument on behalf of the Province of Quebec which was based upon this section of the Interpretation Act was as follows: "Here is a debt due to His Majesty in Quebec. That debt is an asset of His Majesty, to be applied in Quebec for the purposes of Quebec according to the advice of the Quebec ministers. If the claim of the Dominion is upheld the money to satisfy this debt is swept away into the coffers of the Dominion. Therefore by this Statute His Majesty is being bound to the detriment of one of his rights, and there is no express statement in the Statute that His Majesty is to be so bound" This argument was accepted by the Privy Council, which held, that although the Dominion Parliament was competent, under the powers granted to it by the British North America Act, 1867, under the heads, "Bankruptcy" or "Taxation," to enact the Special War Revenue Act so as to prejudice the right of the Crown in any Province, such express statement not having been made, Section 17 of the Special War Revenue Act had to be read, as though it provided that the priority enacted therein should not operate to diminish any right of the Crown in a Province; and in the result the two debts should rank pari passu.

Now, we may pass on to consider disputes to which a Federated State will be a party. Sub-section (1) of Section 204 read along with the proviso, prescribes, that the Federal Court in the exercise of its original jurisdiction will be competent to take cognisance of a dispute to which a Federated State is a party, only when that dispute not only involves a question as to the existence or extent of a legal right, but also arises in connection with one or other of the matters mentioned in the proviso. Clauses (*a*) (i) and (*a*) (ii) involve purely constitutional questions. That disputes coming under those clauses should be determined by the Federal Court is obvious. The acceptance of the Federal Scheme by a State necessarily involves the acceptance of the jurisdiction of the Federal Court to deal with constitutional questions arising under the Act, or an Order in Council, read no doubt in conjunction with the Instrument of Accession of that State. Clause (iii) (*a*) deals with disputes arising under any agreement which may have been made, after the establishment of the Federation, between a Federated State and the Federation, or a Federated State and a Province, in which there is an express provision that disputes arising thereunder should be decided by the Federal Court. This jurisdiction is a jurisdiction exercised with the consent of the parties to the agreement,

and may relate to any transaction which the governments may arrange in the ordinary course of their governmental activities. Clause (*b*) of the proviso has been put in to indicate that in a case of an agreement which expressly excludes the jurisdiction of the Federal Court, that court shall not have jurisdiction.

205. (1) An appeal shall lie to the Federal Court from any judgment, decree or final order of a High Court in British India, if the High Court certifies that the case involves a substantial question of law as to the interpretation of this Act or any Order in Council made thereunder, and it shall be the duty of every High Court in British India to consider in every case whether or not any such question is involved and of its own motion to give or to withhold a certificate accordingly.

(2) Where such a certificate is given, any party in the case may appeal to the Federal Court on the ground that any such question as aforesaid has been wrongly decided, and on any ground on which that party could have appealed without special leave to His Majesty in Council if no such certificate had been given, and, with the leave of the Federal Court, on any other ground, and no direct appeal shall lie to His Majesty in Council either with or without special leave.

This section deals with the appellate jurisdiction of the Federal Court. It provides, that, if in a case decided by a High Court in British India, it appears that a substantial question of law as to the interpretation of this Act, or any Order in Council passed thereunder, arises, then, there will be a right of appeal, if that High Court grants a certificate that such a question of law is involved. It might happen that a case in which a constitutional question arises, may also involve other fit grounds for appeal. Sub-section (2) makes provision for this also. It provides, that a party, in a case in which a certificate is granted, may not only appeal on the ground that any such question of law as aforesaid was wrongly decided, but also on any ground on which that party could have appealed without special leave to His Majesty in Council if no such certificate had been given, and, with the leave of the Federal Court, on any other ground also.

206. (1) The Federal Legislature may by Act provide that in such civil cases as may be specified in the Act an appeal shall lie to the Federal Court from a judgment decree or final order of a High Court in British India without any such certificate as aforesaid, but no appeal shall lie under any such Act unless—

(*a*) the amount or value of the subject matter of the dispute in the court of first instance and still in dispute on appeal was

and is not less than fifty thousand rupees or such other sum, not less than fifteen thousand rupees as may be specified by the Act, or the judgment decree or final order involves directly or indirectly some claim or question respecting property of the like amount or value , or

(*b*) the Federal Court gives special leave to appeal.

(2) If the Federal Legislature makes such provision as is mentioned in the last preceding sub-section, consequential provision may also be made by Act of the Federal Legislature for the abolition in whole or in part of direct appeals in civil cases from High Courts in British India to His Majesty in Council, either with or without special leave.

(3) A Bill or amendment for any of the purposes specified in this section shall not be introduced into, or moved in, either Chamber of the Federal Legislature without the previous sanction of the Governor-General in his discretion.

This section deals with the powers of the Federal Legislature to enlarge the appellate jurisdiction of the Federal Court, so as to make it function as a Court of civil appeals in British India to deal with ordinary civil cases decided by the British Indian High Courts. The powers of the Federal Legislature in this matter will have to be exercised in accordance with the provisions of this section

207. (1) An appeal shall lie to the Federal Court from a High Court in a Federated State on the ground that a question of law has been wrongly decided, being a question which concerns the interpretation of this Act or of an Order in Council made thereunder or the extent of the legislative or executive authority vested in the Federation by virtue of the Instrument of Accession of that State, or arises under an agreement made under Part VI of this Act in relation to the administration in that State of a law of the Federal Legislature

(2) An appeal under this section shall be by way of special case to be stated for the opinion of the Federal Court by the High Court, and the Federal Court may require a case to be so stated, and may return any case so stated in order that further facts may be stated therein.

208. An appeal may be brought to His Majesty in Council from a decision of the Federal Court—

(*a*) from any judgment of the Federal Court given in the exercise of its original jurisdiction in any dispute which concerns the interpretation of this Act or of an Order in Council made thereunder, or the extent of the legislative or executive authority vested in the Federation by virtue of the Instrument

of Accession of any State, or arises under an agreement made under Part VI of this Act in relation to the administration in any State of a law of the Federal Legislature, without leave ; and

(*b*) in any other case, by leave of the Federal Court or of His Majesty in Council.

209. (1) The Federal Court shall, where it allows an appeal, remit the case to the court from which the appeal was brought with a declaration as to the judgment, decree or order which is to be substituted for the judgment, decree or order appealed against, and the court from which the appeal was brought shall give effect to the decision of the Federal Court.

(2) Where the Federal Court upon any appeal makes any order as to the costs of the proceedings in the Federal Court, it shall, as soon as the amount of the costs to be paid is ascertained, transmit its order for the payment of that sum to the court from which the appeal was brought and that court shall give effect to the order

(3) The Federal Court may, subject to such terms or conditions as it may think fit to impose, order a stay of execution in any case under appeal to the Court, pending the hearing of the appeal, and execution shall be stayed accordingly

210. (1) All authorities, civil and judicial, throughout the Federation, shall act in aid of the Federal Court

(2) The Federal Court shall, as respects British India and the Federated States, have power to make any order for the purpose of securing the attendance of any person, the discovery or production of any documents, or the investigation or punishment of any contempt of court, which any High Court in British India has power to make as respects the territory within its jurisdiction, and any such orders, and any orders of the Federal Court as to the costs of and incidental to any proceedings therein, shall be enforceable by all courts and authorities in every part of British India or of any Federated State as if they were orders duly made by the highest court exercising civil or criminal jurisdiction, as the case may be, in that part.

(3) Nothing in this section—

(*a*) shall apply to any such order with respect to costs as is mentioned in Sub-section (2) of the last preceding section ; or

(*b*) shall, as regards a Federated State, apply in relation to any jurisdi

only of the making by the Federal Legislature of such provision as is mentioned in this chapter for enlarging the appellate jurisdiction of the Federal Court.

211. Where in any case the Federal Court require a special case to be stated or re-stated by, or remit a case to, or order a stay of execution in a case from, a High Court in a Federated State, or require the aid of the civil or judicial authorities in a Federated State, the Federal Court shall cause letters of request in that behalf to be sent to the Ruler of the State, and the Ruler shall cause such communication to be made to the High Court or to any judicial or civil authority as the circumstances may require.

212. The law declared by the Federal Court and by any judgment of the Privy Council shall, so far as applicable, be recognized as binding on, and shall be followed by, all courts in British India, and, so far as respects the application and interpretation of this Act or any Order in Council thereunder, or any matter with respect to which the Federal Legislature has power to make laws in relation to the State, in any Federated State

213. (1) If at any time it appears to the Governor-General that a question of law has arisen, or is likely to arise, which is of such a nature and of such public importance that it is expedient to obtain the opinion of the Federal Court upon it, he may in his discretion refer the question to that court for consideration, and the court may, after such hearing as they think fit, report to the Governor-General thereon.

(2) No report shall be made under this section save in accordance with an opinion delivered in open court with the concurrence of a majority of the judges present at the hearing of the case, but nothing in this sub-section shall be deemed to prevent a judge who does not concur from delivering a dissenting opinion.

This section deals with the advisory jurisdiction of the Federal Court. It makes provision for a reference being made to the Federal Court by the Governor-General, on any question of law which has already arisen, or is likely to arise, and which is of such public importance as to make it expedient to obtain the opinion of that Court thereon. The Federal Court, upon such reference, and after such hearing as it thinks fit, is to deliver its opinion. A similar provision which exists in Canada (Section 55 of the Supreme Court Act, R.S. Can., 1927, c. 35), empowers the Governor-General in Council to refer questions for the opinion of the Supreme Court. Though a provision of the character to be found in Section 213, whereby the opinion of the Federal Court could be ascertained on questions of law of great public importance may very often be found useful, it

cannot be gainsaid, that this procedure is attended with serious drawbacks. For one thing, it may be difficult to answer questions of law in the abstract, without reference to any actual controversy. And, for another, any answer which may be given on a hypothetical question without any reference to actual facts, may, to some extent, prejudice the rights of private litigants in a future litigation. In *Attorney-General for British Columbia* v. *Attorney-General for Canada*,[1] Viscount Haldane has pointed out the inconveniences which arise under the procedure sanctioned by the analogous Canadian provision. "It is clear that questions of this kind can be competently put to the Supreme Court where, as in this case, statutory authority to pronounce upon them has been given to that court by the Dominion Parliament. The practice is now well established and its validity was affirmed by this Board in the recent case of *Attorney-General for Ontario* v. *Attorney-General for the Dominion*.[2] It is at times attended with inconveniences, and it is not surprising that the Supreme Court of the United States should have steadily refused to adopt a similar procedure, and should have confined itself to adjudication on the legal rights of litigants in actual controversies. But this refusal is based on the position of that Court in the Constitution of the United States, a position which is different from that of any Canadian Court, or of the Judicial Committee under the Statute of William IV. The business of the Supreme Court of Canada is to do what is laid down as its duty by the Dominion Parliament, and the duty of the Judicial Committee, although not bound by any Canadian Statute, is to give to it as a Court of review such assistance as is within its power. Nevertheless under this procedure questions may be put of a kind which it is impossible to answer satisfactorily. Not only may the question of future litigants be prejudiced by the Court laying down principles in an abstract form without any reference or relation to actual facts, but it may turn out to be practically impossible to define a principle adequately and safely without previous ascertainment of the exact facts to which it is to be applied. It has therefore happened that in cases of the present class their Lordships have occasionally found themselves unable to answer all the questions put to them and have found it advisable to limit and guard their replies."

See also the observations of Lord Sankey, L.C., in *The Regulation and Control of Aeronautics in Canada in re*.[3]

[1] (1914) A.C. 153, p. 162. [2] (1912) A.C. 571.
[3] (1932) A.C. 54, p. 66.

There is also an analogous advisory jurisdiction vested in the Privy Council by Section 4 of the Judicial Committee Act, 1833, upon a reference made by His Majesty. A recent case decided by the Privy Council under this procedure was in *re Piracy Jure Gentium.*[1]

214. (1) The Federal Court may from time to time, with the approval of the Governor-General in his discretion, make rules of court for regulating generally the practice and procedure of the court, including rules as to the persons practising before the court, as to the time within which appeals to the court are to be entered, as to the costs of and incidental to any proceedings in the court, and as to the fees to be charged in respect of proceedings therein, and in particular may make rules providing for the summary determination of any appeal which appears to the court to be frivolous or vexatious or brought for the purpose of delay.

(2) Rules made under this section may fix the minimum number of judges who are to sit for any purpose, so however that no case shall be decided by less than three judges.

Provided that, if the Federal Legislature makes such provision as is mentioned in this chapter for enlarging the appellate jurisdiction of the court, the rules shall provide for the constitution of a special division of the court for the purpose of deciding all cases which would have been within the jurisdiction of the court even if its jurisdiction had not been so enlarged.

(3) Subject to the provisions of any rules of court, the Chief Justice of India shall determine what judges are to constitute any division of the court and what judges are to sit for any purpose.

