Committee considered the question of the incidence of the cost of Home Administration as between Indian revenues and the British Exchequer. The majority of the members of the Committee stated in their Report as follows[1] :—

The Crewe Committee's views on the same.

'We understand that it is the intention of His Majesty's Government that the salary of the Secretary of State should, like that of all other Ministers of the Crown, be defrayed from Home revenues and voted annually by Parliament. Our main principles have already led us to distinguish the political and administrative duties of the Secretary of State, acting as a Minister, from the agency business conducted by the India Office on behalf of the Indian authorities. It appears to follow as a general conclusion that the charges incidental to the former should be met from British revenues. They form a normal part of the cost of Imperial administration, and should in equity be treated similarly to other charges of the same nature. . . . Charges on account of agency work would naturally continue to be borne by India, in whose interests they are incurred. The exact apportionment is clearly a matter of technical detail which is best left for settlement between the India Office and the Treasury. The principle that we would lay down is that, in addition to the salary of the Secretary of State, there should be placed on the Estimates (*a*) the salaries and expenses (and ultimately pensions) of all officials and other persons engaged in the political and administrative work of the Office, as distinct from agency work; (*b*) a proportionate share, determined with regard to the distinction laid down in head (*a*), of the cost of maintenance of the India Office; the exact sum payable under heads (*a*) and (*b*) to be determined by agreement between the Secretary of State and the Lords

[1] Majority Report, para. 32.

Commissioners of the Treasury from time to time. Any arrangement made under this scheme would supersede the adjustment agreed to between the India Office and the Treasury as a result of the recommendations of the Royal Commission on Indian Expenditure, over which Lord Welby presided. The India Office building and site and other similar property paid for in the past by Indian revenues, and now held by the Secretary of State for India in Council, would continue to be Indian property.'

The Joint Select Committee also recommended in its Report[1] that all charges of the India Office, not being 'agency' charges, should be paid out of moneys to be provided by Parliament.

The present arrangement.

As a consequence of all these recommendations it has been provided by the Government of India Act that 'the salary of the Secretary of State *shall* be paid out of moneys provided by Parliament, and the salaries of his Under-Secretaries and any other expenses of his department *may* be paid out of the revenues of India or out of moneys provided by Parliament;'[2] and that the salaries and allowances (where granted) of the members of the Council of India '*may* be paid out of the revenues of India or out of moneys provided by Parliament.'[3]

A departmental Committee, on which the British Treasury was represented, was appointed to go into the details of the apportionment of the India Office charges. It recommended that 'for a period of five years from April 1, 1920, the Treasury should make to the India Office an annual lump sum contribution, which would remain constant for that period and the amount of which would be equivalent to that part of the total estimated cost of the

[1] On clause 30, G. I. Bill, 1919.

[2] Section 2 (3) of the Act. The expressions 'shall' and 'may' should be noted.

[3] Section 3 (8) of the Act.

India Office for 1920-21 (less the salaries of the Secretary of State and the Parliamentary Under-Secretary of State) which is attributable to the political and administrative work of the India Office.'[1] The present arrangement[2] is as follows:—The salaries of the Secretary of State and of his Parliamentary Under-Secretary are paid out of the British revenues and a grant-in-aid in respect of the India Office is made by the Treasury. The grant-in-aid for 1920–21 was first fixed at £72,000 on the basis of the 1920–21 estimates;[3] 'but later in the year, on the basis of a revised estimate submitted by the India Office, it was fixed at £136,000[4] per annum for the period 1920–21 to 1924–25.' Subsequently, it was decided by the Secretary of State in Council in 1921–22 that the amount of this annual contribution by the Treasury should be reduced to £113,500[5] a year with effect from 1922–23. The object of this reduction was to concede to the Treasury a proportionate share of certain economies anticipated in the estimates for 1922–23 and the following two years 'as a result of a reduction in the rate of "bonus" due to the fall in the cost of living.'

The Indian Retrenchment Committee[6] stated that this reduction had not taken fully into account the reorganization of the establishments then contemplated in the India Office

[1] See *Report of the Indian Retrenchment Committee*, p. 223. See also p. 212 and p. 221 of *ibid.*

[2] *Ibid.*, pp. 212–13, and also p. 224. 'At present the cost of the (Secretary of State's) department is shared between Great Britain and India, the latter meeting the expense of such proportion of the charges as would in any case fall upon the Government of India for business done in London.'—Seton, *India Office*, p. 2.

[3] But see also the Hon'ble Mr. (now Sir) Purshotamdas Thakurdas's Supplementary Note on this question in Rep., Ind. Ret. Com., p. 224.

[4] This amount does not include the indirect contribution of £40,000 a year by the Treasury, referred to on pages 313-14 *ante*. See Sir Basil Blackett's statement in *Legislative Assembly Debates*, January 16, 1923, vol. iii, No. 17, p. 1079.

[5] This amount is exclusive of the indirect contribution of £40,000, a year, referred to in the previous footnote. *Ibid.*

[6] See p. 213 of its Report.

on the lines laid down for the administrative offices of the British Government. It had ascertained that, if allowance had been made for this, the grant-in-aid would have been fixed at a sum of £122,000, representing a saving of £8,500 to Indian revenues. It had however no doubt that the Treasury would agree to the revision in the same way that it had accepted the reduced contribution offered by the India Office as stated above. But no such revision seems to have been necessary, as the provisional estimate of the India Office expenditure for 1923–24 showed, according to Sir Basil Blackett[1] (Finance Member), a reduction[2] of £20,000 in the above figure (i.e. £122,000) and as further reduction was anticipated in the estimates for 1924–25. It may be noted here that, as a result of further consideration of the question of the apportionment of the charge of the Home administration, the British contribution in 1926–27 towards the cost of the India Office amounted to £ 119,901.[3]

Its effect.

[1] *Legislative Assembly Debates*, January 16, 1923, p. 1079.

[2] This, together with the anticipated further reduction in 1924–25, enabled the deficiency in the Treasury contribution for 1922–23 to be fully recouped. *Ibid.*

[3] *Finance and Revenue Accounts of the Government of India for the year 1926–27*, p. 305.

We may also quote the following in this connection :

The English charges against Indian revenues under the head—General Administration—' consist mainly of the salaries and expenses of the Secretary of State's Council and his establishment ; and the charges of the office of the High Commissioner, who acts as the agent of the Governments in India in respect of the purchase of stores and certain other matters. The salaries of the Secretary of State and of the Parliamentary Under-Secretary of State are borne on the British Estimates and a lump sum contribution is also made to Indian revenues on account of the cost of staff employed at the India Office on non-agency functions. . . . *The contribution in the year 1926–27 amounted to £119,901.*' (The italics are ours).—*Ibid.*

CHAPTER XIX

THE 'HOME' GOVERNMENT—POWERS[1] OF THE SECRETARY OF STATE

Pre-Reforms relations between the Home Government and the Governments in India—Sir John Strachey's views on the same—The Joint Report on the same question—The present position—The Secretary of State's control over Transferred subjects—His control over Central and Reserved subjects—The Home Government and the fiscal policy of India—Power of the Secretary of State to sell, mortgage and buy property—Rights and liabilities of the Secretary of State in Council—Indian revenue accounts to be annually laid before Parliament—Imperial interference in Dominion legislation and administration.

Pre-Reforms relations between the Home Government and the Governments in India.

The Secretary of State for India has, even under the Reforms Scheme, very extensive powers [2] in relation to the administration of India. These powers are derived partly from the Government of India Act and partly from his position as a member of the British Cabinet. Some of these powers he exercises alone and some in concert with his Council. As a member of the Imperial Executive and as Parliament's responsible Minister in respect of the administration of Indian affairs, he holds even now a specially dignified and influential position in the government of our country. Before the Reforms, though wide powers had been delegated to the authorities in India as a matter of expediency, the ultimate authority was retained by the Secretary of State in Council as the head of the administrative system of British India. As the Crewe Committee said,[3] 'the Secretary

[1] See also in this connection Chapter XXII *post*.

[2] See in this connection *The India Office* (Ch. V) by Sir Malcolm Seton.

[3] Majority Report, para. 12.

of State in Council represented in fact the supreme element of expert control at the higher end of the chain of official administration.' According to the *Report*[1] *on Indian Constitutional Reforms*, all projects for legislation, whether in the Indian or provincial legislatures, had to be sent to the Secretary of State for approval in principle. Before him were laid all variations in taxation or other measures materially affecting the revenues and in particular the customs; any measures affecting the currency operations or debt; and, generally speaking, any proposals which would involve questions of policy or which would raise important administrative issues or would involve large or novel expenditure. 'To set out all the Secretary of State's specific powers,' wrote[2] the authors of the Report, 'would be a long task: but we may mention the construction of public works and railways; the creation of new appointments of a certain value, the raising of the pay of others, or the revision of establishments beyond a certain sum; grants to local Governments, or loans to Native States; large charges for ceremonial or grants of substantial political pensions; large grants for religious or charitable purposes; mining leases and other similar concessions; and additions to the military expenditure, as classes of public business in respect of which he has felt bound to place close restrictions upon the powers of the Governments in India.' He had[3] the power of giving orders to every officer in India, including the Governor-General, and the Governor-General in Council was required by law[4] to pay due obedience to all such orders as he might receive from the Secretary of State. The constitutional justification for

[1] *Montagu-Chelmsford Report*, para. 36.
[2] *Ibid.* See also in this connection the Report of the Royal Commission upon Decentralization in India (1909), vol. i, paras. 9 and 15.
[3] Vide *The Imperial Gazetteer of India*, vol. iv, p. 36.
[4] Section 33 of the Government of India Act, 1915.

vesting some of these powers in the Secretary of State was that, since the Government of India exercised immense powers over a vast and populous country, and there was no popular control over it in India itself, it was right that it should, in matters of importance, be made to feel itself amenable to Parliament's responsible Minister who was expected to exercise conscientiously the powers which had been entrusted to him by Parliament.[1]

What the exact nature of the relations between the Home Government and the Government of India was before the Reforms and to what extent the former interfered in the details of Indian administration it is difficult for us to state, having no intimate acquaintance with the working of the administrative machinery of India. We shall have to depend for our enlightenment in respect of this matter upon those who have authority to speak. Sir John Strachey who was a member of the Government of India for nearly nine years under five Viceroys, and afterwards a member for ten years of the Council of India, wrote on this subject as follows[2] :—

Sir John Strachey's views on the same.

'It is an error to suppose that the Secretary of State is constantly interfering in the ordinary work of Indian administration. The description of the Home Government given by Mr. J. S. Mill in the time of the East India Company is as applicable now as when he wrote :—" It is not so much an executive as a deliberative body. The Executive Government of India is, and must be, seated in India itself. The principal function of the Home Government is not to direct the details of administration, but to scrutinize and revise the past acts of the Indian Governments; to lay down principles and issue general instructions for their future guidance, and to give or refuse sanction to great political measures which are referred home for approval." The

[1] See *The Montagu-Chelmsford Report*, para. 36.
[2] *India : Its Administration and Progress*, pp. 70-71.

action of the Secretary of State is mainly confined to answering references made to him by the Government in India, and, apart from great political or financial questions, the number and nature of those references mainly depend on the character of the Governor-General for the time being. Some men in that position like to minimize personal responsibilities, and to ask for the orders of the Home Government before taking action. Others prefer to act on their own judgment and on that of their councillors. The Secretary of State initiates almost nothing. . . . . So far as the Secretary of State is a free agent, the foregoing observations require no qualification. He has no disposition to interfere needlessly in the details of administration in India. Pressure, however, not easy to resist, is sometimes brought to bear upon him.'

Similar views were expressed on this question by Sir Valentine Chirol in his famous book *Indian Unrest*.[1] He wrote: 'The Secretary of State exercises general guidance and control, but, as Mill laid it down no less forcibly, "the Executive Government of India is and must be seated in India itself." Such relations are clearly very different from those of principal and agent which Mr. Montagu[2] would apparently wish to substitute for them.'

[1] *Indian Unrest*, p. 310. The reader may be referred in this connection to Chapter XXVI of that book. The whole of that chapter is of absorbing interest.

[2] For Mr. Montagu's views referred to here, see p. 306 of *Indian Unrest* by Sir Valentine Chirol. Mr. Montagu stated in the course of one of his speeches in the House of Commons as Under-Secretary of State for India:—

'Lord Morley and his Council, working through the *agency* of Lord Minto, have accomplished much.'

See in this connection P. Mukherji's *Constitutional Documents*, vol. ii, Introduction, pp. xlv–xlvii.

Vide also *The Government of India* by Mr. Ramsay MacDonald, pp. 57–58.

We may note here what Sir Malcolm Seton, Deputy Under-Secretary of State in the India Office, says on the question of relations between the Secretary of State and the Viceroy:—

'Much harm has been caused by wrong-headed or ill-informed

Joint Report on the same question.

Perhaps the most authoritative statement of the pre-Reforms relations between the Home Government and the Government of India is to be found in the *Report on Indian Constitutional Reforms.* After stating the specific powers vested by law in the Secretary of State or the Secretary of State in Council in relation to the administration of this country, the authors of the Report write[1]:—'It has been, of course, impossible in practice that the affairs of a vast and remote Asiatic dependency should be administered directly from Whitehall; and, as we have seen, large powers and responsibilities have always been left by the Secretary of State to the Government of India and again by the Government of India to local Governments. At the same time, the Secretary of State's responsibility to Parliament has set very practical limits to the extent of the delegation which he can be expected to sanction.'

Again, in another part of the Report they say[2]: 'The greater part of the duties of the Secretary of State and his Council consists in the control of the Government of India. . . . Obviously the intensity of control must vary with the interest shown by Parliament on whose behalf the Secretary of State exercises his powers. The relations between Simla and Whitehall vary also with the personal equation. If resentment has been felt in India that there has been a tendency on occasions to treat Viceroys of India as "agents" of the British Government, it is fair to add that

utterances suggesting that the control of the Home Government does, or ought to, reduce to the position of a mere subordinate agency the authority charged with the actual government of three hundred millions of the human race. In the last resort the will of the Imperial Government must prevail in this as in every other branch of Imperial affairs, but a Governor-General is no more a mere agent of the Secretary of State for India than a General commanding in the field is an orderly officer of the Secretary of State for War or of the Prime Minister.'—*The India Office*, p. 74.

[1] *Montagu-Chelmsford Report*, para 291. [2] *Ibid.*, para 35.

there have been periods when Viceroys have almost regarded Secretaries of State as the convenient mouthpiece of their policy in Parliament. Certainly there have been times when the power of the Government of India rested actually far less upon the support of the Cabinet and Parliament than on the respect which its reputation for efficiency inspired.'

Two things are clear from the views quoted above. Left to himself, the Secretary of State for India would seldom interfere in the details of Indian administration; and secondly, the extent of the Home interference in Indian affairs depended to a large extent upon the personality of the Viceroy and the Secretary of State.[1] One thing, however, was early[2] brought home to the authorities in India,

[1] It may be noted here that 'the Viceroy and the Secretary of State exchange weekly letters which are treated as confidential, although passages are sometimes communicated to their colleagues. This correspondence is supplemented by the interchange of telegrams between them, the bulk of which, relating to public affairs, are circulated to the members of Council, whether in India or in London. A portion, however, is in the nature of secret correspondence between the two heads of the Government, and need not be divulged to the colleagues of either.' In these letters 'each unburdens himself in accents of explanation, advice, encouragement, warning, appeal, protest or indignation, according as the situation may demand.'—Curzon, *British Government in India*, vol. ii, pp. 116–17 and also p. 129.

In the time of Lord Morley and also during the Great War, the practice of private communications by telegrams and letters, between the Viceroy and the Secretary of State, was 'carried to a point which amounted to a usurpation of the powers of their respective Councils and was inconsistent with the constitutional basis of Indian Government.' This practice was therefore severely criticised by the Royal Commission on the Mesopotamia Campaign of which Lord George Hamilton was the Chairman. The Commission stated *inter alia*: 'The substitution of private for public telegrams in recent years has apparently so developed as to become almost the regular channel of official intercommunication. This substitution tends to dispossess the (Executive) Council of the functions which by statute they are entitled to exercise. We have been informed by two Members of the Governor-General's Council that, according to their recollection, the Council was never consulted as to, nor were they privy to, the Campaign in Mesopotamia.'—*Ibid.*, pp. 117–18. It is hoped that the practice has been abandoned.

[2] This important principle was laid down by the Duke of Argyll,

namely, that the final control and direction of the affairs of India rested with the Home Government, and not with the authorities appointed and established by the Crown, under Parliamentary enactment, in India itself; and that the Government established in India was (from the nature of the case) subordinate to the Imperial Government at Home; and, further, that the Imperial Government must hold in its hands the ultimate power of requiring the Governor-General to introduce a measure, and of requiring also all the members of his Government to vote for it.

The position is somewhat different under the Reforms.

The present position. Subject to the provisions of the Government of India Act and the Rules made thereunder,—

(1) the Secretary of State now[1]—

(*a*) has and performs all such or the like powers and duties relating to the government or revenues of India, and has all such or the like powers over all officers appointed or continued under the Act as, if the Government of India Act, 1858, had not been passed, might or should have been exercised or performed by the East India Company, or by the Court of Directors or Court of Proprietors of the Company, either alone or by the direction or with the sanction or approbation of the Board of Control, in relation to that government or those revenues and the officers and servants of that Company, and also all such powers as might have been exercised by the Board of Control alone, and

(*b*) in particular, *may* superintend, direct and control all acts, operations and concerns which relate

Secretary of State for India, in a despatch (dated May 24, 1870), addressed to the Government of India during the Viceroyalty of Lord Mayo.—*Vide* Iyengar's *Indian Constitution*, p. 35, and also *Montagu-Chelmsford Report*, pp. 22–23.

[1] Sections 2 (1) and 2 (2) of the Act.

to the government or revenues of India, and all grants of salaries, gratuities and allowances, and all other payments and charges, out of or on the revenues of India; and

(2) the expenditure of the revenues of India, both in British India and elsewhere, is subject[1] to the control of the Secretary of State in Council, and no grant or appropriation of any part of those revenues, or of any other property coming into the possession of the Secretary of State in Council by virtue of the Government of India Act, 1858, or the Government of India Act, shall be made without the concurrence of a majority of votes at a meeting of the Council of India.

The word '*may*' in (1)(*b*) safeguards, to quote Sir Valentine Chirol,[2] the rights of the Crown and Parliament in regard to the administration of India. The phrase 'subject to the provisions of the Government of India Act' has a special significance now in view of the fact that large powers, specially financial and legislative, have been conferred upon the authorities in India by the Act and the Rules made thereunder. Nevertheless, under Sections 2 (1) and 2 (2)[3] of the Government of India Act, taken with Section 131 (1)[4] of the same Act, the powers of the Secretary of State or of the Secretary of State in Council in relation to the government of India are still very extensive. But the Act has provided for the relaxation of the control of the Secretary of State. It is laid down in Section 19A of the Act that the Secretary of State in Council may, notwithstanding anything in the Act, by Rule regulate and restrict the exercise of the

[1] Section 21 of the Act. [2] *Indian Unrest*, p. 308.
[3] See foot-note 1 on the preceding page.
[4] Section 131 (1) of the Act runs thus:
'Nothing in this Act (i.e., the Government of India Act) shall derogate from any rights vested in His Majesty, or any powers of the Secretary of State in Council, in relation to the government of India'.

powers of superintendence, direction and control vested in the Secretary of State and the Secretary of State in Council by the Act, or otherwise, in such manner as may appear necessary or expedient in order to give effect to the purposes[1] of the Government of India Act, 1919. Any Rules made under this Section relating to subjects other than Transferred must be approved in draft by both Houses of Parliament; or they will not be valid. And Rules relating to Transferred subjects made under this Section must be laid before both Houses of Parliament as soon as may be after they are made, and if an address is presented to the Crown by either House of Parliament within the next thirty days on which that House has sat after the Rules are laid before it praying that the Rules or any of them may be annulled, the Crown in Council 'may annul the Rules or any of them, and those Rules will thenceforth be void, but without prejudice to the validity of anything previously done thereunder.'

The Secretary of State's control over Transferred subjects.

The authors of the Joint Report recommended[2]: 'Now that His Majesty's Government have declared their policy of developing responsible institutions in India we are satisfied that Parliament must be asked to assent to set certain bounds to its own responsibility for the internal administration of that country. It must, we think, be laid down broadly that, in respect of all matters in which responsibility

[1] The purposes of the Government of India Act, 1919, are as follows:—

(1) the increasing association of Indians in every branch of Indian administration;

(2) the gradual development of self-governing institutions, with a view to the progressive realization of responsible government in British India as an integral part of the Empire; and

(3) the granting to the provinces of India in provincial matters the largest measure of independence of the Government of India, compatible with the due discharge by the latter of its own responsibilities.—See the Preamble to the Act of 1919. App. A.

[2] *Montagu-Chelmsford Report*, para. 291.

is entrusted to representative bodies in India, Parliament must be prepared to forgo the exercise of its own power of control, and that this process must continue *pari passu* with the development of responsible government in the provinces and eventually in the Government of India. . . . The Secretary of State would, we imagine, ask Parliament's assent to his declaring by statutory orders which he would be empowered to make under the Act that such and such subjects in the various provinces have been transferred; and when Parliament has assented to such orders the Secretary of State would cease to control the administration of the subjects which they covered.'[1] Similarly, the Joint Select Committee recommended that over Transferred subjects the control of the Governor-General in Council, and thus of the Secretary of State, should be restricted in future within the narrowest possible limits.[2] In accordance with these recommendations, the following Rule [3] has been made by the Secretary of State in Council under Section 19A of the Government of India Act:—

'The powers of superintendence, direction and control vested in the Secretary of State and the Secretary of State in Council under the Act or otherwise shall, in relation to Transferred subjects, be exercised only for the following purposes, namely:—

(1) To safeguard the administration of Central subjects;

(2) to decide questions arising between two provin-

[1] We may also note the following in this connection:—
'It is almost a truism to say that any extension of popular control over an official system of government must be accompanied by some relaxation of the bonds of superior official authority.'—*Montagu-Chelmsford Report*, para. 10.