(4) No judgment shall be delivered by the Federal Court save in open court and with the concurrence of a majority of the judges present at the hearing of the case, but nothing in this sub-section shall be deemed to prevent a judge who does not concur from delivering a dissenting judgment.

(5) All proceedings in the Federal Court shall be in the English language.

Section 206 of the Act empowers the Federal Legislature, to provide by its Act, that appeals in such civil cases decided by the High Courts in British India, as may be prescribed therein, shall lie to the Federal Court. This provision enables the Federal Court to exercise appellate jurisdiction in ordinary civil cases, that is to say, cases which may not involve any constitutional question. When the appellate jurisdiction of the

[1] (1934) A C. 586.

Federal Court is so enlarged, the proviso to sub-section (2) of Section 214 provides, that rules made by the Federal Court must provide for the constitution of a special division of the court to deal with cases which would have come within the jurisdiction of that court, before its appellate jurisdiction was so enlarged. The idea is to constitute two divisions of the court, one division dealing with constitutional cases, and the other with ordinary civil appeals. Subject to any rules that may be framed, the Chief Justice will have the power to decide what judges are to constitute any division of the court and what judges are to sit for any purpose.

215. The Federal Legislature may make provision by Act for conferring upon the Federal Court such supplemental powers not inconsistent with any of the provisions of this Act as may appear to be necessary or desirable for the purpose of enabling the court more effectively to exercise the jurisdiction conferred upon it by or under this Act.

216. (1) The administrative expenses of the Federal Court, including all salaries, allowances and pensions payable to or in respect of the officers and servants of the court, shall be charged upon the revenues of the Federation, and any fees or other moneys taken by the court shall form part of those revenues.

(2) The Governor-General shall exercise his individual judgment as to the amount to be included in respect of the administrative expenses of the Federal Court in any estimates of expenditure laid by him before the Chambers of the Federal Legislature.

217. References in any provision of this Part of this Act to a High Court in a Federated State shall be construed as references to any court which His Majesty may, after communication with the Ruler of the State, declare to be a High Court for the purposes of that provision.

218. Nothing in this chapter shall be construed as conferring, or empowering the Federal Legislature to confer, any right of appeal to the Federal Court in any case in which a High Court in British India is exercising jurisdiction on appeal from a court outside British India, or as affecting any right of appeal in any such case to His Majesty in Council with or without leave.

CHAPTER XIX

THE HIGH COURTS IN BRITISH INDIA

THE new Constitution Act introduces very important changes in the provisions which have hitherto governed the composition of the personnel of the High Courts in British India. There was a statutory requirement that not less than one-third of the judges of a High Court, including the Chief Justice, should belong to the English, Scottish or Irish bars, and that not less than another one-third of the judges should be members of the Indian Civil Service The new Act abolishes those provisions, whereby certain fixed percentages of the appointments to High Court Judgeships were reserved to barristers and members of the Indian Civil Service. The new Act also abrogates the rule which prescribed that a person appointed to hold the office of Chief Justice should be a barrister of England or Ireland or a member of the Faculty of Advocates in Scotland. An Indian civil servant, who has served as a Judge of a High Court for not less than three years, will be eligible to hold the office of Chief Justice of an Indian High Court under the new Act The ban on a member of the Indian Bar being appointed to the office of Chief Justice is also removed

219. (1) The following courts shall in relation to British India be deemed to be High Courts for the purposes of this Act, that is to say, the High Courts in Calcutta, Madras, Bombay, Allahabad, Lahore, and Patna, the Chief Court in Oudh, the Judicial Commissioner's Courts in the Central Provinces and Berar, in the North-West Frontier Province and in Sind, any other court in British India constituted or reconstituted under this chapter as a High Court, and any other comparable court in British India which His Majesty in Council may declare to be a High Court for the purposes of this Act :

Provided that, if provision has been made before the commencement of Part III of this Act for the establishment of a High Court to replace any court or courts mentioned in this sub-section, then as from the establishment of the new court this section shall have effect as if the new court were mentioned therein in lieu of the court or courts so replaced.

(2) The provisions of this chapter shall apply to every High Court in British India.

The Judicial Commissioner's Court in the Central Provinces

and Berar has been replaced by a High Court since January 1936.

220. (1) Every High Court shall be a court of record and shall consist of a chief justice and such other judges as His Majesty may from time to time deem it necessary to appoint :

Provided that the judges so appointed together with any additional judges appointed by the Governor-General in accordance with the following provisions of this chapter shall at no time exceed in number such maximum number as His Majesty in Council may fix in relation to that court

(2) Every judge of a High Court shall be appointed by His Majesty by warrant under the Royal Sign Manual and shall hold office until he attains the age of sixty years

Provided that—

(*a*) a judge may by resignation under his hand addressed to the Governor resign his office ;

(*b*) a judge may be removed from his office by His Majesty by warrant under the Royal Sign Manual on the ground of misbehaviour or of infirmity of mind or body, if the Judicial Committee of the Privy Council, on reference being made to them by His Majesty, report that the judge ought on any such ground to be removed.

(3) A person shall not be qualified for appointment as a judge of a High Court unless he—

(*a*) is a barrister of England or Northern Ireland, of at least ten years standing, or a member of the Faculty of Advocates in Scotland of at least ten years standing , or

(*b*) is a member of the Indian Civil Service of at least ten years standing, who has for at least three years served as, or exercised the powers of, a district judge , or

(*c*) has for at least five years held a judicial office in British India not inferior to that of a subordinate judge, or judge of a small cause court ; or

(*d*) has for at least ten years been a pleader of any High Court, or of two or more such Courts in succession :

Provided that a person shall not, unless he is, or when first appointed to judicial office was, a barrister, a member of the Faculty of Advocates or a pleader, be qualified for appointment as Chief Justice of any High Court constituted by letters patent until he has served for not less than three years as a judge of a High Court.

In computing for the purposes of this sub-section the standing of a barrister or a member of the Faculty of Advocates, or the period during which a person has been a pleader, any period during which the person has held judicial office after he became

a barrister, a member of the Faculty of Advocates, or a pleader, as the case may be, shall be included.

(4) Every person appointed to be a judge of a High Court shall, before he enters upon his office, make and subscribe before the Governor or some person appointed by him an oath according to the form set out in that behalf in the Fourth Schedule to this Act.

221. The judges of the several High Courts shall be entitled to such salaries and allowances, including allowances for expenses in respect of equipment and travelling upon appointment, and to such rights in respect of leave and pensions, as may from time to time be fixed by His Majesty in Council :

Provided that neither the salary of a judge, nor his rights in respect of leave of absence or pension, shall be varied to his disadvantage after his appointment.

222. (1) If the office of chief justice of a High Court becomes vacant, or if any such chief justice is by reason of absence, or for any other reason, unable to perform the duties of his office, those duties shall, until some person appointed by His Majesty to the vacant office has entered on the duties thereof, or until the chief justice has resumed his duties, as the case may be, be performed by such one of the other judges of the court as the Governor-General may in his discretion think fit to appoint for the purpose.

(2) If the office of any other judge of a High Court becomes vacant, or if any such judge is appointed to act temporarily as a chief justice, or is by reason of absence, or for any other reason, unable to perform the duties of his office, the Governor-General may in his discretion appoint a person duly qualified for appointment as a judge to act as a judge of that court, and the person so appointed shall, unless the Governor-General in his discretion thinks fit to revoke his appointment, be deemed to be a judge of that court until some person appointed by His Majesty to the vacant office has entered on the duties thereof, or until the permanent judge has resumed his duties.

(3) If by reason of any temporary increase in the business of any High Court or by reason of arrears of work in any such court it appears to the Governor-General that the number of the judges of the court should be for the time being increased, the Governor-General in his discretion may, subject to the foregoing provisions of this chapter with respect to the maximum number of judges, appoint persons duly qualified for appointment as judges to be additional judges of the court for such period not exceeding two years as he may specify.

223. Subject to the provisions of this Part of this Act, to the provisions of any Order in Council made under this or any other Act and to the provisions of any Act of the appropriate Legislature enacted by virtue of powers conferred on that Legislature by this Act, the jurisdiction of, and the law administered in, any existing High Court, and the respective powers of the judges thereof in relation to the administration of justice in the court, including any power to make rules of court and to regulate the sittings of the court and of members thereof sitting alone or in division courts, shall be the same as immediately before the commencement of Part III of this Act.

224. (1) Every High Court shall have superintendence over all courts in India for the time being subject to its appellate jurisdiction, and may do any of the following things, that is to say—

(*a*) call for returns ;

(*b*) make and issue general rules and prescribe forms for regulating the practice and proceedings of such courts ;

(*c*) prescribe forms in which books, entries and accounts shall be kept by the officers of any such courts ; and

(*d*) settle tables of fees to be allowed to the sheriff, attorneys, and all clerks and officers of courts :

Provided that such rules, forms and tables shall not be inconsistent with the provision of any law for the time being in force, and shall require the previous approval of the Governor.

(2) Nothing in this section shall be construed as giving to a High Court any jurisdiction to question any judgment of any inferior court which is not otherwise subject to appeal or revision.

Sub-section (2) of this section effects a serious change in the powers of superintendence possessed by the Indian High Courts under Section 107 of the Consolidated Government of India Act. That section, which prescribed, that each of the High Courts had superintendence over all courts for the time being subject to its appellate jurisdiction, was interpreted as conferring not only powers of administrative superintendence but also judicial superintendence over the courts subject to its appellate jurisdiction. The power of judicial superintendence, though rarely invoked, was in the nature of a reserve power in the hands of a High Court to be used when specific statutory powers did not apply to any case which, nevertheless, called for interference in the interests of justice. In view of the amendment effected in the section by Sub-section (2) newly added, it would no longer be possible to invoke any such reserve or

residuary power, beyond what a High Court can exercise under the appellate or revisional powers conferred upon it by specific statutes.

225. (1) If on an application made in accordance with the provisions of this section a High Court is satisfied that a case pending in an inferior court, being a case which the High Court has power to transfer to itself for trial, involves or is likely to involve the question of the validity of any Federal or Provincial Act, it shall exercise that power

(2) An application for the purposes of this section shall not be made except, in relation to a Federal Act, by the Advocate-General for the Federation and, in relation to a Provincial Act, by the Advocate-General for the Federation or the Advocate-General for the Province

226. (1) Until otherwise provided by Act of the appropriate Legislature, no High Court shall have any original jurisdiction in any matter concerning the revenue, or concerning any act ordered or done in the collection thereof according to the usage and practice of the country or the law for the time being in force

(2) A Bill or amendment for making such provision as aforesaid shall not be introduced into or moved in a Chamber of the Federal or a Provincial Legislature without the previous sanction of the Governor-General in his discretion or, as the case may be, of the Governor in his discretion

227. All proceedings in every High Court shall be in the English language.

228. (1) The administrative expenses of a High Court, including all salaries, allowances and pensions payable to or in respect of the officers and servants of the court and the salaries and allowances of the judges of the court shall be charged upon the revenues of the Province, and any fees or other moneys taken by the court shall form part of those revenues.

(2) The Governor shall exercise his individual judgment as to the amount to be included in respect of such expenses as aforesaid in any estimates of expenditure laid by him before the Legislature.

229. (1) His Majesty, if the Chamber or Chambers of the Legislature of any Province present an address in that behalf to the Governor of the Province for submission to His Majesty, may by letters patent constitute a High Court for that Province or any part thereof or reconstitute in like manner any existing High Court for that Province or for any part thereof, or, where there are two High Courts in that Province, amalgamate those courts.

(2) Where any Court is reconstituted, or two Courts are amalgamated, as aforesaid, the letters patent shall provide for the continuance in their respective offices of the existing judges, officers and servants of the Court or Courts, and for the carrying on before the reconstituted Court or the new Court of all pending matters, and may contain such other provisions as may appear to His Majesty to be necessary by reason of the reconstitution or amalgamation.

230. (1) His Majesty in Council may, if satisfied that an agreement in that behalf has been made between the Governments concerned, extend the jurisdiction of a High Court in any Province to any area in British India not forming part of that Province, and the High Court shall thereupon have the same jurisdiction in relation to that area as it has in relation to any other area in relation to which it exercises jurisdiction.

(2) Nothing in this section affects the provisions of any law or letters patent in force immediately before the commencement of Part III of this Act empowering any High Court to exercise jurisdiction in relation to more than one Province or in relation to a Province and an area not forming part of any Province

(3) Where a High Court exercises jurisdiction in relation to any area or areas outside the Province in which it has its principal seat, nothing in this Act shall be construed—

(*a*) as empowering the Legislature of the Province in which the Court has its principal seat to increase, restrict or abolish that jurisdiction, or

(*b*) as preventing the Legislature having power to make laws in that behalf for any such area from passing such laws with respect to the jurisdiction of the court in relation to that area as it would be competent to pass if the principal seat of the court were in that area

231. (1) Any judge appointed before the commencement of Part III of this Act to any High Court shall continue in office and shall be deemed to have been appointed under this Part of this Act, but shall not by virtue of this Act be required to relinquish his office at any earlier age than he would have been required so to do, if this Act had not been passed.