[2] Joint Select Committee's Report on Clause 33 of the Government of India Bill.

[3] The Government of India Notification No. 835-G., dated December 14, 1920—*The Calcutta Gazette*, December 22, 1920.

ces, in cases where the provinces concerned fail to arrive at an agreement;

(3) to safeguard Imperial interests;

(4) to determine the position of the Government of India in respect of questions arising between India and other parts of the British Empire; and

(5) to safeguard the due exercise and performance of any powers and duties possessed by or imposed on the Secretary of State or the Secretary of State in Council, under or in connection with or for the purpose of the following provisions of the Act, namely, Section 29A, Section 30 (1A), Part VIIA, or of any rules made by or with the sanction of the Secretary of State in Council.' [1]

[1] Section 29A of the Act relates to the appointment of a High Commissioner for India, to the conditions of his employment and to the delegation of certain powers to him.—See pages 310-13 *ante*.

Section 30 (1a) of the Act runs thus:

'A local Government may, on behalf and in the name of the Secretary of State in Council, raise money on the security of revenues allocated to it under the Government of India Act, and make proper assurances for that purpose, and rules made under the Act may provide for the conditions under which this power shall be exercisable.' For the Local Government Borrowing Rules, see Appendix C.

Part VIIA of the Act relates to the Civil Services in India. See Chapter XXII.

'Commenting upon this Rule under Section 19A of the Act (i.e. S. 33 of the Act of 1919), the Joint Select Committee stated:—

"This rule (which, as already stated, is exactly parallel with Devolution Rule 49) is confined to relaxation of the Secretary of State's control over Transferred subjects, and the Committee consider that no statutory divestment of control, except over the Transferred field, is either necessary or desirable. It is open to the Secretary of State to entrust large powers, administrative and financial, to the Governor-General in Council and the provincial Governors in Council, and he will no doubt be largely influenced in deciding whether or not to require reference to himself in any given case or whether to interpose his orders when reference has been made, by the attitude of provincial public opinion as expressed in the Legislative Council. But these matters cannot be regulated by statutory rules, and any authority which the Secretary of State may

Again, it is laid down in Devolution Rule 27[1] that, except in those cases[2] in which the previous sanction of the Secretary of State in Council or of the Governor-General in Council is required for including a proposal for expenditure on a Transferred subject in a demand for a grant, the local Government of a Governor's province will have power to sanction expenditure on Transferred subjects to the extent of any grant voted by the Legislative Council. It will also have power, under the same Devolution Rule, to sanction any expenditure on Transferred subjects which relates to the heads[3] enumerated in Section 72D (3) of the Act (i.e., to non-votable heads of expenditure), subject to the approval of the Secretary of State in Council or of the Governor-General in Council, if any such approval is required by any Rule for the time being in force. Commenting upon this Rule the Joint Select Committee stated[4]:

'It is the clear intention of the Act of 1919 that expenditure on transferred subjects shall, with the narrowest possible reservations, be within the exclusive control of the provincial legislatures and subject to no higher sanction save such as is reserved to the Governor by Section 11 (2) (*b*)[5] of the Act (which empowers him to authorize expenditure in cases of emergency). But some reservations are required. The Secretary of State in

decide to pass on to the official Governments in India will be a mere delegation of his own authority and responsibility, for the exercise of which in relation to central and reserved subjects he must remain accountable to Parliament". Second Report from the Joint Select Committee on the Government of India Act, 1919 (Draft Rules).'

[1] See Appendix B.

[2] The cases are mentioned in Schedule III to the Devolution Rules. See pp. 331–33 *post*; see also Appendix B.

[3] Proposals for expenditure relating to those heads are not submitted to the vote of a Governor's Legislative Council. See p. 216 *ante*.

[4] Second Report from the Joint Select Committee on the Government of India Act, 1919 (Draft Rules).

[5] I.e. Section 72D (2) (*b*) of the Government of India Act.

Council must retain control over expenditure on transferred subjects which is likely to affect the prospects or rights of the all-India services, which he recruits and will continue to control, and he must retain power to control the purchase of stores in the United Kingdom. But subject to these limitations, Ministers should be as free as possible from external control, and the control to be exercised over expenditure on transferred subjects should be exercised by the provincial legislature, and by that body alone.'

Accordingly, under Schedule III[1] to the Devolution Rules, the previous sanction of the Secretary of State in Council is necessary—

'(1) to the creation of any new or the abolition of any existing permanent post, or to the increase or reduction of the pay drawn by the incumbent of any permanent post, if the post in either case is one which would ordinarily be held by a member of an all-India service, or to the increase or reduction of the cadre of an all-India service;

(2) to the creation of a permanent post on a maximum rate of pay exceeding Rs. 1,200 a month, or in Burma Rs. 1,250 a month, or the increase of the maximum pay of a sanctioned permanent post to an amount exceeding Rs. 1,200 a month or in Burma Rs. 1,250 a month;

(3) to the creation of a temporary post with pay exceeding Rs. 4,000 a month, or to the extension beyond a period of two years of a temporary post or deputation with pay exceeding Rs. 1,200 a month or in Burma Rs. 1,250 a month;[2]

[1] This Schedule relates to the *Transferred subjects* only.—App. B.

[2] 'If the holder of a temporary post created by the local Government, the rupee pay of which does not exceed Rs. 3,000 a month, would have drawn overseas pay in sterling had he not been appointed to this post, the local Government may permit the holder of that post to draw, in addition to the rupee pay sanctioned for the post, overseas pay in sterling not exceeding the amount to which he would have been entitled had he not been appointed to the temporary post.'—Sch. III to the Devolution Rules.

(4) to the grant to any Government servant or to the family or other dependants of any deceased Government servant of an allowance, pension or gratuity which is not admissible under rules made or for the time being in force under section 96B of the Act, except in the following cases :—

(*a*) compassionate gratuities to the families of Government servants left in indigent circumstances, subject to such annual limit as the Secretary of State in Council may prescribe ; and

(*b*) pensions or gratuities to Government servants wounded or otherwise injured while employed in Government service or to the families of Government servants dying as the result of wounds or injuries sustained while employed in such service, granted in accordance with such rules as have been or may be laid down by the Secretary of State in Council in this behalf.'

Every application for the sanction of the Secretary of State in Council 'shall be addressed to the Governor-General in Council who shall, save as hereinafter provided, forward the same with his recommendations, and with such further explanations of the proposal as he may have seen fit to require from the local Government (concerned), to the Secretary of State in Council.

If the application relates to—

(1) the grant in an individual case of any increase of pay, or

(2) the creation or extension of a temporary post,'

the Governor-General in Council may sanction the proposal on behalf of the Secretary of State in Council, or may, and, if he dissents from the proposal, must forward the application with his recommendations, and with such further

explanations of the proposal as he may have thought fit to require from the local Government concerned, for the orders of the Secretary of State in Council.

The Secretary of State's control over Central and Reserved subjects.

We have in the preceding few paragraphs shown the extent of control which the Secretary of State or the Secretary of State in Council can exercise over the Transferred subjects. We shall now consider the nature of his control over the administration of the Reserved subjects and of the subjects, known as Central, which are under the administration of the Governor-General in Council. With regard to these subjects, there are no such statutory Rules providing for the relaxation of the control exercisable over them by the Secretary of State or by the Secretary of State in Council as there are in the case of the Transferred subjects The Joint Select Committee [1] was strongly opposed to any statutory divestment of control except over the Transferred field. It held that any authority which the Secretary of State might decide to pass on to the official Governments in India would be a mere delegation of his own authority and responsibility, for the exercise of which in relation to Central and Reserved subjects he must remain accountable to Parliament. Thus there may be delegation of financial authority to the Governments in India under the proviso to Section 21 of the Act. Under it a grant or appropriation may be made by them for any subject in accordance with provisions or restrictions prescribed by the Secretary of State in Council with the concurrence of a majority of votes at a meeting of the Council. Commenting on Devolution Rule 27[2], the Joint Select Committee stated [3]:

[1] Second Report from the Joint Select Committee on the Government of India Act, 1919 (Draft Rules).

[2] See p. 330 or Appendix B.

[3] Second Report from the Joint Select Committee on the Government of India Act, 1919 (Draft Rules).

'They think that it is unnecessary and undesirable to prescribe by statutory rules under the Act of 1919 the extent to which the Secretary of State in Council is prepared to delegate to provincial Governments his powers of control over expenditure on reserved services. Such delegation has always in the past been effected by orders of the Secretary of State in Council made in virtue of the powers conferred by the proviso to Section 21 of the Act of 1915, and the Committee recommend that this practice should be continued under the new regime. When the Act of 1919 comes into operation, an order under section 21 of the earlier Act would necessarily assume an entirely new complexion, in view of the large measure of control over appropriations for reserved services vested by the new Act in the provincial Legislative Councils, and such an order might by its provisions well recognize the principles to which the Committee alluded in their observations on clause 33 in their Report on the Bill. Thus the Secretary of State in Council might in some cases permit the Governors in Council to dispense with his previous sanction to proposed appropriations for new reserved expenditure if a resolution approving the same had been passed by the Legislative Council. But whatever arrangement of this kind the Secretary of State in Council might think fit to make, the result would be a mere delegation of the Secretary of State's statutory powers of control, and his responsibility to Parliament would and must remain undiminished.'

Rules[1] under Section 21 of the Act have been made by the Secretary of State in Council to the effect that certain classes of expenditure relating to Central and Reserved subjects may not be sanctioned[2] by the Governor-General in Council or by a Governor in Council, as the

[1] See Resolutions Nos. 1448-E.A., and 1449-A., Simla, September 29, 1922. *Vide The Gazette of India*, October 7, 1922, pp. 1214-18.
[2] See Appendix I.

case may be, without the previous sanction of the Secretary of State in Council. These Rules, which were first published on October 7, 1922, have superseded all previous Rules of a similar nature.

Rules relating to expenditure on Central and Reserved subjects.

Where the previous sanction of the Secretary of State in Council is required to any expenditure, it should ordinarily be obtained before the Legislative Assembly or the Legislative Council, as the case may be, is asked to vote supply to meet the expenditure. Departures from this rule may be made only in cases of extreme urgency, where the time available is so short that the required sanction cannot be obtained even by telegraph ; but in such cases of departure, a statement must be submitted to the Secretary of State in Council, 'showing all schemes for which supply has been asked before sanction has been obtained.'

Subject to these Rules and to the provisions of Section 67A[1] of the Government of India Act, the Governor-General in Council can authorize expenditure from central revenues upon subjects other than Provincial, and can also delegate, with the previous consent of the Finance Department, such authority on such conditions as he may think fit, either to an officer subordinate to him or to a local Government acting as his agent in relation to a Central subject.