(2) Where a High Court exercises jurisdiction in relation to more than one Province or in relation to a Province and an area not forming part of a Province, references in this chapter to the Governor in relation to the judges and expenses of a High Court and references to the revenues of the Province shall be construed as references to the Governor and the revenues of the Province in which the Court has its principal seat, and the

reference to the approval by the Governor of rules, forms and tables for subordinate courts shall be construed as a reference to the approval thereof by the Governor of the Province in which the subordinate court is situate, or, if it is situate in an area not forming part of a Province, by the Governor-General.

CHAPTER XX

THE SERVICES OF THE CROWN IN INDIA

I. *The Defence Services*

THE Act makes provision for the appointment of a Commander-in-Chief for His Majesty's Forces in India by a warrant issued under the Royal Sign Manual. His pay and allowances and the conditions of his service will be such as may be prescribed by His Majesty in Council With regard to appointments connected with defence, His Majesty in Council may require that such appointments as he may specify shall be made by him or in such manner as he may direct ; but this will not in any way derogate from any power vested in His Majesty by virtue of any Act or by virtue of His Royal prerogative Commissions in His Majesty's naval, military and air forces raised in India are to be granted by His Majesty or a person duly empowered in that behalf. Such commissions can be granted to any person who might be, or has been, lawfully enlisted or enrolled in that force. The Secretary of State, acting in concurrence with his advisers, is empowered to specify from time to time what rules, regulations and orders affecting the conditions of service of all or any of His Majesty's Forces in India shall be made only with his previous approval. Any right of appeal which members of His Majesty's Forces enjoyed before the passing of the Act will continue as before.

II. *The Civil Services*

Under Section 240, Sub-section (1) it is provided that, except as expressly provided under the Act, every person who is a member of a Civil Service in India or holds any civil post under the Crown in India holds office during His Majesty's pleasure. In view of this provision, a servant of the Crown, unless his case comes within an exception, has no right of action against the Crown for improper dismissal. *Dunn* v. *The Queen* ;[1] *Shenton* v. *Smith* ;[2] *Venkata Rao* v. *Secretary of State.*[3]

Lord Hobhouse, in delivering the judgment of the Privy Council in *Shenton* v. *Smith,*[4] stated as follows : " It appears to

[1] (1896) 1 Q B. 116. [2] (1895) A.C. 229.
[3] A.I.R. 1937 P.C. 31. [4] (1895) A.C. 229, pp. 234–235.

their Lordships that the proper grounds of decision in this case have been expressed by Stone, J. in the Full Court. They consider that, unless in special cases where it is otherwise provided, servants of the Crown hold their offices during the pleasure of the Crown, not by virtue of any special prerogative of the Crown, but because such are the terms of their engagement, as is well understood throughout the public service. If any public servant considers that he has been dismissed unjustly, his remedy is not by a law suit, but by an appeal of an official or political kind. . . "

Though a person holding a civil post under the Crown holds office during His Majesty's pleasure, Sub-section (4) of Section 240 provides, that any contract under which a person, not being a member of a civil service of the Crown in India, is appointed under this Act to hold a civil post may, if the Governor-General, or, as the case may be, the Governor deems it necessary to secure the services of a person having special qualifications, provide for the payment to him of compensation if before the expiration of an agreed period that post is abolished or he is, for reasons not connected with any misconduct on his part, required to vacate the post. Provision has been made by Sub-sections (2) and (3) of Section 240 of the Act to prevent improper dismissal of persons in the civil services. Those sub-sections provide as follows: (1) No such person shall be dismissed from the service of His Majesty by any authority subordinate to that by which he was appointed, (2) No such person as aforesaid shall be dismissed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him: Provided, however, that no such opportunity need be given where a person is dismissed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge, or where an authority empowered to dismiss a person or reduce him in rank is satisfied that for some reason, to be recorded in writing, it is not reasonably practicable to give to that person an opportunity of showing cause

Subject to certain important reservations to be mentioned presently, it is provided that appointments to the civil services of, and civil posts under the Crown shall, after the commencement of Part III of the Act, be made (*a*) in the case of services of the Federation, and posts in connection with the affairs of the Federation, by the Governor-General or such person as he may direct, (*b*) in the case of services of a Province, and posts in connection with the affairs of a Province, by the Governor or

such person as he may direct. Even after the commencement of Part III of the Act, the Secretary of State, until Parliament otherwise directs, will continue to make appointments to the Indian Civil Service, the Indian Medical Service (Civil) and the Indian Police Service (which will hereafter be known as the Indian Police). Apart from the appointments which he will make for these three important services, the Secretary of State will be empowered, until Parliament otherwise determines, to make certain other appointments also. He will make appointments to any service or services which at any time after the commencement of Part III of the Act, he may deem it necessary to establish for the purpose of securing the recruitment of suitable persons to fill civil posts in connection with the discharge of any functions of the Governor-General which that authority is, by or under the Act, required to exercise in his discretion Until Parliament otherwise directs, he will also make appointments to any civil service of, or civil post under the Crown in India, concerned with irrigation which he may consider necessary for securing efficiency in irrigation in any Province

The Act also makes elaborate provisions regarding the conditions of service of the members of the various civil services, and the various authorities who are to make rules governing the conditions of service in the different branches Special provisions are also made regarding the appointment of Judicial officers like District Judges and subordinate civil judicial officers.

The following important provision regarding the eligibility of persons who are not British subjects to hold civil appointments under the Crown may be mentioned.

262. (1) The Ruler or a subject of a Federated State shall be eligible to hold any civil office under the Crown in India in connection with the affairs of the Federation, and the Governor-General may declare that the Ruler or any subject of a specified Indian State which is not a Federated State, or any native of a specified tribal area or territory adjacent to India, shall be eligible to hold any such office, being an office specified in the declaration.

(2) The Governor of a Province may declare that the Ruler or any subject of a specified Indian State, or any native of a specified tribal area or territory adjacent to India, shall be eligible to hold any civil office in connection with the affairs of the Province, being an office specified in the declaration.

(3) The Secretary of State may declare that any named

subject of an Indian State, or any named native of a tribal area or territory adjacent to India, shall be eligible for appointment by him to any civil service under the Crown in India to which he makes appointments, and any person who, having been so declared eligible, is appointed to such a service, shall be eligible to hold any civil office under the Crown in India.

(4) Subject as aforesaid and to any other express provisions of this Act, no person who is not a British subject shall be eligible to hold any office under the Crown in India :

Provided that the Governor-General or, in relation to a Province, the Governor may authorize the temporary employment for any purpose of a person who is not a British subject.

(5) In the discharge of his functions under this section the Governor-General or the Governor of a Province shall exercise his individual judgment.

III. *Public Service Commissions*

The Act makes provision, by Section 264, for the establishment of a Public Service Commission for the Federation and a Public Service Commission for each of the Provinces But, it is open to two or more Provinces to agree that there shall be one Public Service Commission for that group of Provinces ; or that the Public Service Commission for one of the Provinces shall serve the needs of all the Provinces

It will be the duty of the Federal and Provincial Public Service Commissions to conduct examinations for appointments to the services of the Federation and the services of the Provinces respectively. It will also be the duty of the Federal Public Service Commission, if requested by any two or more Provinces so to do, to assist those Provinces in framing and operating schemes of joint recruitment for their forest services, and any other services for which candidates possessing special qualifications are required. The Secretary of State as respects services and posts to which appointments are made by him, the Governor-General in his discretion as respects other services and posts in connection with the affairs of the Federation, and the Governor in his discretion as respects other services and posts in connection with the affairs of a Province, may make regulations specifying the matters on which either generally, or in any particular class of case or in any particular circumstances, it shall not be necessary for a Public Service Commission to be consulted but, subject to regulations so made, the Federal Commission, or, as the case may be, the Provincial Commission shall be consulted—

(*a*) on all matters relating to methods of recruitment to civil services and for civil posts ;

(*b*) on the principles to be followed in making appointments to civil services and posts and in making promotions and transfers from one service to another and on the suitability of candidates for such appointments, promotions or transfers ;

(*c*) on all disciplinary matters affecting a person serving His Majesty in a civil capacity in India, including memorials or petitions relating to such matters ;

(*d*) on any claim by or in respect of a person who is serving or has served His Majesty in a civil capacity in India that any costs incurred by him in defending legal proceedings instituted against him in respect of acts done or purporting to be done in the execution of his duty should be paid out of the revenues of the Federation or, as the case may be, the Province ,

(*e*) on any claim for the award of a pension in respect of injuries sustained by a person while serving His Majesty in a civil capacity in India, and any question as to the amount of any such award ;

and it shall be the duty of a Public Service Commission to advise on any matter so referred to them and on any other matter which the Governor-General in his discretion or, as the case may be, the Governor in his discretion, may refer to them.

A Public Service Commission need not, however, be consulted with respect to the manner in which appointments and posts are to be allocated as between the various communities in the Federation or a Province or, in the case of the subordinate ranks of the various police forces in India, as respects any of the matters mentioned in paragraphs (*a*), (*b*) and (*c*) above.

267. Subject to the provisions of this section, an Act of the Federal Legislature or the Provincial Legislature may provide for the exercise of additional functions by the Federal Public Service Commission or, as the case may be, by the Provincial Public Service Commission :

Provided that—

(*a*) no Bill or amendment for the purposes aforesaid shall be introduced or moved without the previous sanction of the Governor-General in his discretion, or, as the case may be, of the Governor in his discretion ; and

(*b*) it shall be a term of every such Act that the functions conferred by it shall not be exercisable—

(i) in relation to any person appointed to a service or a post by the Secretary of State or the Secretary of State in Council, any officer in His Majesty's Forces, or any holder

of a reserved post, except with the consent of the Secretary of State ; or

(ii) where the Act is a provincial Act, in relation to any person who is not a member of one of the services of the Province, except with the consent of the Governor-General.

CHAPTER XXI

THE SECRETARY OF STATE, HIS ADVISERS AND HIS DEPARTMENT

THOUGH the Statutory Corporation of "the Secretary of State in Council" will disappear and the functions exercised by that body will be largely taken over by the Federation and the autonomous Provinces under the new Constitutional arrangements, it was considered desirable to provide the Secretary of State with a small body of advisers to whom he may turn for advice with regard to any matter relating to India on which he may desire to consult them. The Act makes provision for the appointment of such advisers.

278. (1) There shall be a body of persons appointed by the Secretary of State, not being less than three nor more than six in number, as the Secretary of State may from time to time determine, whose duty it shall be to advise the Secretary of State on any matter relating to India on which he may desire their advice.

(2) One-half at least of the persons for the time being holding office under this section as advisers of the Secretary of State shall be persons who have held office for at least ten years under the Crown in India and have not last ceased to perform in India official duties under the Crown more than two years before the date of their respective appointments as advisers under this section.

(3) Any person appointed as an adviser to the Secretary of State shall hold office for a term of five years and shall not be eligible for reappointment:

Provided that—

(*a*) any person so appointed may by writing under his hand resign his office to the Secretary of State;

(*b*) the Secretary of State may, if he is satisfied that any person so appointed has by reason of infirmity of mind or body become unfit to continue to hold his office, by order remove him from his office.

(4) A person for the time being holding office as adviser to the Secretary of State shall not be capable of sitting or voting in either House of Parliament.

(5) There shall be paid out of moneys provided by Parliament to each of the advisers of the Secretary of State a salary of

thirteen hundred and fifty pounds a year, and also to any of them who at the date of his appointment was domiciled in India a subsistence allowance of six hundred pounds a year.

(6) Except as otherwise expressly provided in this Act, it shall be in the discretion of the Secretary of State whether or not he consults with his advisers on any matter, and, if so, whether he consults with them collectively or with one or more of them individually, and whether or not he acts in accordance with any advice given to him by them.

(7) Any provision of this Act which requires that the Secretary of State shall obtain the concurrence of his advisers shall be deemed to be satisfied if at a meeting of his advisers he obtains the concurrence of at least one-half of those present at the meeting, or if such notice and opportunity for objection as may be prescribed has been given to those advisers and none of them has required that a meeting shall be held for discussion of the matter.

In this sub-section " prescribed " means prescribed by rules of business made by the Secretary of State after obtaining at a meeting of his advisers the concurrence of at least one-half of those present at the meeting.

(8) The Council of India as existing immediately before the commencement of Part III of this Act shall be dissolved.

(9) Notwithstanding anything in the foregoing provisions of this section, a person who immediately before the commencement of Part III of this Act was a member of the Council of India may be appointed under this section as an adviser to the Secretary of State to hold office as such for such period less than five years as the Secretary of State may think fit.

279. (1) All stock or money standing to the credit of the Secretary of State in Council in the books of the Bank of England at the commencement of Part III of this Act shall, as from that date, be transferred to the credit of the Secretary of State, and any order or instrument with respect to that stock or money executed by the Secretary of State or by such person as may be authorized in writing by the Secretary of State for the purpose, either generally or specially, shall be a sufficient authority and discharge to the Bank in respect of anything done by the Bank in accordance therewith.

(2) Any directions, authority or power of attorney given or executed by or on behalf of the Secretary of State in Council and in force at the commencement of Part III of this Act shall continue in force until countermanded or revoked by the Secretary of State.

280. (1) As from the commencement of Part III of this Act the salary of the Secretary of State and the expenses of his department, including the salaries and remuneration of the Staff thereof, shall be paid out of moneys provided by Parliament.

(2) Subject to the provisions of the next succeeding section with respect to the transfer of certain existing officers and servants, the Secretary of State may appoint such officers and servants as he, subject to the consent of the Treasury as to numbers, may think fit and there shall be paid to persons so appointed such salaries or remuneration as the Treasury may from time to time determine.

(3) There shall be charged on and paid out of the revenues of the Federation into the Exchequer such periodical or other sums as may from time to time be agreed between the Governor-General and the Treasury in respect of so much of the expenses of the department of the Secretary of State as is attributable to the performance on behalf of the Federation of such functions as it may be agreed between the Secretary of State and the Governor-General that that department should so perform.

CHAPTER XXII

MISCELLANEOUS AND GENERAL

I. *The Crown and the Indian States*

285. Subject in the case of a Federated State to the provisions of an Instrument of Accession of that State, nothing in this Act affects the rights and obligations of the Crown in relation to any Indian State.

286. (1) If His Majesty's Representative for the exercise of the functions of the Crown in its relations with Indian States requests the assistance of armed forces for the due discharge of those functions, it shall be the duty of the Governor-General in the exercise of the executive authority of the Federation to cause the necessary forces to be employed accordingly, but the net additional expense, if any, incurred in connection with those forces by reason of that employment shall be deemed to be expenses of His Majesty incurred in discharging the said functions of the Crown

(2) In discharging his functions under this section the Governor-General shall act in his discretion.

287. Arrangements may be made between His Majesty's Representative for the exercise of the functions of the Crown in its relations with Indian States and the Governor of any Province for the discharge by the Governor and officers serving in connection with the affairs of the Province of powers and duties in connection with the exercise of the said functions of the Crown

II. *New Provinces and alterations of Boundaries of Provinces*

Under Section 289, provision has been made for the constitution of two new Governors' Provinces, Sind and Orissa Acting under this power, the territory known as the Division of Sind was separated from the rest of the Bombay Presidency and constituted into a Governor's Province by His Majesty in Council with effect from April 1, 1936 The new Province of Orissa was also established on April 1, 1936. The Orissa Division of the Province of Bihar and Orissa and certain Oriya-speaking tracts detached from the Presidency of Madras and the Central Provinces are now included within the boundaries of the new Province of Orissa.

290. (1) Subject to the provisions of this section, His Majesty may by Order in Council—

(*a*) create a new Province ;

(*b*) increase the area of any Province ;

(*c*) diminish the area of any Province ,

(*d*) alter the boundaries of any Province ·

Provided that, before the draft of any such Order is laid before Parliament, the Secretary of State shall take such steps as His Majesty may direct for ascertaining the views of the Federal Government and the Chambers of the Federal Legislature and the views of the Government and the Chamber or Chambers of the Legislature of any Province which will be affected by the Order, both with respect to the proposal to make the Order and with respect to the provisions to be inserted therein

(2) An Order made under this section may contain such provisions for varying the representation in the Federal Legislature of any Governor's Province the boundaries of which are altered by the Order and for varying the composition of the Legislature of any such Province, such provisions with respect to apportionments and adjustments of and in respect of assets and liabilities, and such other supplemental, incidental and consequential provisions as His Majesty may deem necessary or proper .

Provided that no such Order shall vary the total membership of either Chamber of the Federal Legislature

(3) In this section the expression, " Province " means either a Governor's Province or a Chief Commissioner's Province.

III. *Franchise*

291. In so far as provision with respect to the matters hereinafter mentioned is not made by this Act, His Majesty in Council may from time to time make provision with respect to those matters or any of them, that is to say—

(*a*) the delimitation of territorial constituencies for the purpose of elections under this Act ;

(*b*) the qualifications entitling persons to vote in territorial or other constituencies at such elections, and the preparation of electoral rolls ;

(*c*) the qualifications for being elected at such elections as a member of a legislative body ;

(*d*) the filling of casual vacancies in any such body ,

(*e*) the conduct of elections under this Act and the methods of voting thereat ;

(*f*) the expenses of candidates at such elections ;

(*g*) corrupt practices and other offences at or in connection with such elections ;

(*h*) the decision of doubts and disputes arising out of, or in connection with, such elections ;

(*i*) matters ancillary to any such matter as aforesaid.

IV. *Provisions as to certain legal matters*

292. Notwithstanding the repeal by this Act of the Government of India Act, but subject to the other provisions of this Act, all the law in force in British India immediately before the commencement of Part III of this Act shall continue in force in British India until altered or repealed or amended by a competent Legislature or other competent authority.

The India and Burma (Existing Laws) Act, 1937, 1 Edward VIII and 1 George VI, c 9 which, as its preamble mentions, is " an Act to explain and amend sections two hundred and ninety-two and two hundred and ninety-three of the Government of India Act, 1935 . . ." may be read along with Sections 292 and 293 of the Act. This amending Act has been passed primarily with the intention of making the scope of the two sections hereinbefore mentioned clear.

293. His Majesty may by Order in Council to be made at any time after the passing of this Act provide that, as from such date as may be specified in the Order, any law in force in British India or in any part of British India shall, until repealed or amended by a competent Legislature or other competent authority, have effect subject to such adaptations and modifications as appear to His Majesty to be necessary or expedient for bringing the provisions of that law into accord with the provisions of this Act and, in particular, into accord with the provisions thereof which reconstitute under different names governments and authorities in India and prescribe the distribution of legislative and executive powers between the Federation and the Provinces :

Provided that no such law as aforesaid shall be made applicable to any Federated State by an Order in Council made under this section.

In this section the expression " law " does not include an Act of Parliament, but includes any ordinance, order, bye-law, rule or regulation having in British India the force of law.

The Government of India (Adaptation of Indian Laws) Order, 1937, published in the *Gazette of India Extraordinary* of

April 1, 1937, makes suitable adaptations and modifications in the existing laws.

294. (1) Neither the executive authority of the Federation nor the legislative power of the Federal Legislature shall extend to any area in a Federated State which His Majesty in signifying his acceptance of the Instrument of Accession of that State may declare to be an area theretofore administered by or on behalf of His Majesty to which it is expedient that the provisions of this sub-section should apply, and references in this Act to a Federated State shall not be construed as including reference to any such area :

Provided that—

(*a*) a declaration shall not be made under this sub-section with respect to any area unless, before the execution by the Ruler of the Instrument of Accession, notice has been given to him of His Majesty's intention to make that declaration ;

(*b*) if His Majesty with the assent of the Ruler of the State relinquishes his powers and jurisdiction in relation to any such area or any part of any such area, the foregoing provisions of this sub-section shall cease to apply to that area or part, and the executive authority of the Federation and the legislative power of the Federal Legislature shall extend thereto in respect of such matters and subject to such limitations as may be specified in a supplementary Instrument of Accession for the State.

Nothing in this sub-section applies to any area if it appears to His Majesty that jurisidiction to administer the area was granted to him solely in connection with a railway.

(2) Subject as aforesaid and to the following provisions of this section, if, after the accession of a State becomes effective, power or jurisdiction therein with respect to any matter is, by virtue of the Instrument of Accession of the State, exercisable, either generally or subject to limits, by the Federation, the Federal Legislature, the Federal Court, the Federal Railway Authority, or a Court or an authority exercising the power or jurisdiction by virtue of an Act of the Federal Legislature, or is, by virtue of an agreement made under Part VI of this Act in relation to the administration of a law of the Federal Legislature, exercisable, either generally or subject to limits, by the Ruler or his officers, then any power or jurisdiction formerly exercisable on His Majesty's behalf in that State, whether by virtue of the Foreign Jurisdiction Act, 1890, or otherwise, shall not be exercisable in that State with respect to that matter or, as the case may be, with respect to that matter within those limits.

(3) So much of any law as by virtue of any power exercised by

or on behalf of His Majesty to make laws in a State is in force in a Federated State immediately before the accession of the State becomes effective and might by virtue of the Instrument of Accession of the State be re-enacted for that State by the Federal Legislature, shall continue in force and be deemed for the purposes of this Act to be a Federal law so re-enacted :

Provided that any such law may be repealed or amended by Act of the Federal Legislature and unless continued in force by such an Act shall cease to have effect on the expiration of five years from the date when the accession of the State becomes effective

(4) Subject as aforesaid, the powers and jurisdiction exercisable by or on behalf of His Majesty before the commencement of Part III of this Act in Indian States shall continue to be exercisable, and any Order in Council with respect to the said powers or jurisdiction made under the Foreign Jurisdiction Act, 1890, or otherwise, and all delegations, rules and orders made under any such Order, shall continue to be of full force and effect until the Order is amended or revoked by a subsequent Order

Provided that nothing in this sub-section shall be construed as prohibiting His Majesty from relinquishing any power or jurisdiction in any Indian State.

(5) An Order in Council made by virtue and in exercise of the powers by the Foreign Jurisdiction Act, 1890, or otherwise in His Majesty vested, empowering any person to make rules and orders in respect of courts or administrative authorities acting for any territory shall not be invalid by reason only that it confers, or delegates powers to confer, on courts or administrative authorities power to sit or act outside the territory in respect of which they have jurisdiction or functions, or that it confers, or delegates power to confer, appellate jurisdiction or functions on courts or administrative authorities sitting or acting outside the territory.

(6) In the Foreign Jurisdiction Act, 1890, the expression, " a British court in a foreign country," shall, in relation to any part of India outside British India, include any person duly exercising on behalf of His Majesty any jurisdiction, civil or criminal, original or appellate, whether by virtue of an Order in Council or not, and for the purposes of Section 9 of that Act the Federal Court shall, as respects appellate jurisdiction in cases tried by a British Court in a Federated State, be deemed to be a Court held in a British Possession or under the authority of His Majesty.

(7) Nothing in this Act shall be construed as limiting any right of His Majesty to determine by what courts British subjects and subjects of foreign countries shall be tried in respect of offences committed in Indian States.

(8) Nothing in this section affects the provisions of this Act with respect to Berar.

This section deals with the exercise by the Crown of its powers under the Foreign Jurisdiction Act, 1890, in the territories of Indian States Sub-section (1) of this section contemplates a case in which any parcel of Indian State territory hitherto ceded to the British Government for certain purposes, and administered under the provisions of the Foreign Jurisdiction Act, 1890, will continue to be so administered, as a separate area, not amenable to the control of the Federal Legislature or the Federal Executive, although the Indian State of which that territory happens to be a part, may become a Federated State, and thereby become subject to the operation of the Federal laws and to the control of the Federal Executive in respect of those Federal matters which are specifically mentioned in the Instrument of Accession of that State. His Majesty in signifying his acceptance of the Instrument of Accession of a State, may declare what area of that State will come under Sub-section (1) of this section If His Majesty, with the consent of the Ruler of the State, relinquishes his powers and jurisdiction over any such parcel of territory heretofore administered by His Majesty under the Foreign Jurisdiction Act, 1890, Sub-section (1) (*b*) states that that territory will become amenable to the operation of the Federal laws and the control of the Federal Executive in accordance with the terms specified in a supplementary Instrument of Accession for the State.

Sub-section (7) is a declaratory provision stating that nothing in this Act shall be construed as limiting any right of His Majesty to determine by what courts British subjects and subjects of foreign countries shall be tried in respect of offences committed in Indian States The extra-territorial jurisdiction exercised by the British Government in regard to offences committed by European British Subjects in Indian State territories is of an extremely anomalous character. As this subject has already been considered by me, at some length, in the chapter on the Indian States, I do not propose to refer to this again in this context.

295. (1) Where any person has been sentenced to death in a Province, the Governor-General in his discretion shall have all

such powers of suspension, remission or commutation of sentence as were vested in the Governor-General in Council immediately before the commencement of Part III of this Act, but save as aforesaid no authority in India outside a Province shall have any power to suspend, remit or commute the sentence of any person convicted in the Province :

Provided that nothing in this sub-section affects any power of any officer of His Majesty's forces to suspend, remit or commute a sentence passed by a court martial.

(2) Nothing in this Act shall derogate from the right of His Majesty, or of the Governor-General, if any such right is delegated to him by His Majesty, to grant pardons, reprieves, respites or remissions of punishment.