Similarly, subject to those Rules and to the provisions of Section 72D[2] of the Act, a Governor in Council has full power to sanction expenditure upon Reserved subjects and, with the previous consent of the provincial Finance Department, to delegate such power on such conditions as he may consider fit, to any officer subordinate to him.

In regard to matters other than financial, relating to the Reserved and Central subjects, the following recommendations have been made by authoritative persons and bodies

[1] See Chapter XIII *ante*.

[2] See Chapter XIV *ante*.

as to what should be the attitude of the Home Government towards them under the Reforms. The authors of the Joint Report said [1]:—

'Even as regards reserved subjects, while there cannot be any abandonment by Parliament of ultimate powers of control, there should . . . be such delegation of financial and administrative authority as will leave the Government of India free, and enable them to leave the provincial Governments free, to work with the expedition that is desirable. . . . We are agreed that a wider discretion ought henceforth to be left to the Governor-General in Council; and that certain matters which are now referred Home for sanction[2] might in future be referred merely for the information of the Secretary of State in Council. . . . It will follow in such cases in future that, when the policy of the executive Government in India is challenged, Parliament must be asked to accept the explanation that in accordance with deliberate policy the Government of India have been given discretion in respect of the topic in question and that for this reason the Secretary of State is not prepared to interfere with what has been settled in India. It is not part of our plan to make the official Governments in India less amenable to the control of Parliament than hitherto. It must be for Parliament itself to determine the limits which it will set to the exercise of its own powers. On the other hand, intervention by Parliament may involve intervention by the Government of India in matters which otherwise would be recognized as of provincial concern.'

[1] Joint Report, para. 292.

[2] 'Reference to the Secretary of State is still necessary before the Government of India introduces Bills which involve Imperial or military affairs or foreign relations, affect the rights of European British subjects or the law of naturalization, or concern the public debt or customs, currency, shipping, and certain other matters, but there has been marked decentralization of administrative finance, not only from the Supreme Government to the provinces but from Whitehall to Delhi.'—Seton, *The India Office*, pp. 84–85.

Next, the Committee on the Home Administration of Indian Affairs observed[1] in its Report :—

'It appears to us that the conception of the Reforms Scheme leads naturally to the acceptance of the principle . . . that where the Government of India find themselves in agreement with a conclusion of the Legislative Assembly, their joint decision should ordinarily prevail.'

And one[2] of its special recommendations was as follows :—

'Where the Government of India are in agreement with a majority of the non-official members of the Legislative Assembly, either in regard to legislation or in regard to resolutions on the Budget or on matters of general administration, assent to their joint decision should only be withheld in cases in which the Secretary of State feels that his responsibility to Parliament for the peace, order and good government of India, or paramount considerations of Imperial policy, require him to secure reconsideration of the matter at issue by the Legislative Assembly.'[3]

Finally, the Joint Select Committee stated[4] :—

'The Committee have given most careful consideration to the relations of the Secretary of State with the Government of India, and through it with the provincial governments. In the relations of the Secretary of State with the Governor-General in Council the Committee are not of opinion that any statutory change can be made, so long as the Governor-General remains responsible

[1] *Vide* Majority Report, para. 13. [2] Para. 35, *ibid*.

[3] Another recommendation of the Committee was :—

'As a basis of delegation, the principle of previous consultation between the Secretary of State and the Government of India should be substituted in all cases in which the previous sanction of the Secretary of State in Council has hitherto been required.'—Majority Report, para. 35. See note 2 on page 336. See in this connexion *India's Parliament*, vol. viii, pp. 179-80.

[4] *Vide* the Joint Select Committee's Report on Clause 33 of the Government of India Bill.

to Parliament, but in practice the conventions which now govern these relations may wisely be modified to meet fresh circumstances caused by the creation of a Legislative Assembly with a large elected majority. In the exercise of his responsibility to Parliament, which he cannot delegate to any one else, the Secretary of State may reasonably consider that only in exceptional circumstances should he be called upon to intervene in matters of purely Indian interest where the Government and the Legislature of India are in agreement.'

'This examination of the general proposition leads inevitably to the consideration of one special case of non-intervention. Nothing is more likely to endanger the good relations between India and Great Britain than a belief that India's fiscal policy is dictated from Whitehall in the interests of the trade of Great Britain. That such a belief exists at the moment there can be no doubt. That there ought to be no room for it in the future is equally clear. India's position in the Imperial Conference opened the door to negotiation between India and the rest of the Empire, but negotiation without power to legislate is likely to remain ineffective. A satisfactory solution of the question can only be guaranteed by the grant of liberty to the Government of India to devise those tariff arrangements which seem best fitted to India's needs as an integral portion of the British Empire. It cannot be guaranteed by statute without limiting the ultimate power of Parliament to control the administration of India, and without limiting the power of veto which rests in the Crown; and neither of these limitations finds a place in any of the statutes in the British Empire. It can only therefore be assured by an acknowledgment of a convention. 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.'

'The relations of the Secretary of State and of the Government of India with provincial governments should, in the Committee's judgment, be regulated by similar principles, so far as the reserved subjects are concerned.[1] It follows, therefore, that in purely provincial matters, which are reserved, where the provincial government and legislature are in agreement, their view should ordinarily be allowed to prevail, though it is necessary to bear in mind the fact that some reserved subjects do cover matters in which the central government is closely concerned.'

The Home Government and the fiscal policy of India.

'To what extent the above recommendations have been actually given effect to, it is difficult for us to say. In one respect, however, they appear to have been followed. The principle of fiscal autonomy for India has been definitely accepted by the British Government.[2] In the course of his reply to a deputation from Lancashire on the Indian

[1] Also note the following:—'It appears to us to follow from our general reasoning that in so far as provincial action comes under the cognizance of the Secretary of State, either directly or through the Government of India, he should regulate his intervention with regard to the principle which we have sought to apply to the working of the central Government, namely, that where the Government find themselves in agreement with a conclusion of the legislature, their joint decision should ordinarily be allowed to prevail.'—The Crewe Committee, Majority Report, para. 18.

[2] *Vide Report of the Indian Fiscal Commission*, 1921-22, p. 4.

import duty on cotton goods, Mr. Montagu stated[1] on March 23rd, 1921, as Secretary of State for India: 'After that Report by an authoritative Committee of both Houses and Lord Curzon's promise in the House of Lords, it was absolutely impossible for me to interfere with the right which I believe was wisely given and which I am determined to maintain—to give to the Government of India the right to consider the interests of India first, just as we, without any complaint from any other parts of the Empire, and the other parts of the Empire without any complaint from us, have always chosen the tariff arrangements which they think best fitted for their needs, thinking of their own citizens first'. In a Despatch, dated June 30th, 1921, the Secretary of State stated that he had, on behalf of His Majesty's Government, accepted the recommendation of the Joint Select Committee on the question of fiscal autonomy for India.[2] His words were[3]:

'The Secretary of State should, as far as possible, avoid interference on this subject when the Government of India and the Indian Legislature are in agreement, and it is considered 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.'

The Government of India's acceptance of the principle of discriminating protection as conducive to the best interests of India, the appointment of a Tariff Board, and

[1] *Report of the Indian Fiscal Commission*, p. 4. *Vide* also *Fiscal Policy in India* by Dr. P. N. Banerji, pp. 114-16.

[2] *Ibid.*

[3] See p. 381 of *India's Parliament*, vol. ii, prepared by the Director, Central Bureau of Information, Government of India. *Vide* also in this connection the debate in the Council of State on the resolution regarding 'Fiscal powers under Constitutional Reforms'. *Ibid.*, pp. 378-82.

the enactment in recent years of measures for the protection of Indian industries prove the fact that India now enjoys a certain[1] amount of freedom in respect of fiscal matters.

During the regime of Mr. Montagu's successor in office, the Home interference in Indian affairs appears to have increased. This, at least, we gather from the views of one who has a right to express an opinion on the question. In an article [2] published in the *Contemporary Review*, November, 1923, Sir Tej Bahadur Sapru, who was, till January 1923, a member of the Viceroy's Executive Council, wrote as follows:—

'It must be distinctly recognized that the Government of India is not an independent Government, and howsoever it may be denied, the fact remains that in all vital matters,

[1] See also in this connection the reply given by Lord Winterton, as Under-Secretary of State for India, to another deputation representing cotton textile interests, on March 29, 1922, in Dr. P.N. Banerji's *Fiscal Policy in India*, pp. 121–22, or in the *Indian Annual Register*, 1922–23, vol. ii, edited by Mr. H. N. Mittra, pp. 197–200. He stated among other things: 'I should like first of all to deal very briefly with the constitutional point that has been raised. I will at once say that *of course the ultimate financial responsibility* under the Government of India Act rests with the Secretary of State, but I think it will be generally admitted that the Government of India must have wide latitude in deciding the steps to be taken in particular instances. . . . If you accept my argument, real, complete, self-government must always be based on fiscal autonomy. However, do not let us raise that point at this moment. I would only venture to say with all respect that sooner or later, when this question comes to be the subject of public controversy and public debate, not perhaps in this Parliament but in a future Parliament, when the advance is again made, which, I suppose, we all hope will be made as anticipated by Parliament—then Parliament will have to make up its mind when the question is most emphatically brought up of the cotton interest of Lancashire, with all its magnificent record of service and devotion to the Empire, on which leg it stands, whether it is prepared to say it will grant complete fiscal autonomy to India or not.'—*The Indian Annual Register*, 1922–23, vol. ii, pp. 197–98.

This statement indicates rather a change of attitude on the part of the Home authorities, and is against the spirit of the recommendation of the Joint Select Committee on the question of fiscal autonomy for India. It does not appear, however, that the principle underlying it has been actually followed in practice.

[2] The article was entitled '*The Problem of India's Aspirations*.'

and sometimes even in unimportant ones, the policy for India is formulated not at Delhi, nor at Simla, but in Whitehall. . . . Frankly speaking, I am one of those who feel that the position in India would be ever so much easier, even under the present constitution, if the Government of India could be left to deal with the local problems independently, and if the control of Whitehall over India could be substantially relaxed.' This, then, was the position even after the introduction of the Reforms.

Power of the Secretary of State to sell, mortgage and buy property.

The Secretary of State in Council may,[1] with the concurrence of a majority of votes at a meeting of the Council, sell and dispose of any property for the time being vested in the Crown for the purposes of the government of India and raise money on any such property, and purchase and acquire any property.

Rights and Liabilities of the Secretary of State in Council.

As a corporate body, the Secretary of State in Council[2] may sue and be sued. Neither the Secretary of State nor any member of his Council is personally liable in respect of any contract or assurance 'made by or on behalf of the Secretary of State in Council, or any other liability incurred by the Secretary of State or the Secretary of State in Council in his or their official capacity.' Nor is any person executing

[1] Section 28 (1) of the Act.

Any property acquired in pursuance of this section must vest in the Crown for the purposes of the Government of India.—Section 28 (3), *ibid*.