296. (1) No member of the Federal or a Provincial Legislature shall be a member of any tribunal in British India having jurisdiction to entertain appeals or revise decisions in revenue cases

(2) If in any Province any such jurisdiction as aforesaid was, immediately before the commencement of Part III of this Act, vested in the Local Government, the Governor shall constitute a tribunal, consisting of such person or persons as he, exercising his individual judgment, may think fit, to exercise the same jurisdiction until other provision in that behalf is made by Act of the Provincial Legislature.

(3) There shall be paid to the members of any tribunal constituted under the last preceding sub-section, such salaries and allowances as the Governor exercising his individual judgment may determine, and those salaries and allowances shall be charged on the revenues of the Province

In explaining the object of Sub-section (2), the Solicitor-General stated as follows in the House of Commons, when the Government of India Bill was passing through the Committee stage : " The clause contemplates that the legislature ought to set up, and must set up, tribunals to deal with revenue matters. At present such matters are in effect dealt with by the Executive, but that, as I said just now, is not a proper permanent procedure, especially when the Executive in future, instead of being, as it is at present, partly an official body, will be wholly dependent on the legislature. I think my hon. Friend will agree that it is desirable that a tribunal should be set up to deal with these matters. The exact nature of the tribunal and its appointment are proper matters for the Provincial Legislature. The clause merely deals with the interim position until the tribunal has been set up by the Legislature, and, in order to

provide what we may call an emergency tribunal, the Governor is given power in the exercise of his individual judgment to go ahead and set up a tribunal which will function until another tribunal has been enacted by the Provincial Legislature."[1]

297. (1) No Provincial Legislature or Government shall—

(*a*) by virtue of the entry in the Provincial Legislative List relating to trade and commerce within the Province, or the entry in that list relating to the production, supply, and distribution of commodities, have power to pass any law or take any executive action prohibiting or restricting the entry into, or export from, the Province of goods of any class or description; or

(*b*) by virtue of anything in this Act have power to impose any tax, cess, toll, or due which, as between goods manufactured or produced in the Province and similar goods not so manufactured or produced, discriminates in favour of the former, or which, in the case of goods manufactured or produced outside the Province, discriminates between goods manufactured or produced in one locality and similar goods manufactured or produced in another locality.

(2) Any law passed in contravention of this section shall, to the extent of the contravention, be invalid.

This section has been enacted in order to prevent the Provinces from imposing restrictions on the flow of internal trade. No Provincial Legislature or Government has power to pass any law or to take any executive action, prohibiting or restricting the entry into, or export from, the Province of goods of any class or description. Nor has any Provincial Legislature or Government power to impose any tax, cess, toll or due, which, as between goods manufactured or produced in the Province and similar goods not so manufactured or produced, discriminates in favour of the former, or which, in the case of goods manufactured or produced outside the Province, discriminates between goods manufactured or produced in one locality and similar goods manufactured or produced in another locality.

The Commonwealth of Australia Constitution Act, 1900, contains a provision whereby absolute freedom in trade, commerce and intercourse among the States, is guaranteed. Section 92 of that Act, which embodies that Provision provides, *inter alia*, that "on the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free." Under Section 88 of the same Act, uniform duties

[1] Official Report, House of Commons, April 9, 1935, Vol. 300, Column 1038.

and customs had to be imposed within two years after the establishment of the Commonwealth The object of these two provisions was that only one single tariff wall must surround the whole of the Australian Continent, and that trade, commerce and intercourse as between the various States of the Federation should proceed unhindered. As Lord Wright has observed in *James* v. *Commonwealth of Australia*,[1] "The idea starts with the admitted fact that Federation in Australia was intended (*inter alia*) to abolish the frontiers between the different States and create one Australia That conception involved freedom from customs duties, imports, border prohibitions and restrictions of every kind · the people of Australia were to be free to trade with each other, and to pass to and fro among the States, without any burden, hindrance or restriction based merely on the fact that they were not members of the same State." The freedom of trade, commerce, and intercourse which is provided for under Section 92, cannot be infringed either by the Commonwealth or the States. There was some doubt, at one time, whether the provision contained in Section 92 was binding upon the Commonwealth Parliament or not. But that doubt has now been set at rest by the Privy Council, in the recent case of *James* v. *Commonwealth of Australia*,[2] already referred to, where it was laid down that Section 92 bound the Parliament of the Commonwealth of Australia equally with the States

In the chapter dealing with Federal Finance, I had occasion to consider the problem how far internal freedom of trade, which is an important feature of every fully developed Federation, was attainable in India Some of the Indian States which are going to enter the Federation, will, it would seem, continue to retain their existing rights to impose customs duties at their land frontiers. It may take several years before the Indian Federation will achieve the ideal of complete free trade among all the constituent units of the Federation Now, coming to the present section itself, the idea behind it is, that so far as the British Indian Provinces at least are concerned, the power of imposing restrictions on the freedom of trade should not exist from the very beginning alone.

In *James* v. *Cowan*[3] the validity of Section 28 of the Dried Fruits Act, 1924, of South Australia, was contested by the appellant on the ground that it was an infringement of the provision contained in Section 92 of the Commonwealth of

[1] (1936) A C. 578, p. 630. [2] (1936) A.C 578
[3] (1932) A C 542

Australia Constitution Act, 1900. The appellant was a fruit grower and dryer carrying on business in South Australia, who, in the course of his business sold his products in South Australia and other States and by export out of Australia. The quantity of dried fruits produced in Australia was very much in excess of what could be consumed locally. The litigation was mainly concerned with dried fruits of the following kinds, namely, currants, sultanas and lexias (a species of raisin). It appeared that about 15 per cent only of these dried fruits could be absorbed locally, while the surplus had to find a market outside Australia Unlimited competition, therefore, in Australia would adversely affect the native grower by depriving him of the advantage of a protected market, and leaving him to get for his exports out of the Commonwealth the world price. The Dried Fruits Act, 1924, of South Australia, was designed to help the grower to obtain a better price than what he could obtain if there was unrestrained competition locally Under the Act, provision was made for the Dried Fruits Board constituted thereunder to fix the percentages of fruits which were marketable in Australia, by every grower, dealer, or any person being the owner or occupier or person in charge of any packing shed. There was provision made by Section 28 of this Act for the Minister of Agriculture to make orders for the compulsory acquisition of dried fruits with the object of forcing the surplus of dried fruits off the Australian market. The person from whom such fruits were acquired was entitled under Section 29, Sub-section (2), to receive the export parity price, which by Section 3 meant the selling price in London of the like Australian dried fruits, less freight, insurance and other charges The appellant's fruits were seized under the authority of an order passed by the Minister of Agriculture of the State of South Australia The validity of this seizure was disputed by the appellant on the ground that it was an interference with his freedom of inter-State-trade, which freedom had been guaranteed by Section 92. The Privy Council upheld the appellant's contention, holding that inasmuch as the object of the impugned provision was to force the surplus of dried fruits off the Australian market, that object involved directly an interference with the freedom of inter-State trade and therefore the section was *ultra vires* as having infringed Section 92.

Would a similar compulsory marketing provision enacted by a Provincial Legislature in British India be valid or not? It would seem, that such a provision would not be valid as the compulsory acquisition of dried fruits would, to adopt the

language of the section of the Indian Act, be a restriction on the export of goods from the Province. A producer of dried fruits in a British Indian Province may desire to export the whole of his production in pursuance of contracts entered into with buyers in other Provinces. If such fruits are acquired compulsorily, under the authority of a Provincial Act, analogous to that contained in the South Australian Dried Fruits Act, such acquisition would, it appears, be illegal, as the provision authorizing the acquisition would be a restriction on the freedom of an individual in a Province to export his goods to buyers with whom he has contracted Though a Provincial Act would be invalid, it would seem for reasons to be mentioned hereafter, a Federal statute to secure the same object would be valid.

In *James* v. *Commonwealth of Australia*[1] the appellant, a grower and processor of dried fruits in the State of South Australia, challenged the validity of certain provisions contained in the Dried Fruits Act, 1928–35, enacted by the Parliament of the Commonwealth of Australia. In this action he claimed damages for the seizure by or on behalf of the Commonwealth of (1) fifty cases of dried fruits which he had shipped on a steamship at Port Adelaide, consigned to one E. D Clarton for delivery at Sydney in part performance of a contract, and (2) twenty cases of dried fruits which he had shipped at Port Adelaide to H. Hooper and Co for delivery at Sydney, in part performance of a contract. The Dried Fruits Act, 1928–35, enacted by Section 3, Sub-section 1 :

" 3 (1) Except as provided by the Regulations—

" (*a*) the owner or person having possession or custody of dried fruits shall not deliver any dried fruits to any person for carriage into or through another State to a place in Australia beyond the State in which the delivery is made ; and

" (*b*) the owner or any other person shall not carry any dried fruits from a place in one State into or through another State to a place in Australia beyond the State in which the carriage begins ;

unless he is the holder of a license then in force, issued under this Act, authorizing him so to deliver or carry such dried fruits, as the case may be, and the delivery or carriage is in accordance with the terms and conditions of that license.

" Penalty : One hundred pounds or imprisonment for six months.

" (2) Prescribed authorities may issue licenses, for such

[1] (1936) A C. 578

periods and upon such terms and conditions as are prescribed, permitting the delivery of dried fruits to any person for carriage or the carriage of dried fruits from a place in one State to a place in Australia beyond that State.

" (3) Any dried fruits which have been, or are in process of being, carried in contravention of this Act, shall be forfeited to the King "

The relevant Regulations, Dried Fruits (Inter-State Trade) Regulations, in force at the material times provided that an owner's license to export shall be issued on the terms (*inter alia*) . " 11. That the licensee shall export from Australia, or cause to be exported on his behalf, during the period for which his license has been issued and during such further period as a prescribed authority considers necessary, such percentage of the dried fruits produced in Australia during any specified periods which came into the possession or custody of the licensee prior to the date of issue of his license, or which come into the possession or custody of the licensee on and after the date of issue of this license, as is from time to time fixed by the minister, upon the report of a prescribed authority, and notified in the *Gazette*. . . " The Minister of State for Commerce of the Commonwealth, in accordance with the Act and the Regulations aforesaid, determined that it should be a condition of the issue of a license that the licensee should cause to be exported from Australia certain prescribed proportions of the Australian dried fruits in his possession, varying from 60 to 90 per cent , according to the description of the fruit. The appellant refused to take out a license, contending, that the Act and the Regulations were *ultra vires* as they militated against the provision contained in Section 92 of the Act. The Privy Council upheld the appellant's contention and held that Section 92 bound the Commonwealth equally with the States, and that the provisions impugned were invalid as they interfered with the freedom of inter-State trade.

So far as the Government of India Act, 1935, is concerned, it is submitted, that the Federal Legislature would be in a position to enact legislation introducing compulsory marketing schemes in relation to the product of any industry, as Item 34 of the Federal Legislative List gives power to the Federal Legislature to pass laws with reference to " the development of industries, where development under Federal control is declared by Federal Law to be expedient in the public interest " Can compulsory marketing legislation be passed with reference to the dried fruits trade in India ? Is it an industry to come within

the purview of Item 34 of the Federal Legislative List ? It may, I think, be reasonably contended that the processes involved in the preparation of raw fruits marketable as dried fruits would be in the nature of industrial processes, as the raw fruits have to be scientifically cleaned, dried, treated with preservatives, and then packed or canned to render them fit to be placed on the market as dried fruits The dried fruits trade may, perhaps, be classed as an industry for these and other reasons

In the case of *Fox* v. *Robbins*,[1] it was held, that a State law which, for a license authorizing the sale of wine manufactured from fruit grown in another State, requires a greater fee to be paid than for a license authorizing the sale of wine manufactured from fruit locally produced, was an infraction of Section 92 of the Commonwealth of Australia Constitution Act.

298. (1) No subject of His Majesty domiciled in India shall on grounds only of religion, place of birth, descent, colour or any of them be ineligible for office under the Crown in India, or be prohibited on any such grounds from acquiring, holding or disposing of property or carrying on any occupation, trade, business or profession in British India.

(2) Nothing in this section shall affect the operation of any law which—

(*a*) prohibits, either absolutely or subject to exceptions, the sale or mortgage of agricultural land situate in any particular area, and owned by a person belonging to some class recognized by the law as being a class of persons engaged in or connected with agriculture in that area, to any person not belonging to any such class , or

(*b*) recognizes the existence of some right, privilege or disability attaching to members of a community by virtue of some personal law or custom having the force of law.

(3) Nothing in this section shall be construed as derogating from the special responsibility of the Governor-General or of a Governor for the safeguarding of the legitimate interests of minorities

299. (1) No person shall be deprived of his property in British India save by authority of law.

(2) Neither the Federal nor a Provincial Legislature shall have power to make any law authorizing the compulsory acquisition for public purposes of any land, or any commercial or industrial undertaking, or any interest in, or in any company owning, any commercial or industrial undertaking, unless the law provides for the payment of compensation for the property acquired and

[1] 8 C.L.R. 115. Cited in Kerr, p. 84.

either fixes the amount of the compensation, or specifies the principles on which, and the manner in which, it is to be determined.

(3) No Bill or amendment making provision for the transference to public ownership of any land or for the extinguishment or modification of rights therein, including rights or privileges in respect of land revenue, shall be introduced or moved in either Chamber of the Federal Legislature without the previous sanction of the Governor-General in his discretion, or in a Chamber of a Provincial Legislature without the previous sanction of the Governor in his discretion.

(4) Nothing in this section shall affect the provisions of any law in force at the date of the passing of this Act.

(5) In this section "land" includes immovable property of every kind and any rights in or over such property, and "undertaking" includes part of an undertaking

300. (1) The executive authority of the Federation or of a Province shall not be exercised, save on an order of the Governor-General or Governor, as the case may be, in the exercise of his individual judgment, so as to derogate from any grant or confirmation of title of or to land, or of or to any right or privilege in respect of land or land revenue, being a grant or confirmation made before the first day of January, one thousand eight hundred and seventy, or made on or after that date for services rendered

(2) No pension granted or customarily payable before the commencement of Part III of this Act by the Governor-General in Council or any Local Government on political considerations or compassionate grounds shall be discontinued or reduced, otherwise than in accordance with any grant or order regulating the payment thereof, save on an order of the Governor-General in the exercise of his individual judgment or, as the case may be, of the Governor in the exercise of his individual judgment, and any sum required for the payment of any such pension shall be charged on the revenues of the Federation or, as the case may be, the Province.

(3) Nothing in this section affects any remedy for a breach of any condition on which a grant was made.

V. *High Commissioner*

302. (1) There shall be a High Commissioner for India in the United Kingdom who shall be appointed, and whose salary and conditions of service shall be prescribed by the Governor-General, exercising his individual judgment.

(2) The High Commissioner shall perform on behalf of the Federation such functions in connection with the business of the Federation, and, in particular, in relation to the making of contracts as the Governor-General may from time to time direct.

(3) The High Commissioner may, with the approval of the Governor-General and on such terms as may be agreed, undertake to perform on behalf of a Province or Federated State, or on behalf of Burma, functions similar to those which he performs on behalf of the Federation.

VI. *General Provisions*

304. Any person appointed by His Majesty to act as Governor-General or as the Governor of a Province during the absence of the Governor-General or the Governor from India, or during any period during which the Governor-General or the Governor is for any reason unable to perform the duties of his office, shall during, and in respect of, the period while he is so acting, have all the powers and immunities, and be subject to all the duties of, the Governor-General or Governor, as the case may be and, if he holds any other office, shall not act therein or be entitled to the salary and allowances appertaining thereto while he is acting as Governor-General or Governor.

305. (1) The Governor-General and every Governor shall have his own secretarial staff to be appointed by him in his discretion

(2) The salaries and allowances of persons so appointed and the office accommodation and other facilities to be provided for them shall be such as the Governor-General or, as the case may be, the Governor may in his discretion determine, and the said salaries and allowances and the expenses incurred in providing the said accommodation and facilities shall be charged on the revenues of the Federation or, as the case may be, the Province.

306. (1) No proceedings whatsoever shall be in, and no process whatsoever shall issue from, any court in India against the Governor-General, against the Governor of a Province, or against the Secretary of State, whether in a personal capacity or otherwise, and, except with the sanction of His Majesty in Council, no proceedings whatsoever shall lie in any court in India against any person who has been the Governor-General, the Governor of a Province, or the Secretary of State in respect of anything done or omitted to be done by any of them during his term of office in performance or purported performance of the duties thereof:

Provided that nothing in this section shall be construed as restricting the right of any person to bring against the Federation, a Province, or the Secretary of State such proceedings as are mentioned in Chapter III of Part VII of this Act.

(2) The provisions of the preceding sub-section shall apply in relation to His Majesty's Representative for the exercise of the functions of the Crown in its relations with Indian States as they apply in relation to the Governor-General.

308. (1) Subject to the provisions of this section, if the Federal Legislature or any Provincial Legislature, on motions proposed in each Chamber by a minister on behalf of the Council of Ministers, pass a resolution recommending any such amendment of this Act or of an Order in Council made thereunder as is hereinafter mentioned, and on motions proposed in like manner, present to the Governor-General or, as the case may be, to the Governor an address for submission to His Majesty praying that His Majesty may be pleased to communicate the resolution to Parliament, the Secretary of State shall, within six months after the resolution is so communicated, cause to be laid before both Houses of Parliament a statement of any action which it may be proposed to take thereon

The Governor-General or the Governor, as the case may be, when forwarding any such resolution and address to the Secretary of State shall transmit therewith a statement of his opinion as to the proposed amendment and, in particular, as to the effect which it would have on the interests of any minority, together with a report as to the views of any minority likely to be affected by the proposed amendment and as to whether a majority of the representatives of that minority in the Federal or, as the case may be, the Provincial Legislature support the proposal, and the Secretary of State shall cause such statement and report to belaid before Parliament.

In performing his duties under this sub-section the Governor-General or the Governor, as the case may be, shall act in his discretion.

(2) The amendments referred to in the preceding sub-section are—

(*a*) any amendment of the provisions relating to the size or composition of the Chambers of the Federal Legislature, or to the method of choosing or the qualifications of members of that Legislature, not being an amendment which would vary the proportion between the number of seats in the Council of State and the number of seats in the Federal Assembly, or would vary, either as regards the Council of State or the Federal Assembly,

the proportion between the number of seats allotted to British India and the number of seats allotted to Indian States.

(*b*) any amendment of the provisions relating to the number of Chambers in a Provincial Legislature or the size or composition of the Chamber, or of either Chamber, of a Provincial Legislature, or to the method of choosing or the qualifications of members of a Provincial Legislature ,

(*c*) Any amendment providing that, in the case of women, literacy shall be substituted for any higher educational standard for the time being required as a qualification for the franchise, or providing that women, if duly qualified, shall be entered on electoral rolls without any application being made for the purpose by them or on their behalf , and

(*d*) any other amendment of the provisions relating to the qualifications entitling persons to be registered as voters for the purposes of elections.

(3) So far as regards any such amendment as is mentioned in Paragraph (*c*) of the last preceding sub-section, the provisions of Sub-section (1) of this section shall apply to a resolution of a Provincial Legislature whenever passed, but, save as aforesaid, those provisions shall not apply to any resolution passed before the expiration of ten years, in the case of a resolution of the Federal Legislature, from the establishment of the Federation, and, in the case of a resolution of a Provincial Legislature, from the commencement of Part III of this Act.

(4) His Majesty in Council may at any time before or after the commencement of Part III of this Act, whether the ten years referred to in the last preceding sub-section have elapsed or not, and whether any such address as is mentioned in this section has been submitted to His Majesty or not, make in the provisions of this Act any such amendment as is referred to in Sub-section (2) of this section .

Provided that—

(i) if no such address has been submitted to His Majesty, then, before the draft of any Order which it is proposed to submit to His Majesty is laid before Parliament, the Secretary of State shall, unless it appears to him that the proposed amendment is of a minor or drafting nature, take such steps as His Majesty may direct for ascertaining the views of the Governments and Legislatures in India who would be affected by the proposed amendment and the views of any minority likely to be so affected, and whether a majority of the representatives of that minority in the Federal or, as the case may be, the Provincial Legislature support the proposal ;

(ii) the provisions of Part II of the First Schedule to this Act shall not be amended without the consent of the Ruler of any State which will be affected by the amendment.

309. (1) Any power conferred by this Act on His Majesty in Council shall be exercisable only by Order in Council, and subject as hereinafter provided, the Secretary of State shall lay before Parliament the draft of any Order which it is proposed to recommend His Majesty to make in Council under any provision of this Act, and no further proceedings shall be taken in relation thereto except in pursuance of an address presented to His Majesty by both Houses of Parliament praying that the Order may be made either in the form of the draft, or with such amendments as may have been agreed to by resolutions of both Houses :

Provided that, if at any time when Parliament is dissolved or prorogued, or when both Houses of Parliament are adjourned for more than fourteen days, the Secretary of State is of opinion that on account of urgency an Order in Council should be made under this Act forthwith, it shall not be necessary for a draft of the Order to be laid before Parliament, but the Order shall cease to have effect at the expiration of twenty-eight days from the date on which the Commons House first sits after the making of the Order unless within that period resolutions approving the making of the Order are passed by both Houses of Parliament

(2) Subject to any express provision of this Act, His Majesty in Council may by a subsequent Order, made in accordance with the provisions of the preceding sub-section, revoke or vary any Order previously made by him in Council under this Act

(3) Nothing in this section applies to any Order of His Majesty in Council made in connection with any appeal to His Majesty in Council, or to any Order of His Majesty in Council sanctioning the taking of proceedings against a person who has been the Governor-General, His Majesty's Representative for the exercise of the functions of the Crown in its relations with Indian States, the Governor of a Province or the Secretary of State

VII. *Interpretation*

311. (1) In this Act and, unless the context otherwise requires, in any other Act the following expressions have the meanings hereby respectively assigned to them, that is to say :

" British India " means all territories for the time being

comprised within the Governors' Provinces and the Chief Commissioners' Provinces ;

" India " means British India together with all territories of any Indian Ruler under the suzerainty of His Majesty, all territories under the suzerainty of such an Indian Ruler, the tribal areas, and any other territories which His Majesty in Council may, from time to time, after ascertaining the views of the Federal Government and the Federal Legislature, declare to be part of India ;

" Burma " includes (subject to the exercise by His Majesty of any powers vested in him with respect to the alteration of the boundaries thereof) all territories which were immediately before the commencement of Part III of this Act comprised in India, being territories lying to the east of Bengal, the State of Manipur, Assam, and any tribal areas connected with Assam ;

" British Burma," means so much of Burma as belongs to His Majesty ,

" Tribal areas " means the areas along the frontiers of India or in Baluchistan which are not part of British India or of Burma or of any Indian State or of any foreign State ,

" Indian State," includes any territory, whether described as a State, an Estate, a Jagir or otherwise, belonging to or under the suzerainty of a Ruler who is under the suzerainty of His Majesty and not being part of British India ,

" Ruler " in relation to a State means the Prince, Chief or other person recognized by His Majesty as the Ruler of the State.

(2) In this Act, unless the context otherwise requires, the following expressions have the meanings hereby respectively assigned to them, that is to say :

" agricultural income " means agricultural income as defined for the purposes of the enactments relating to Indian income tax ,

" borrow " includes the raising of money by the grant of annuities and "loan " shall be construed accordingly ,

" chief justice," includes in relation to a High Court a chief judge or judicial commissioner, and " judge " includes an additional judicial commissioner ;

" corporation tax " means any tax on so much of the income of companies as does not represent agricultural income, being a tax to which the enactments requiring or authorizing companies to make deductions in respect of income tax from payments of interest or dividends, or from other payments representing a distribution of profits, have no application ;

" corresponding Province " means in case of doubt such Province as may be determined by His Majesty in Council to be the corresponding Province for the particular purpose in question;

" debt " includes any liability in respect of any obligation to repay capital sums by way of annuities and any liability under any guarantee, and " debt charges " shall be construed accordingly ;

" existing Indian law " means any law, ordinance, order, bye-law, rule or regulation passed or made before the commencement of Part III of this Act by any legislature, authority or person in any territories for the time being comprised in British India, being a legislature, authority or person having power to make such a law, ordinance, order, bye-law, rule or regulation ;

" goods " includes all materials, commodities, and articles ;

" guarantee " includes any obligation undertaken before the commencement of Part III of this Act to make payments in the event of the profits of an undertaking falling short of a specified amount ;

" High Court " does not, except where it is expressly so provided, include a High Court in a Federated State ;

" Local Government " means any such Governor in Council, Governor acting with ministers, Lieutenant-Governor in Council, Lieutenant-Governor or Chief Commissioner as was at the relevant time a Local Government for the purposes of the Government of India Act or any Act repealed by that Act, but does not, save where the context otherwise requires, include any Local Government in Burma or Aden ;

" pension " in relation to persons in or formerly in the service of the Crown in India, Burma or Aden, means a pension, whether contributory or not, of any kind whatsoever payable to or in respect of any such person, and includes retired pay so payable, a gratuity so payable and any sum or sums so payable by way of the return, with or without interest thereon or any other addition thereto, of subscriptions to a provident fund ;

" pleader " includes advocate ;

" Provincial Act " and " Provincial law " mean, subject to the provisions of this section, an Act passed or law made by a Provincial Legislature established under this Act ;

" public notification " means a notification in the Gazette of India or, as the case may be, the official Gazette of a Province ;

" securities " includes stock ;

" taxation " includes the imposition of any tax or impost whether general or local or special, and " tax " shall be construed accordingly ;

" railway " includes a tramway not wholly within a municipal area ;

" federal railway " does not include an Indian State railway, but, save as aforesaid, includes any railway not being a minor railway ,

" Indian State railway " means a railway owned by a State and either operated by the State, or operated on behalf of the State otherwise than in accordance with a contract made with the State by or on behalf of the Secretary of State in Council, the Federal Government, the federal Railway Authority, or any company operating a federal railway ,

" minor railway " means a railway which is wholly situate in one unit and does not form a continuous line of communication with a federal railway, whether of the same gauge or not ; and

" unit " means a Governor's Province, a Chief Commissioner's Province or a Federated State.