[2] Section 32 (1) of the Act. See in this connection Ilbert's *Government of India* (third edition), pp. 196–202.

In England, since the King can do no wrong, 'he cannot be prosecuted criminally, or, without his own consent, sued civilly in tort or in contract in any court in the land. . . . If a person has a claim against the Crown for breach of contract, or because his property is in its possession, he may bring a Petition of Right, and the Crown on the advice of the Home Secretary will order the petition indorsed "Let right be done", when the case proceeds like an ordinary suit' —Lowell, *Government of England*, vol. i, p. 27.

any contract on behalf of the Secretary of State in Council personally liable in respect of the same. All such liabilities, and all costs and damages in respect thereof, will be borne by the revenues of India.[1]

Indian revenue accounts to be annually laid before Parliament.

Finally, the Secretary of State in Council must,[2] within the first twenty-eight days during which Parliament is sitting after the 1st of May in every year, lay before both Houses of Parliament detailed accounts of receipts and disbursements, both in India and elsewhere, for the financial year previous to that last completed and the latest estimate of the same for the last financial year, together with a statement exhibiting 'the moral and material progress and condition of India.'

Imperial interference in Dominion legislation and administration.

We have in a previous chapter referred to the financial powers of some of the Dominion Parliaments. We may note here, by way of contrast, the extent of the Imperial interference with affairs other than financial, of a self-governing Dominion. As regards legislation, though the Governor 'has an absolute discretion to refuse to assent to any and every Bill, practically this is never done save on ministerial advice.'[3] In administration he 'has no real control of any public officer, and . . . in effect cannot do any executive acts effectively without ministerial aid.'[4] 'The degree,' writes Professor Keith, 'to which the Imperial Government interferes in the affairs of a self-governing colony has steadily decreased, and now has probably reached its minimum, as it may safely be said that interference is so restricted as to render further restriction

[1] Section 32 (4) of the Act. [2] Section 26 of *ibid.*

[3] *Responsible Government in the Dominions* (1909), by Prof Keith, p. 167.

[4] *Ibid.*, page 183.

incompatible with the maintenance of the power at all.'[1] Similar views have been expressed by Professor Dicey 'The Imperial Parliament,' he writes,[2] 'now admits and acts upon the admission, that any one of the Dominions has acquired a moral right to as much independence, at any rate in regard to matters occurring within the territory of such Dominion, as can from the nature of things be conceded to any country which still forms part of the British Empire. . . . Any Dominion has now a full and admitted right to raise military or naval forces for its own defence. . . . The Imperial Government . . . is now ready at the wish of a Dominion to grant to such Dominion the power to amend by law the constitution thereof though created under an Act of the Imperial Parliament.'[3]

[1] *Responsible Government in the Dominions* (1909) by Prof. Keith, p. 184.

[2] See *Law of the Constitution* (eighth edition), Introduction, pp. xxx–xxxi.

[3] We may note in this connection what the Imperial Conference of 1926 laid down :

Great Britain and the Dominions '*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.*'

CHAPTER XX

THE GOVERNMENT OF INDIA

The Viceroy and Governor-General of India—The title 'Viceroy' has no statutory basis—History of the office of Governor-General—Position of the Governor-General—His powers—Origin of his over-ruling power—His powers during absence from his Council—His prerogative of mercy—His duties and responsibilities—His oaths.

The Governor-General in Council—Evolution of the Executive Council of the Governor-General—Its present constitution—Procedure followed at meetings of the Governor-General's Council—The present Executive Departments of the Government of India—The Foreign and Political Department—The Army Department—The Home Department—The Legislative Department—The Department of Railways and Commerce—The Department of Industries and Labour—The Department of Education, Health and Lands—The Finance Department—How the Council works: the original system—Introduction of the 'departmental' system—The present system—The Munitions Fraud Case and the resignation of Sir Thomas Holland: their constitutional significance—The Royal Commission upon Decentralization on the transaction of business of the Governor-General in Council—Nature of the Council, its irresponsible character—The Council Secretaries—Advantages and disadvantages of the appointment of Council Secretaries—Relations between the Government of India and the Provincial Governments before the Reforms—Pre-Reforms distribution of the functions of Government—How control was exercised by the central Government—The present position as regards the control exercised by the Government of India over local Governments—Central control over Transferred subjects—Central control over Reserved subjects—Duty of local Governments to supply information—Power to declare and alter the boundaries of provinces.

At the head of the Government of India is the Governor-General who has also, as the representative of the Crown

in India, borne the title of Viceroy since 1858. This title has no statutory basis, since it has as yet found no place in any Parliamentary enactment relating to India. The only designation employed in Acts of Parliament is that of Governor-General. The title was first [1] used in the famous Proclamation by Queen Victoria in 1858, which referred to Viscount Canning, who had already been appointed Governor-General by the Court of Directors, as 'Our first Viceroy and Governor-General.' 'None of the Warrants appointing Lord Canning's successors refers to them as "Viceroys"; and the title, which is frequently employed in Warrants [2] of Precedence, in the statutes [3] of the Indian Orders, and in public notifications, appears to be one of ceremony, which may most appropriately be used in connection with the State and social functions of the Sovereign's representative, for the Governor-General is the sole representative of the Crown in India.' [4]

The Viceroy and Governor-General of India.

The title 'Viceroy' has no statutory basis.

The origin of the office of Governor-General is to be traced to the year 1773. As has been stated before, until 1773 the three presidencies of Bengal, Madras and Bombay were, in each case, under a President or Governor and a Council composed of servants of the East India Company and were independent of one another. The Regulating Act of 1773

History of the office of Governor-General.

[1] The title was also used in the Royal Proclamation of December 23, 1919.

[2] See in this connection *The Gazette of India*, August 19, 1922, Part I, p. 1029.

[3] See *The Indian Year Book*, 1923, edited by Sir Stanley Reed, p. 2.

[4] *The Imperial Gazetteer of India*, vol. iv, p. 16.

'Where the Governor-General is referred to as the statutory head of the Government of India, he is designated Governor-General: where he is regarded as the representative of the Sovereign, he is spoken of as Viceroy.'—Curzon, *Problems of Government in India*, vol. ii, p. 49.

provided for the appointment of a Governor-General and four Counsellors for the government of the Presidency of Fort William in Bengal and declared Warren Hastings, who had been appointed Governor of Bengal in 1772, to be the first Governor-General. Moreover, 'the said Governor-General and Council, or the major part of them,' were given by the Act certain powers of control and superintendence over the presidencies of Madras and Bombay. These powers of control were further emphasized and enlarged by Pitt's Act of 1784 and the Charter Act of 1793. Finally, the Charter Act of 1833 converted the Governor-General of Bengal in Council into the Governor-General of India in Council[1] and vested in the latter the superintendence, direction and control of the whole civil and military government of the Company's territories and revenues in India.[2] But it was not till 1854[3] when a Lieutenant-Governor was appointed, under the Charter Act of 1853, for the province of Bengal (including Bihar and Orissa) which had hitherto been administered directly by the Governor-General of India as the Governor thereof, that the Governor-General in Council assumed his 'present character of a general controlling authority' in British India.

Position of the Governor-General.

The Governor-General occupies in many respects a unique position in our constitutional system. Apart from his statutory powers, which are undoubtedly very great, as the head of the administration he is, as Viceroy, to quote Mr. Ramsay MacDonald, 'the Crown visible in India, the ceremonial head of the sovereignty, the great lord.'[4] He 'is surrounded

[1] Section 41 of the Charter Act of 1833.—P. Mukerji's *Constitutional Documents*, vol. I.

[2] Section 39 of *ibid.*

[3] Before that, Agra had been carved out of the overgrown presidency of Bengal and constituted in 1836 a Lieutenant-Governorship, under an Act of 1835, in the name of the North-Western Provinces.

[4] *The Government of India* by M. J. Ramsay MacDonald, p. 57.

'And yet I desire to say on this parting occasion that I regard the

by pomp and awe; ceremony walks behind and before him, and does obeisance to him.'[1] Both his arrival at, and departure from, India are 'invested with special dignity and display.' He is appointed[2] by the Crown by Warrant under the Royal Sign Manual and usually holds office for a period of five years. The maximum annual salary that may[3] be paid to him under the Act is Rs. 2,56,000. He is

office of Viceroy of India, inconceivably laborious as it is, as the noblest office in the gift of the British Crown.'—Lord Curzon's speech at the Byculla Club.—*Lord Curzon in India*, vol. ii, p. 319.

Vide in this connection Lord Curzon's *British Government in India*, vol. ii, ch. xi.

[1] Ramsay MacDonald, *The Government of India*, p. 54.

[2] According to Ilbert, the appointment is made on the advice of the Prime Minister (*The Government of India*, p. 204). But Lord Curzon says:—

'I have often been asked the question by whom and in what circumstances the appointment to the Viceroyalty is made . . . . . While the appointment is vested as a matter of course in the Sovereign, the respective parts that are played in the selection by the Prime Minister, the Secretary of State for India, and the Cabinet, depend not upon any law, written or unwritten, but upon the Prime Minister for the time being. I have known cases, and others are recorded in published Memoirs, where prolonged discussions took place in Cabinet upon the merits of a suggested candidate or candidates. I have known other cases where the Prime Minister consulted a few of his colleagues before making his submission to the Sovereign. Ordinarily the Secretary of State for India would be the first to be asked to offer suggestions. But I have known one case where he was not even informed until after the appointment had been made by the Prime Minister and the Sovereign in combination. The tendency, as Cabinets have grown in size to their recent unwieldy dimensions, is unquestionably to treat important appointments less and less as matters for Cabinet discussion, and more and more as falling within the province of the Prime Minister, relying upon such advice as he may choose to seek.'—*British Government in India*, vol. ii, p. 62.

[3] The Secretary of State in Council is empowered by the Act to fix the actual salary of the Viceroy within the statutory maximum. The actual salary has been fixed at Rs. 2,50,800 per annum. Besides, the Viceroy obtains an outfit allowance (for voyage and equipment) of £5,000 if, at the time of his appointment, he is resident in Europe, and an annual sumptuary allowance of Rs. 40,000 during his tenure of office. He is required to pay Income-tax in respect of his salary. But the allowances for his official journeys, 'the wages and pensions of the huge native establishments, the Private and Military Secretaries'

not subject (i) to the original jurisdiction of any High Court by reason of anything counselled, ordered or done by him in his public capacity only, or (ii) to the original criminal jurisdiction of any High Court in respect of any offence not being treason or felony; nor (iii) is he liable to be arrested or imprisoned in any suit or proceeding in any High Court acting in the exercise of its original jurisdiction.[1]

His powers.

'The Governor-General, or Viceroy, of India', wrote President Lowell, 'and the Czar of Russia are sometimes said to be the two great autocrats of the modern world'.[2] If we take into consideration the constitutional position of the Governor-General in the Government of India, this statement appears to be an exaggeration of facts even as they were at the time when President Lowell made it. But, still, the powers vested in the Governor-General by statute or otherwise are immense and various[3] even under the Reforms Scheme. We have, in preceding chapters, referred to those of his powers, which are in relation to the Indian legislatures, central and provincial, and to Acts passed by them. We have also discussed

Offices, and the maintenance of the Viceregal palaces, have always been a charge upon public funds.' See Curzon, *British Government in India*, vol. ii, pp. 99–100; also Ilbert, *Government of India*, 3rd Ed., p. 253, and *Finance and Revenue Accounts of the Government of India for the year 1926–27*.

[1] Section 110 of the Act. The Reforms Enquiry Committee held that if the immunity was to be maintained, it should be made complete, and that the Governor-General and the other high officials mentioned in Section 110(1) of the Act, should be exempt from the jurisdiction of all courts and not merely from the original jurisdiction of the High Courts.—Majority Report, para. 91 and also recommendation 2.

[2] Lowell, *The Government of England*, vol. ii, p. 421.

[3] 'The Viceroy,' says Mr. Ramsay MacDonald, 'performs three great functions. He personifies the Crown, he represents the Home Government, he is the head of the administration.'—*The Government of India*, p. 37.

"My information leads me to think that the position of the Viceroy is not at present so far impaired as to preclude him from still exerting the full weight of his authority."—Curzon, *British Government in India*, vol. ii, p. 114.

See also pages 109–[illegible] of *ibid* in this connection.

before his power of legislation by the process of certification. We now propose to state some of the other powers specifically vested in him by the Act or otherwise. He may,[1] 'in cases of emergency, make and promulgate ordinances for the peace and good government of British India or any part thereof,' which will have the force of law for a period not exceeding six months. His power of making such ordinances is subject, however, to the same restrictions as the power of the Indian Legislature to make laws; and any ordinance so made by him may be disallowed by the Crown in Council and may be controlled and superseded by an Act of the Indian Legislature. The last limitation is, really speaking, no limitation at all, in view of the fact that no measure can be lawfully introduced into either Chamber of the Indian Legislature repealing or amending any Act or ordinance made by the Governor-General without his previous sanction. This power of making ordinances has been exercised several times.[2] He has power also to override the majority of his Council and act on his own responsibility with regard to any measure 'whereby the safety, tranquillity or interests of British India, or of any part thereof, are or may be, in his judgment, essentially affected.'[3] This power is rarely exercised. It was under this provision that Lord Lytton acted in March 1879, when he, in opposition to the decision of the majority of his Council, exempted from (import) duty the coarser kinds of English cotton goods, 'so that imports of all those qualities which could at that time be manufactured in India' might be left free.[4]

[1] Section 72 of the Act.

[2] In October, 1924, the Governor-General promulgated, at the instance of the Bengal Government, an ordinance to supplement the ordinary criminal law in Bengal. The ordinance was known as the Bengal Criminal Law (Amendment) Ordinance, 1924.

[3] Section 41 (2) of the Act.

[4] See *Report of the Indian Fiscal Commission*, 1921-22, para. 161.

Origin of his overruling power.

The origin of this overriding power of the Governor-General is interesting. Under the Regulating Act of 1773, if there arose any difference of opinion on any question brought before a meeting, the Governor-General and his Council were to be bound by the decision of 'the major part of those present.' As a consequence of this provision, Warren Hastings, who was made the first Governor-General by the said Act, was powerless before his Council. His policies were often frustrated and his decisions overruled by Francis, Clavering and Monson, three of his four Councillors, acting together in opposition to him. 'In 1776,' writes Sir Courtenay Ilbert,[1] 'he was reduced to such depression that he gave his agents in England a conditional authority to tender his resignation.' Though his difficulties disappeared, however, with the death of Monson in September, 1776, as he could now have his own way by means of his casting vote, yet the lesson taught by them was there. When Lord Cornwallis was appointed Governor-General in 1786, he made it a condition of his acceptance of the office that he should be allowed to overrule his Council, if necessary. Accordingly an Act was passed[2] in 1786, which remedied the defect of the Act of 1773 by empowering the Governor-General to override, in matters of grave importance, the decision of the majority of his Council and to act on his own responsibility. This power has been renewed in subsequent statutes and has been provided for, as we have already seen, in the Government of India Act.

The Governor-General, again, has certain powers[3]

[1] *The Government of India* (1916), p. 50. [2] *Ibid.*, 67.

[3] Section 43 of the Act. See *The Imperial Gazetteer of India*, vol. iv, p. 19, in this connection.

It may be of interest to note here that if any person appointed to the office of Governor-General, 'is in India on or after the day on which he is to succeed,' he may, if he thinks it necessary, act alone, before he takes his seat in Council, all or any of the

during absence from his Executive Council. Whenever the Governor-General in Council declares it to be expedient that the Governor-General should visit any part of India without his Council, he may be empowered by the former to exercise alone all or any of the powers of the Governor-General in Council. Further, he may, during his absence from the Executive Council, issue, if he thinks it necessary, on his own authority and responsibility, any order, which might have been issued by the Governor-General in Council, to any local Government, or to any officers or servants of the Crown acting under the authority of any local Government without previously communicating the order to the latter. In any such case he must forthwith send a copy of the order issued to the Secretary of State and to the local Government concerned with his reasons for making the same. This particular power of the Governor-General may be suspended by the Secretary of State in Council.

Powers of the Governor-General during absence from his Council.

He usually keeps in his own hands the Foreign and Political Department which 'transacts all business connected with external politics, with frontier tribes and with the Native States in India.' As we shall have occasion later to refer to this matter, we do not propose to discuss it here.

He is in charge of the Foreign Department.

The Governor-General, like colonial Governors, enjoys now the prerogative of pardon under the revised Instrument of Royal Instructions issued to him. Clause 5 of the Instrument[1] runs as follows:—

...ero-gative of mercy.

'And we do hereby authorize and empower Our said Governor-General in Our name and on Our behalf to grant

[1] ...h might be exercised by the Governor-General in Council. ...n 89 of the Government of India Act. ...ppendix N.

to any offender convicted in the exercise of its criminal jurisdiction by any Court of Justice within Our said territories a pardon either free or subject to such lawful conditions as to him may seem fit.'

According to Sir Courtenay Ilbert,[1] the royal prerogative of pardon was formerly not expressly conferred upon the Governor-General by his warrant of appointment. The Governor-General in Council, however, had the power of remitting sentences under the Code of Criminal Procedure.

The delegation of the prerogative of pardon to the Governor-General does not diminish, however, 'the right of the Crown to grant pardons directly, on the advice of the Imperial Ministry, since the delegation is a voluntary act, and cannot bind or fetter the discretion of the Crown.'[2] According to Professor Keith, in a self-governing Dominion 'in all cases save those of death sentences the Governor must accept ministerial advice, unless either imperial interests are concerned or he is prepared to find other Ministers; but in the case of death sentences he must exercise his personal discretion, and cannot relieve himself of responsibility by relying on ministerial advice.'[3] In our country the question of granting pardon on ministerial advice has not yet arisen for obvious reasons, and the exercise of the royal prerogative of mercy is, in the present circumstances, presumably left to the personal discretion of the Governor-General himself.

His powers regarding some Indian appointments.

Except in the case of Bengal, Bombay or Madras, the Governor of a province is appointed by the Crown after consultation with the Governor-General. The Governor-General can appoint a Deputy-Governor to administer a part of a Governor's province.[4] He has also the power to appoint,

[1] *The Government of India* (1916), p. 203.
[2] *Responsible Government in the Dominions* by Professor Keith (1909), p. 237. [3] *Ibid.*, p. 239. [4] Sec. 52A (1) of the Act.

with the approval of the Crown, Lieutenant-Governors and the members of their Executive Councils, if necessary. Besides, he may, at his discretion, appoint, from among the members of the Legislative Assembly, Council Secretaries who will hold office during his pleasure and discharge such duties in assisting the members of his Executive Council as he may assign to them.

Titles of Honour.

He may confer certain titles[1] of honour either as hereditary distinctions or as personal distinctions.

Finally, the Governor-General has recently[2] been empowered by the King to suspend, with the concurrence of the Secretary of State, from the exercise of his office any person appointed by the Crown or on its behalf to an office in India, against whom misbehaviour may have been alleged, and to constitute a tribunal to enquire into the truth of such allegation in order that Royal pleasure may be signified on its finding.

His duties and responsibilities.

If the Governor-General has certain specific powers, he has also certain specific obligations enjoined upon him, and if his powers are great, no less great is his responsibility. 'In constant and intimate communication,' writes Sir George Chesney, 'with the different governments and administrative agents throughout the country, as well as with the Secretary of State at home; with the immediate charge of diplomatic business within and without the Empire, from which some cause for anxiety is never absent; loaded, in addition, with the burden of ceremonial duties, especially

[1] These titles are: Maharaja, Nawab, Raja, Shams-ul-ulama, Mahamahopadhyaya, Aggamahapandita, Diwan Bahadur, Sardar Bahadur, Khan Bahadur, Rai Bahadur, Rao Bahadur, Sardar Sahib, Khan Sahib, Rai Sahib, Rao Sahib, and a few Burmese titles.—*Vide The Gazette of India*, Extra., July 3, 1926.

[2] See the Government of India's Home Department Notification No. F.—176/26, dated the 7th August, 1926.

in connection with the Chiefs and Princes of a country where ceremonial and etiquette possess an exaggerated degree of importance, duties ever increasing as the means of travel and communication improve; the Governor-General of India has literally hardly ever an hour to call his own, and the office involves the carrying of a sustained burden of business, high pressure, and anxiety which only great powers and public spirit can sustain unimpaired for even the few years of a Viceroy's reign[1].'

Constitutionally, the position of the Governor-General is one of subordination to the Secretary of State.[2] And though in actual practice the relations between them may be largely determined by personal factors and though constitutional usages and understandings may to a certain extent obscure their exact legal position, yet the subordination is there and the politically inferior position of the Governor-General cannot be denied. He is, for instance, required by the revised Instrument of Royal Instructions, to which we have already referred, to obey the directions of the Secretary of State. Thus begins the Instrument[3]:—

'Whereas by the Government of India Act it is enacted that the Governor-General of India is appointed by Warrant under Our Royal Sign Manual, and We have by Warrant constituted and appointed a Governor-General to exercise the said office *subject to such instructions and directions*[4] as he, or Our Governor-General for the time being, shall from time to time receive or have received under Our Royal Sign Manual or under the hand of one of Our Principal Secretaries of State, etc. . . . .'

[1] *Indian Polity*, p. 132. See *Lord Curzon in India* edited by Sir Thomas Raleigh, vol. ii, pp. 315–17; also Sir William Hunter's *The Earl of Mayo*, pp. 91–94.

[2] 'The Viceroy is directly subordinate to the Secretary of State for India and his Council—a subordination at which many Indian rulers have openly chafed and which by some has been found insupportable.'—Curzon, *British Government in India*, vol. ii, p. 110.

[3] See Appendix N.

[4] The Italics are ours.