(3) No Indian State shall, for the purpose of any reference in this Act to Federated States, be deemed to have become a Federated State until the establishment of the Federation.

(4) In Paragraph (3) of Section 18 of the Interpretation Act, 1889 (which paragraph defines the expression " colony ") for the words " exclusive of the British Islands and of British India " there shall be substituted the words " exclusive of the British Islands and of British India and of British Burma."

(5) Any Act of Parliament containing references to India or any part thereof, to countries other than or situate outside India or other than or situate outside British India, to His Majesty's dominions, to a British possession, to the Secretary of State in Council, to the Governor-General in Council, to a Governor in Council or to Legislatures, courts, or authorities in, or to matters relating to the government or administration of, India or British India shall have effect subject to such adaptations and modifications as His Majesty in Council may direct, being adaptations and modifications which appear to His Majesty in Council to be necessary or expedient in consequence of the provisions of this Act or the Government of Burma Act, 1935

Any power of any legislature under this Act to repeal or amend any Act adapted or modified by an Order in Council under this sub-section shall extend to the repeal or amendment of that Order, and any reference in this Act to an Act of Parliament shall be construed as including a reference to any such Order.

(6) Any reference in this Act to Federal Acts or laws or Provincial Acts or laws, or to Acts or laws of the Federal or a Provincial Legislature, shall be construed as including a reference to an ordinance made by the Governor-General or a Governor-General's Act or, as the case may be, to an ordinance made by a Governor or a Governor's Act.

(7) References in this Act to the taking of an oath include references to the making of an affirmation.

VIII. *Commencement, Repeals, etc.*

320. (1) Part II of this Act shall come into force on such date as His Majesty may appoint by the Proclamation establishing the Federation and the date so appointed is the date referred to in this Act as the date of the establishment of the Federation.

(2) The remainder of this Act shall, subject to any express provision to the contrary, come into force on such date as His Majesty in Council may appoint and the said date is the date referred to in this Act as the commencement of Part III of this Act.

(3) If it appears to His Majesty in Council that it will not be practicable or convenient that all the provisions of this Act which are under the foregoing provisions of this section to come into force on a date therein mentioned should come into operation simultaneously on that date, His Majesty in Council may, notwithstanding anything in this section, fix an earlier or a later date for the coming into operation, either generally or for particular purposes, of any particular provisions of this Act.

321. The Government of India Act shall be repealed and the other Acts mentioned in the Tenth Schedule to this Act shall also be repealed to the extent specified in the third column of that Schedule :

Provided that—

(*a*) nothing in this section shall affect the Preamble to the Government of India Act, 1919 ;

(*b*) without prejudice to any other provisions of this Act, to the provisions of the Government of Burma Act, 1935, and to the provisions of the Interpretation Act, 1889, relating to the effect of repeals, this repeal shall not affect any appointment made under any enactment so repealed to any office, and any such appointment shall have effect as if it were an appointment to the corresponding office under this Act or the Government of Burma Act, 1935.

POSTSCRIPT

IN the New Irish Constitution, which came into operation on December 29, 1937, the long-cherished Irish aspiration of independent nationhood takes concrete shape. The Irish Free State which was established under the provisions of the Irish Treaty of 1921 was, under Article 1 of that instrument, given the same constitutional status in the Community of Nations known as the British Empire as the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand and the Union of South Africa, and a Parliament empowered to make laws for the peace, order and good government of Ireland and an Executive responsible to that Parliament. Article 5 of the New Constitution declares that Ireland is a sovereign, independent, democratic State. The New Constitution makes no reference to Ireland's membership of the British Commonwealth of Nations, nor is there any mention of the King in that document. Equally noteworthy is the omission of any reference to the status of Ireland—or Éire as that country will officially be known hereafter—under that Constitution as a republic But if she is so minded Éire can proclaim herself a republic without altering a single syllable of the New Constitution There is now no constitutional impediment to that country functioning as a republic if she so chooses. Mr. de Valera does not, however, appear to be anxious that his country should so act. And he has apparently his reason for this, and I shall refer to this later. His country's self-respect being satisfied by asserting her right to regard herself as an independent nation, Mr. de Valera seems willing to collaborate with Great Britain on a plane of equality and friendship. In fact, Article 29 of the New Constitution leaves the door open for maintaining the British connection through the instrumentality of the Crown in the field of external affairs.

The New Irish Constitution is of interest for more than one reason. As an instrument of government, it has features which make it well worth careful study. And its repercussions on the existing structure of the British Commonwealth merit equally careful consideration. Before considering that Constitution from these standpoints it would, I believe, be useful to have a clear idea of the constitutional developments which have taken place in the Irish Free State ever since it was founded under the terms of the Irish Treaty of 1921. As

certain aspects of this matter have already been considered in the Introduction, I shall, as far as possible, avoid the ground already traversed.

On December 6, 1921, the representatives of the Irish and British peoples signed in London, the Articles of Agreement for a Treaty between Great Britain and Ireland, usually referred to as the Irish Treaty. As the late Mr Arthur Griffith, the Irish Minister for Foreign Affairs, pointed out in his speech to the Dáil Eireann moving the resolution that the Irish Treaty be approved, the Treaty gave the two countries the chance to end the bitter conflict of seven centuries and to take away the poison that had been rankling in the two countries and ruining the relationship of good neighbours.[1] The old animosities though greatly softened since have not altogether disappeared. Indeed, it is this circumstance more than any other, which accounts for the policy which, since the signing of the Irish Treaty of 1921, the Irish Free State has steadily pursued of dissolving one by one the ties which bound her to Great Britain and the Empire With this aspect I shall deal later

On March 31, 1922, the Imperial Parliament placed on the Statute Book the Irish Free State (Agreement) Act, 1922, by which the Irish Treaty which was scheduled to it was to have the place of law as from the date of the passing of that Act Sub-section 2 of Section 1 of the Act provided that Orders in Council had to be made for the purpose of transferring to the Provisional Government the requisite powers and machinery for carrying on its duties and with a view to elect certain members of a body called the House of Parliament to which the Provisional Government should be responsible and which should have the power to make laws, as respects matters within the jurisdiction of the Provisional Government, as the Parliament of the Irish Free State would have when constituted. This provision was intended to give effect to Article 17 of the Irish Treaty which provided as follows .

" By way of provisional arrangement for the administration of Southern Ireland during the interval which must elapse between the date hereof and the constitution of a Parliament and Government of the Irish Free State in accordance therewith, steps shall be taken forthwith for summoning a meeting of members of Parliament elected for constituencies in Southern Ireland since the passing of the Government of Ireland Act, 1920, and for constituting a Provisional Government, and the British Government shall take the steps necessary to transfer

[1]Keith *Speeches and Documents on the British Dominions*, 1918–1931, *p* 104

to such Provisional Government the powers and machinery requisite for the discharge of its duties, provided that every member of such Provisional Government shall have signified in writing his or her acceptance of this instrument But this arrangement shall not continue in force beyond the expiration of twelve months from the date hereof "

The House of Parliament above referred to, which was a single-chamber body known as the Dáil Eireann, met as a Constituent Assembly and enacted on October 25, 1922, the Constitution of the Irish State. The Preamble to this Act ran as follows :

" Dáil Eireann sitting as a Constituent Assembly in this Provisional Parliament, acknowledging that all lawful authority comes from God to the people and in the confidence that the National life and unity shall thus be restored, hereby proclaims the establishment of the Irish Free State (otherwise called Saorstát Eireann) and in the exercise of undoubted right, decrees and enacts as follows : "

The Constitution which was so enacted was set forth in the first Schedule to the Act , while the Treaty itself was placed in the second Schedule and given the force of law. Section 2 of this Act expressly provided that the Constitution should be construed with reference to the Articles of the Treaty and that if any provision of the Constitution or any amendment thereof was in any respect repugnant to the Treaty it was to the extent of the repugnancy void and inoperative This Constituent Act passed by the Dáil Eireann was called the Constitution of the Irish Free State (Saorstát Eireann) Act, 1922. The Constitution so enacted was scheduled to an Act of the Imperial Parliament entitled the Irish Free State Constitution Act, 1922 (Session 2) which received the assent of His Majesty on December 5, 1922 By this process the Constituent Act of the Irish Free State became part of British Statute Law It may be mentioned that the Imperial Act aforesaid expressly adverted to the fact that the Constitution and any amendment thereto were in no way to conflict with the provisions of the Treaty.

In the year 1933, Section 2 of the Constitution of the Irish Free State (Saorstát Eireann) Act, 1922, was deleted by Section 2 of the Constitution (Removal of Oath) Act, 1933, passed by the Irish Parliament, the Oireachtas. The validity of this enactment incidentally came up for consideration at the hands of the Privy Council in *Moore* v. *The Attorney-General for the Irish Free State.*[1] I have already referred to this case in the

[1] (1935) A. C. 484.

Introduction. At this point it is sufficient to point out that the Privy Council upheld the legality of that Act on the main ground that, under Section 2 of the Statute of Westminster, the Oireachtas had acquired full competence to repeal or amend the Treaty and the Constitutent Act which respectively formed parts of the Statute Law of the United Kingdom, each of them being parts of an Imperial Act. Of course, it is necessary to distinguish between the Treaty considered as an executive act, and the provisions of the Treaty so far as they formed the Statute Law of Great Britain. While the effect of that decision was that the provisions of the Treaty considered as a British Statute could be abrogated by the legislative action of the Irish Parliament, it in no way affected the binding character of any contractual obligations undertaken by the Irish Free State under that instrument considered as an executive compact concluded between the two countries.

Another important change effected by the Act already referred to, namely, the Constitution (Removal of Oath) Act, 1933, was the deletion of Article 17 of the Constitution by which every member of the Oireachtas was required before taking his seat therein to take an oath of allegiance to the King. This was indeed a drastic innovation when we remember that the oath was an integral part of the Irish Treaty of 1921. Article 4 of that Treaty, in fact, prescribed the form of the Oath to be taken by members of Parliament of the Irish Free State. This change was carried out in the teeth of the most serious protests of the Secretary of State for Dominion Affairs. In November 1933, the Oireachtas passed the Constitution (Amendment No. 22) Act, 1933, abolishing the right of appeal to His Majesty in Council.

Under the British Nationality and Status of Aliens Act, 1914–33, all persons born within His Majesty's dominions and allegiance enjoy the common status of being regarded as British subjects. In 1935, the Irish Free State enacted the Irish Nationality and Citizenship Act, by which, the British Nationality and Status of Aliens Act above referred to, was repealed so far as the Free State was concerned. The Act severed allegiance as the bond connecting the Crown and Irish Nationals. The contention has been put forward in the Irish Free State, that, by virtue of this Act, Irish citizens have only one national status both within and outside that country and that they have lost their status as British citizens completely. So far as the position within the Irish Free State itself is concerned there could be no doubt that that is a correct position.

But outside that country its citizens will, it would seem, continue to preserve their status as British citizens. Professor Keith in his letter to the *Spectator*, dated February 6, 1937,[1] in dealing with this matter observes as follows :

" Some, of course, contend that an Irish National outside the State is not in British law a British subject. The answer is that in such cases there are conflicting legal provisions and that British Courts should follow their national law "

When an Irish National travels abroad he is in the happy position of being able to enjoy the good offices of his country's own Legations, where they happen to exist, while in States to which his country has not accredited Ministers, he can indent upon the services of the British Legations on the score of his being continued to be regarded as a British subject under British law.

In December 1936, the Oireachtas passed two very important Acts Under Constitution (Amendment No 27) Act, 1936, the office of Governor-General was abolished and the King completely eliminated from all the internal affairs of the Irish Free State. And by the second Act also passed in December 1936, the Executive authority (External Relations) Act, 1936, the King was retained for the purposes of the external relations of the Irish Free State such as the appointment of the diplomatic and consular representatives and the conclusion of international agreements.

It may be pointed out that these pieces of legislation had, in large measure, forestalled the provisions of the New Irish Constitution The Abolition of the Oath, the termination of the right of Appeal to His Majesty in Council, the creation of a distinct Irish citizenship involving the severance of the tie of allegiance which hitherto bound the Irish national to the Crown, the abolition of the office of Governor-General and the elimination of the King from all the internal activities of the Irish Free State, were all carefully-planned acts intended to sever one by one the ties which bound the Irish State to Great Britain and to consolidate step by step the ground leading towards independent nationhood. Of the status of Éire under the New Constitution *vis-à-vis* the British Empire, I shall have something to say later Now I shall proceed to give a short sketch of the New Constitution

It is claimed by Article 2 of the Constitution that the national territory consists of the whole island of Ireland ; its

[1] Now printed in his recent Book : Keith : *The King, The Constitution, The Empire and Foreign Affairs* (1938), p 59

islands and the territorial seas, though the very next Article tones down that claim by providing that, pending the reintegration of the national territory, the laws enacted by the Parliament established under the Constitution shall apply only to that part of Ireland which hitherto constituted the Irish Free State.