It appears that the position in this respect has remained unchanged since 1858. For example, we find the following in Queen Victoria's Proclamation of that year :—

'And We, reposing especial trust and confidence in the loyalty, ability and judgment of Our right trusty and well beloved Cousin and Councillor, Charles John Viscount Canning, do hereby constitute and appoint him, the said Viscount Canning, to be Our first Viceroy and Governor-General in and over Our said territories, and to administer the government thereof in Our name, and generally to act in Our name and on Our behalf, *subject to such Orders and Regulations*[1] as he shall, from time to time, receive from Us through one of Our Principal Secretaries of State.'

The Governor-General may not be the 'agent' of the Secretary of State, but he is undoubtedly his subordinate[2] politically.

He must take certain oaths.

Every Governor-General must take an oath of allegiance, and an oath for the due execution of his office and for the due and impartial administration of justice, in the forms given hereinafter, and must, either himself or by any other person authorized by him, administer to every person who may be appointed a Governor, Lieutenant-Governor, Chief Commissioner, member of an Executive Council, or a Minister in India, similar 'oaths of allegiance and of office'.[3]

[1] The Italics are ours.

[2] Whilst performing his function as the representative of the Home Government, the Viceroy 'is really subordinate to the Secretary of State. Lord Salisbury made this perfectly plain to Lord Northbrook in 1875. The amount of this subordination, however, depends on the personality of the Viceroy and the Secretary. Lord Salisbury made this subordination apparent with his fist, Lord Morley with his persuasiveness'.—Mr. J. Ramsay MacDonald, *The Government of India*, p. 57. See also Sapru, *The Indian Constitution*, pp. 59–66.

[3] See *The Gazette of India*, June 11, 1921, pp. 850–51; Notification No. 1552, June 8, 1921.

FORM OF OATH OF ALLEGIANCE

I, . . . , do swear that I will be faithful and bear true allegiance to His Majesty, King. . . . . , Emperor of India, His Heirs and Successors, according to law.

So help me God.

FORM OF OATH OF OFFICE

I, . . . , do swear that I will well and truly serve our Sovereign, King. . . . . , Emperor of India, in the office of . . . and that I will do right to all manner of people after the laws and usages of India, without fear or favour, affection or ill-will.

So help me God.

He is required by the Royal Instructions[1] to be vigilant that the policy of Parliament as set forth in the Preamble to the Government of India Act, 1919, 'is constantly furthered alike by his Government and by the local Governments of . . . presidencies and provinces'. He is also required by the same Instructions to do everything that lies in him, consistently with the fulfilment of his responsibilities to the Crown and Parliament for the welfare of the Indian people, that the administration of the central subjects may be carried on in harmony with the wishes of the people as expressed by their representatives in the Indian Legislature, 'so far as the same will appear to him to be just and reasonable.'

The Governor-General in Council.

We have stated above the specific powers and duties of the Governor-General. We now propose to describe the constitution and functions of his Executive Council and to discuss the powers vested in the Governor-General in Council[2] as, we must bear in mind, the Government of India is

[1] See Appendix N.

[2] 'The Governor-General in Council is often described as the

conducted 'not by an individual but by a Committee. No important act can be taken without the assent of a majority of that Committee.'[1]

Evolution of the Executive Council of the Governor-General.

The constitution of the Executive Council of the Governor-General has been altered from time to time. The Council, as originally constituted by the Regulating Act of 1773, consisted of four members named in the Act.[2] The number of councillors was reduced by Pitt's Act of 1784 to three, of whom the Commander-in-Chief of the Company's forces in India for the time being was to be one and to have precedence in Council next to the Governor-General.[3] The Charter Act of 1793 fixed the number of members at

Government of India, a description which is recognized by Indian legislation'.—Ilbert, *The Government of India*, p 202.

According to Sir C. Ilbert, 'the Governor-General in Council, as representing the Crown in India, enjoys, in addition to any statutory powers, such of the powers, prerogatives, privileges, and immunities appertaining to the Crown as are appropriate to the case and consistent with the system of law in force in India. . . . The Governor-General in Council has also, by delegation, powers of making treaties and arrangements with Asiatic States, of exercising jurisdiction and other powers in foreign territory, and of acquiring and ceding territory'.—*The Government of India*, p. 203.

See also in this connection *Comparative Administrative Law* by Mr. N. N. Ghosh, pp. 252–53.

[1] Lord Curzon's speech at a dinner given by the United Service Club, Simla, on September 30, 1905.—*Lord Curzon in India*, vol. ii, p. 299.

Lord Curzon also said in the course of his speech :—

'The Viceroy is constantly spoken of as though he and he alone were the Government. This is of course unjust to his colleagues, who are equally responsible with himself, and very often deserve the credit which he unfairly obtains. On the other hand, it is sometimes unfair to him ; for he may have to bear the entire responsibility for administrative acts or policies which were participated in and perhaps originated by them. . . . The Viceroy has no more weight in his Council than any individual member of it.'

The last sentence in the above quotation is, as Mr. Ramsay MacDonald puts it, 'a fanciful exaggeration of the Viceroy's weakness.'

[2] The East India Company Act, 1773, Section 10.—P. Mukerji's *Constitutional Documents*, vol. i.

[3] The East India Company Act, 1784, Section 18, *Ibid.*

three and provided further that, if the offices of Governor-General and Commander-in-Chief were not united in the same person, which might be allowed under an Act of 1786, the Commander-in-Chief might be a member of the Council of Fort William, if specially appointed so by the Court of Directors, and that, if so appointed, he should have rank and precedence next to the Governor-General.[1] The Charter Act of 1833 authorized the appointment of four ordinary members and one extraordinary member of Council.[2] The Commander-in-Chief was to be the extra-ordinary member of Council, if so appointed. Of the ordinary members, three were to be recruited from the Company's service, but the fourth member was to be appointed from outside the service. The duty of the fourth ordinary member had been confined entirely to legislation till 1853 when he was made, under the Charter Act of that year, a 'full executive member' and thus placed on the same footing with the other ordinary members of the Council. The number of the ordinary members of the Council was increased to five by the Indian Councils Act of 1861 which also continued the provision of the Act of 1833 relating to the appointment of the Commander-in-Chief as an extraordinary member.[3] It further enacted that whenever the Council would meet in Madras or Bombay, the local Governor would be another extraordinary member of the Council.[4] The Indian Councils Act of 1874[5] authorized the appointment of a sixth ordinary member to the Council for public works purposes, but the power given by this Act was not always exercised. An amending Act[6] passed in

[1] The Charter Act of 1793, Section 32.—P. Mukerji's *Constitutional Documents*, vol. i.
[2] The Charter Act of 1833, Section 40. *Ibid*
[3] The Indian Councils Act, 1861, Section 3.—P. Mukherji's *Constitutional Documents*, vol. i.
[4] The Indian Councils Act, 1861, Section 9. *Ibid.*
[5] Section 1. [6] P. Mukherji's *Constitutional Documents*, vol. i.

1904 removed the restriction that the appointment of the sixth ordinary member should be only for public works purposes. The Government of India Act, 1915,[1] fixed the maximum number of the ordinary members at six and provided for the appointment of the Commander-in-Chief as an extraordinary member. It re-enacted the provision, referred to before, that whenever the Council would assemble in any province having a Governor, the latter would be another extraordinary member of the Council. Thus the Council before the Reforms consisted ordinarily of six ordinary members and the Commander-in-Chief as an extraordinary member thereof.

Its present constitution.

Under the existing Act[2] the Council is to consist of such number of members as the Crown may think fit to appoint. Thus the statutory limitation on the number of its members, which existed previously, has now been removed. This has been done obviously in pursuance of the recommendations both of the authors of the Joint Report and of the Joint Select Committee. The changed relations of the Government of India 'with provincial governments,' write the authors of the Joint Report,[3] 'will in themselves materially affect the volume of work coming before the departments, and for this reason alone some redistribution will be necessary. We would therefore abolish such statutory restrictions as now exist in respect of the appointment of members of the Governor-General's Council so as to give greater elasticity both in respect of the size of the Government and the distribution of work.' The Joint Select Committee also recommended[4] that the limitation on the number of the members of the Executive Council should be removed; that three

[1] Sections 36 and 37.
[2] Section 36 (2) of the Act.
[3] Para. 271.
[4] The Joint Select Committee's Report on Clause 28 of the Government of India Bill.

members of that Council should continue to be public servants or ex-public servants having not less than ten years' experience in the service of the Crown in India; and that one member of the Council should have definite legal qualifications which might be gained in India as well as in the United Kingdom. Accordingly it has been provided in the Act[1] that three at least of the members of the Council must be persons who have been in the service of the Crown in India for not less than ten years, and one must be a barrister of England or Ireland, or a member of the Faculty of Advocates of Scotland, or a pleader of a High Court in India of not less than ten years' standing. If any member of the Council other than the Commander-in-Chief is at the time of his appointment in the military service of the Crown, he must not, so long as he continues to be a member, hold any military command or be employed in actual military duties. If the Commander-in-Chief is a member of the Council, he must have, subject to the provisions of the Act, rank and precedence in the Council next to the Governor-General.[2] The Council, as at present constituted, consists of seven members including the Commander-in-Chief who is no longer to be regarded as an extraordinary member, since the classification of members as ordinary and extraordinary, which formerly existed, has been abolished by the present Act.[3] There are now three Indian members on the Council. The increase in the number of Indian members to three has been made in pursuance of the recommendation of the Joint Select Committee that 'not less than three members of the

[1] Section 36 (3).

[2] Section 37 of the Act. The Commander-in-Chief is appointed by the crown by Warrant under the Royal Sign Manual.—Section 19 (1) of the Act. This provision was made by the Government of India (Leave of Absence) Act, p. 1924.

[3] Section 37 of the Act.

Council should be Indians.'[1] It may be noted here that there is nothing in the Act to prevent all the members of the Council from being Indians, provided, of course, they satisfy the statutory requirements stated above. The Act distinctly lays down that no native of British India, nor any subject of His Majesty resident therein, shall, by reason only of his religion, place of birth, descent, colour, or any of them, be disabled from holding any office under the Crown in India.[2] It will only require a bold effort of statesmanship to Indianize the Council completely. We may note, however, in this connection, as the Joint Select Committee has remarked, that 'the members of the Council drawn from the ranks of the public servants will, as time goes on, be more and more likely to be of Indian rather than of European extraction.'[3] It need not perhaps be stated here that these questions will not at all arise when India will attain full Dominion status.

The members[4] of the Council are appointed by the Crown[5] on the advice[6] of the Secretary of State and usually hold office for a term of five years.[7] Every member of the Council other than the Commander-in-Chief is paid a salary of Rs. 80,000 per annum. This is also the maximum

[1] The Joint Select Committee's Report on Clause 28 of the Government of India Bill. [2] Section 96 of the Act.

[3] See the Report of the Joint Select Committee on Clause 28 of the Government of India Bill.

[4] Under a Notification of the Viceroy, the members are styled 'The Honourable'.—See Eggar, *The Government of India*, p. 23 *n*.