The constitutional head of the State will be the President, who will be elected by direct vote of the people. It is provided that every citizen who has the right to vote at an election for members of Dáil Eireann shall have the right to vote at an election for President. As every citizen who has reached the age of twenty-one years and without any restriction as to sex, property or education, is entitled to vote at election of members of Dáil Eireann, the person chosen to occupy the office of President will doubtless be a true representative of the people. The term of office of President is fixed at seven years. The Irish President, though endowed with greater authority than a Governor-General in a self-governing Dominion, is far from the majestic figure which the President of the United States is. The reason is that the Irish draftsman has pinned his faith to the cabinet form of government of the British pattern. It is, however, true that the position of the Irish cabinet is not so unassailable as that of its modern British counterpart. With this aspect, I shall deal later.

The Constitution enumerates the powers and functions which the President will exercise and perform. Additional powers and functions may be conferred, subject to the Constitution, by future legislative enactments The President is not a free agent in all respects as Section 9 of Article 13 clearly provides that the powers and functions conferred on him by the Constitution shall be exercisable and performable by him only on the advice of the Government, save where it is provided that he shall act in his absolute discretion or after consultation with the Council of State. He commands the Defence forces and exercises the prerogative of mercy, though on the advice of the ministry. He may, after consultation with the Council of State, communicate with the Houses of the Oireachtas by message or address on any matter of national or public importance. He can also, after consultation with the Council of State, address a message to the nation. He has the right, under Article 26, to refer any Bill passed by the Oireachtas, other than a Money Bill or a Bill to amend the Constitution, to the Supreme Court for a decision whether any provision or provisions of that Bill is repugnant to the Constitution. This right

can be exercised only after consultation with the Council of State. The President, on the nomination of Dáil Eireann, appoints the Taoiseach or the Prime Minister. The President also summons and dissolves the Dáil Eireann on the advice of the Taoiseach, though he has been given the absolute discretion to refuse dissolution of the Dáil Eireann on the advice of a Taoiseach who has ceased to retain the support of the majority of that body. This is a departure from British and Dominion precedents in this matter as the right of a British or Dominion Prime Minister to demand a dissolution is now beyond question.

The National Parliament of Ireland is known as the Oireachtas. The Oireachtas will consist of the President and two Houses, viz., a House of Representatives to be called Dáil Eireann and a Senate to be called Seanad Eireann. The members of the lower House, the Dáil Eireann, will be elected directly by the people voting in territorial constituencies on the system of proportional representation by means of the single transferable vote The constitution of the Upper House or Senate proceeds on interesting lines. As the problem of the constitution of the Upper House in a bi-cameral legislature is always a source of difficulty to the constitutional draftsman, the Irish example is deserving of careful study. The Irish Senate will have a strength of sixty members, of whom eleven shall be nominated members and forty-nine elected members. The nominated members will be nominated by the Taoiseach with their prior consent. The elected members of the Senate will be elected as follows .

(i) Three will be elected by the National University of Ireland ;

(ii) Three will be elected by the University of Dublin ;

(iii) Forty-three will be elected from panels of candidates to be constituted in the manner to be mentioned hereafter.

According to Section 7, Article 18, there will be five panels of candidates to be formed in the manner provided by law containing respectively the names of persons having knowledge and experience of the following interests and services, namely :

(i) National Language and Culture, Literature, Art, Education and professional interests to be defined by law, which, according to the Seanad electoral (Panel Members) Act 1937, will be, law and medicine, including surgery, dentistry, veterinary medicine and pharmaceutical chemistry ;

(ii) Agriculture and allied interests, and Fisheries ;

(iii) Labour, organized and unorganized ;

(iv) Industry and Commerce, including banking, finance, accountancy, engineering and architecture, and

(v) Public administration and social services, including voluntary social activities.

The Seanad Electoral (Panel Members) Act, 1937, which was enacted into law on December 21, 1937, works out the details of the constitution of Panels and allied matters.

As regards the respective powers of the Dáil Eireann and Seanad Eireann the draftsman has left us in no doubt as to the unchallengeable supremacy of the former over the latter. It is the Dáil Eireann that appoints the Taoiseach or the Prime Minister. It is that body, too, which has to approve of the appointment of the other members of the Ministry, though the Prime Minister will select them. The Ministry, as Section 4 (1) of Article 28 emphasizes, is to be responsible to the Dáil Eireann. The Taoiseach, the Tánaiste (i.e. the Deputy Prime Minister), and the Finance Member must always be members of the Dáil Eireann. The Constitution also provides that the other members of the Government shall be members either of Dáil Eireann or Seanad Eireann, but not more than two of these may be members of the Seanad Eireann. In matters of legislation also this predominance of the lower House is evident. Ordinary Bills which are passed by the Dáil Eireann and sent up to the Seanad Eireann may be rejected or passed with amendments or shelved. But the Seanad Eireann cannot make the amendments or the rejection or the shelving of a bill prevail as against the will of the Dáil Eireann ; all that it can do is to delay the legislation passed by Dáil Eireann becoming law for a period of nine months at the utmost. These provisions are contained in Section 1 of Article 23. With respect to bills initiated and passed by the Seanad Eireann but amended by the Dáil Eireann, it is the decision of the latter body that will ultimately prevail. With regard to money bills also it is the Dáil Eireann that will have the final say. It is clear that the Irish Senate will be a weak body and all that it can do is to make suggestions to the lower house, which, the latter may or may not accept. There is one matter of great importance to be mentioned here. That the authority of the Irish Parliament in matters of legislation is not so unassailable as that of the Parliament of Great Britain will be manifest from what follows hereafter. Article 27 provides that a majority of the members of Seanad Eireann and not less than one-third of the members of Dáil Eireann may by a joint petition addressed to the President request that he may decline to sign and promulgate

as law a bill passed by the Oireachtas on the ground that the Bill contains a proposal of such national importance that the will of the people thereon ought to be ascertained by means of a referendum. The President after considering such petition and after consultation with the Council of State may either refuse or grant the request in his discretion

The Government will consist of not less than seven nor more than fifteen members to be appointed by the President in accordance with the provisions of the Constitution The Prime Minister or Taoiseach, who must be a member of the Dáil Eireann, will be selected by that body, whose nomination has to be accepted by the President This is a departure from the British practice of the outgoing Prime Minister recommending the name of the person to be summoned for forming the next ministry. As I have already mentioned, the Constitution insists that the Prime Minister, his Deputy and the Finance Minister must be members of the Dáil Eireann The ministers will meet and act as a collective authority and be responsible to the Dáil Eireann I have already referred to the provision contained in Article 27 by which a Bill passed by the Oireachtas, and which may even be a Government measure, may be referred to the decision of the people on a joint petition made to the President by a majority of members of the Senate and not less than one-third of the members of the Dáil Eireann, if the President is satisfied that the Bill is of such national importance that the verdict of the people by a referendum should be obtained thereon It may well happen, though perhaps very rarely, that the President will act contrary to the opinion of the responsible executive in a matter of this kind. The existence of this possibility shows that the Irish Cabinet is not in so unchallengeable a position as its British compeer.

The Constitution provides that a body called the Council of State be constituted for the purpose of advising the President in certain matters. It is open to serious doubt whether this body will serve any useful purpose at all interposed as it is between the President on the one hand and the ministry on the other. It will consist of the Taoiseach, the Tánaiste, the Chief Justice, the President of the High Court, the Chairman of the Dáil and Senate, Attorney-General, every ex-President, ex-Chief Justice, ex-Taoiseach, ex-President of the Executive Council of the Saorstát Eireann who is willing to serve as a member, and not more than seven others to be appointed by the President.

Article 29 deals with international relations. Section 4 (1) of that article provides that the executive power of the State in or in connection with its external relations shall in accordance with Article 28 be exercised by or on the authority of the Government. And under Section 4 (2) of the same article it is provided that for the purposes of the exercise of any executive function of the State in or in connection with external relations the Government may to such extent and subject to such conditions, if any, as may be determined by law, avail of or adopt any organ, instrument, or method of procedure used or adopted for the like purpose by the members of any group or league of nations with which the State is or becomes associated for the purpose of international co-operation in matters of common concern. The matter is, therefore, left in a fluid condition. It is possible that the Crown may be ignored even for the purposes of the appointment of diplomatic and consular agents or the conclusion of international agreements. It may well be that the President of Éire will be authorized by law to function in these matters on the advice of the Government. But the possibility of the King continuing to function in external relations remains. And it is unlikely that there will be, in the immediate future, any drastic innovation in the existing position of the King being continued to be employed as an instrument in the international relations of Éire.

The fundamental rights are dealt with in a group of five Articles, Articles 40–44. They are classified under five headings: (i) Personal Rights; (ii) The Family; (iii) Education; (iv) Private property and (v) Religion. As these provisions form a formidable list I shall only give a few of them here. All citizens are to be held equal before the law. Titles of Nobility shall not be conferred by the State; nor can any citizen accept any title of nobility or honour except with the prior approval of Government. No citizen shall be deprived of his personal liberty save in accordance with law. Upon a complaint made by or on behalf of a person that he is being unlawfully detained, the High Court shall forthwith enquire into the same and direct his release unless it is satisfied that he is being detained in accordance with law. But this power cannot be invoked to challenge any act of the defence forces during a state of war, or armed rebellion. The rights of free expression of speech, assembly and association are given subject, however, to the overriding considerations of public order and morality. The State has pledged itself to safeguard with special care the insti-

tution of marriage and no law can be enacted providing for the dissolution of marriage.

Article 46 prescribes the procedure to be followed for amending the Constitution. Every proposal for the amendment of the Constitution shall be initiated in the Dáil Eireann as a Bill and shall upon having been passed or deemed to have been passed by both Houses of the Oireachtas be submitted by Referendum to the decision of the people. Under Article 47 every proposal for an amendment of the Constitution will be deemed to have been approved if a majority of the votes cast at the Referendum have been cast in favour of its enactment into law.

Now the question may be asked what is the status of Éire under the New Constitution? The answer to it is not simple as the status of that country, as matters stand at present, is hardly susceptible of clear-cut definition. Its status is almost that of an independent country, though it is not quite that. I have already pointed out that under the New Constitution, there is no legal obstacle for Éire proclaiming herself a Republic and functioning on that basis. But Mr. de Valera apparently is not prepared for that. I think the primary reason why he is not inclined to declare a republican status for his country is the realization that he would be unnecessarily complicating the factors making for the unity of Ireland. It is well-nigh impossible for Northern Ireland, with its strong attachment to the British Crown, ever to agree to become a part of Republican Ireland, even if Mr. de Valera promises her the largest measure of autonomy within such a Constitution. That is why Mr. de Valera does not appear to be anxious to alter the existing practice of the external relations of his country being conducted in the name of the King. Article 29 of the New Constitution, as I have already explained, enables Éire to co-operate with Great Britain in respect of foreign relations through the instrumentality of the Crown. But it is well to realize that this situation is not free from anomaly. The common tie which binds the King to his subjects all over the Commonwealth is the tie of allegiance. That tie no longer exists as between the Irish citizen and the Crown as it was severed by the Irish Nationality and Citizenship Act, 1935. It is true no doubt, that the name of the Crown will probably still be used for the purposes of the external relations of Éire. But one cannot help feeling that this would be no more than a hollow symbol wherefrom the core of reality has disappeared. For, allegiance to the Crown is the central core of the Unity of the Empire.

Nevertheless, I believe that, so long as the Crown continues to be the basis of co-operation between Great Britain and Éire in external affairs, so long will that country retain her membership of the British Commonwealth of Nations, though the tie which binds her to that group will be of the slenderest kind.

What would be the repercussions of these developments on the Commonwealth? There are those who think that these repeated shocks to the foundations of the Commonwealth are breaking up its unity. In my view this is not a correct reading of the situation. I rather think that the Commonwealth has stood exceedingly well the stresses and strains set up by internal as well as external forces both during and since the Great War. It is showing a remarkable capacity to adapt itself to the changing conditions.

The Ship of State--or rather the fleet of the Commonwealth —is now sailing in stormy waters. There are dangerous breakers ahead. But it can, with genuine goodwill and with scrupulous regard to the self-respect of the constituent units, be safely guided into harbour. The Britisher is a realist who has it in him to rise above barren legalism and indefensible imperialism. That augurs well for the future of the Commonwealth. And it is certain that this attitude will have its own healthy reactions on the Indian problem.

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