[5] But see also the next page.

[6] See Curzon, *British Government in India*, vol. ii, p. 110.

[7] A temporary vacancy in the office of a member of the central Executive Council other than the Commander-in-Chief, or of a member of the Executive Council of a Governor, may be filled by the Governor-General in Council, or a Governor in Council, as the case may be.—Section 92 (1) of the Act. But the Secretary of State may prohibit the filling of a temporary vacancy in the central Executive Council. And if a temporary appointment has already been made it must be cancelled as soon as the Governor-General is informed of the desire of the Secretary of State.

amount payable to him under the Act. The salary of the Commander-in-Chief is Rs. 100,000 a year.[1] It is, perhaps, not necessary to mention that these salaries are paid out of the revenues of India.

Leave of Absence to the Governor-General, etc.

Under Section 86 of the Act,[2] the Secretary of State in Council may grant to the Governor-General and, on the recommendation of the Governor-General in Council, to the Commander-in-Chief, leave of absence for urgent reasons of public interest, or of health or of private affairs. And the Governor-General in Council also may grant to any member of his Executive Council other than the Commander-in-Chief leave of absence for urgent reasons of health or of private affairs.

Such leave of absence cannot be granted to any person for any period exceeding four months, nor more than once during his tenure of office.[3] The Secretary of State in Council may however extend any period of leave granted under the above provision, but in any such case the reasons for the extension must be set forth in a minute signed by the Secretary of State and laid before both Houses of Parliament.[4] If leave is granted, in pursuance of the foregoing provision, to the Governor-General or to the Commander-in-Chief, a person must be appointed to act in his place during his absence, and the appointment must be made by His Majesty by Warrant under the Royal Sign Manual.[5] The person so appointed during the absence of the Commander-in-Chief may, if the latter was a Member of the Executive Council of the Governor-General, be also appointed[6] by the Governor-General in Council to be a temporary member of

[1] This is also the maximum payable under the Act.
[2] See Appendix O.
[3] For other conditions, leave allowances, etc., see Appendix O.
[4] Section 86 of the Act. [5] Section 87 of the Act.
[6] The Commander-in-Chief is not an *ex-officio* member of the central Executive Council.

the Council.[1] Any person so appointed temporarily must, till the return to duty of the permanent holder of the office, or if he does not return, till a successor arrives, hold and execute the office to which he has been appointed, and must have and may exercise all the rights and powers thereof.[2] Besides, he will be entitled to receive the emoluments and advantages appertaining to the office, foregoing the emoluments and advantages (if any) to which he was entitled at the time of his appointment.[3]

Procedure followed at meetings of the Governor-General's Council.

A member of the Council is appointed to be its Vice-President by the Governor-General. The Council meets in such places in India as the Governor-General in Council appoints. At any meeting of the Council the Governor-General or any other person presiding and one member of the Council other than the Commander-in Chief may exercise all the functions of the Governor-General in Council. In case of difference of opinion on any question brought before a meeting of the Council, the Governor-General in Council is ordinarily bound by the decision of the majority of those present, and, if they are equally divided, the Governor-General or any other person presiding has a second or casting vote.[4] But if, as has been seen before, any measure is proposed before the Governor-General in Council, whereby the safety, tranquillity or interests of British India, or of any part thereof, are or may be, in the judgment of the Governor-General, essentially affected, he (i.e. the Governor-General) may overrule the majority if they dissent from his view, and act on his own authority and responsibility.[5] In every such case any two dissentient members may require that the matter in dispute and the fact of their dissent be reported to the Secretary of State ; and in that case the report

[1] Section 87 of the Act. [2] *Ibid.* [3] *Ibid.*
[4] Section 41 of the Act. [5] *Ibid.*

must be sent together with copies of any minutes which may have been recorded on the subject by the members of the Council.[1] It may be noted here that the Governor-General cannot, under his overruling power, do anything which he could not lawfully have done with the concurrence of his Executive Council.[2] If the Governor-General is absent from any meeting of the Council owing to indisposition or any other cause, the Vice-President, or, if he too is absent, the senior member other than the Commander-in-Chief present at the meeting presides thereat.[3] The person presiding has the same powers as the Governor-General would have had if present. But if the Governor-General happens to be at the time at the place where the meeting is held, 'any act of Council made at the meeting' requires his signature, if he is in a position to sign it. If, however, he refuses to sign the act, it becomes null and void. During the absence of the Governor-General on tour, a member in charge of a Department may call together an informal meeting of his colleagues to discuss an important or emergent case, the result being reported to the Governor-General.[4] All orders of the Governor-General in Council must be issued in the name of the Governor-General in Council, and must be signed by a Secretary to the Government of India, or otherwise, as the Governor-General in Council may direct.[5] An order so signed cannot be called into question in any legal proceeding.[6] The Governor-General has been empowered by the Act to make rules and orders for the more convenient transaction of business in his Council.[7] Any order made, or act done, in accordance therewith must be regarded as the order or the act of the Governor-General in Council.[8]

[1] Section 41 of the Act. [2] *Ibid.* [3] Section 42 of the Act.
[4] Resolution on the Report of the Government of India Secretariat Procedure Committee.—*Vide The Gazette of India*, September 18, 1920.
[5] Section 40 of the Act. [6] *Ibid.* [7] *Ibid.* [8] *Ibid.*

The present executive Departments of the Government of India.

Under the present system, which was first introduced by Lord Canning and which we shall have occasion to describe in detail later, the business of the Governor-General in Council is distributed among various Departments, somewhat on the lines of the British Cabinet. Each member of the Council is in charge of one or two Departments of the administration, the Viceroy keeping usually the Foreign and Political Department in his own hands. The work of the Council has been variously distributed from time to time. The existing division of business among the different Departments was made by the Governor-General by an order, dated April 11, 1923.[1] There are at present nine Departments—(i) Foreign and Political, (ii) Railways and Commerce, (iii) Industries and Labour, (iv) Education, Health and Lands, (v) Army, (vi) Home, (vii) Legislative, (viii) Finance, and (ix) Ecclesiastical. The member in charge of the Department of Railways and Commerce holds charge also of the Ecclesiastical Department, and the Governor-General himself, as stated above, administers the Foreign and Political Department.[2]

The Foreign and Political Department.

The Foreign and Political Department deals with questions relating to external politics, frontier tribes, and States in India.[3] It also exercises control over the general administration of Ajmer-Merwara, the North-West Frontier Province and British Baluchistan. This Department, according to Sir George Chesney,[4] is 'the most important and perhaps the most laborious of all.' Describing the varied nature of the work usually done by an officer of this Department,

[1] *Vide The Englishman* (Dak edition), April 13, 1923.
[2] 'There he is in the exact position of an ordinary Member of Council.'—Curzon, *British Government in India*, vol. ii, p. 112.
[3] *Vide The Imperial Gazetteer of India*, vol. iv, p. 21.
[4] *Indian Polity*, p. 124.

Lord Curzon said in one of his parting speeches[1]: 'The public at large hardly realizes what the Political (i.e., an officer of the Political Department) may be called upon to do. At one moment he may be grinding in the Foreign Office, at another he may be required to stiffen the administration of a backward Native State, at a third he may be presiding over a *jirga* of unruly tribesmen on the frontier, at a fourth he may be demarcating a boundary amid the wilds of Tibet or the sands of Seistan. There is no more varied or responsible service in the world than the Political Department of the Government of India.' In course of another speech[2] he stated: 'The work of the Foreign Department is unusually responsible . . . . . it embraces three spheres of action so entirely different and requiring such an opposite equipment of principles and knowledge as to (?) the conduct of relations with the whole of the Native States of India, the management of the Frontier provinces and handling of the Frontier tribes, and the offering of advice to His Majesty's Government on practically the entire foreign policy of Asia, which mainly or wholly concerns Great Britain and its relation to India.' The Foreign Department also 'deals with questions of ceremonial, and with matters relating to the Indian Orders.' In respect of this Department the Viceroy is, in the words of Lord Curzon, in the exact position of an ordinary Member of Council. He is assisted in his work by two Secretaries, one Foreign and the other Political, three Deputy Secretaries, one Under-Secretary, three Assistant Secretaries and a number of other officers.

The Army Department transacts[3] all business 'connected

[1] *Lord Curzon in India*, vol. ii, p. 304.
[2] *Ibid.*, p. 317; also Curzon, *British Government in India*, vol. ii, p. 113.
[3] See pp. 51 and 52 of *The Army in India and its Evolution*, 1924, published by the Superintendent, Government Printing, India.

The Army Department.

with the administration of the Army, the formulation and execution of the military policy of the Government of India, the responsibility for maintaining every branch of the Army, combatant and non-combatant, in a state of efficiency, and the supreme direction of any military operations based upon India.' It is also concerned with the administration of the Royal Indian Marine and the Royal Air Force in India, 'in so far as questions requiring the orders of the Government of India are concerned.'[1] The Commander-in-Chief has twofold functions in India: he is both the chief executive officer of the Army and, by custom, the Army Member of the Viceroy's Executive Council.[2] He is thus the sole military adviser of the Government of India. Besides, he administers the Royal Indian Marine and the Royal Air Force in India.[3] He is assisted by a Secretary, who is now a civilian, a Deputy Secretary, an establishment officer and three Assistant Secretaries. The Secretary, like other Secretaries in the civil Departments, is a Secretary to the Government of India and has the constitutional right of access to the Governor-General.[4] He represents the Army Department in that Chamber of the Indian Legislature of which the Commander-in-Chief does not happen to be a member.

The Governor-General in Council exercises the same authority over the administration of the Army as he does in respect of the administration of other Departments of the Government.[5] As it is a recognized liability of the Government of England to come, in a grave emergency, to India's assistance with the armed forces of the Crown in England, the British Government and its representative, the Secretary of State for India, claim to have 'special responsibility and

[1] See pp. 51–52 of *The Army in India and its Evolution*, 1924, published by the Superintendent, Government Printing, India.
[2] See *ibid.*, pp. 50–51. [3] *Ibid.*, p. 52. [4] *Ibid.*, p. 54.
[5] *Ibid.*, p. 50.

authority in regard to the military administration in India.'[1] The Secretary in the Military Department of the India Office is the chief adviser of the Secretary of State on Indian military questions.[2] He is usually an officer of the rank of Lieutenant-General recruited from the Indian Army.[3] He is assisted by one first-grade staff officer selected also from the Indian Army.[4] He is expected to visit India during the tenure of his office that he may keep in touch with the current of Indian affairs. Besides, a retired Indian Army officer of high rank is usually appointed to the Council of India.[5]

It is extremely desirable that the Commander-in-Chief should not be a member of the Executive Council of the Governor-General; nor should he be a member of either Chamber of the Indian Legislature. As in England, a civilian member should be in charge of the Army Department. As Sir Tej Bahadur Sapru says,[6] 'constitutionally, it is not right that even in a semi-developed Constitution like India's, the administrative head of the Army should participate in civil administration'. Apart from this consideration, free from the worries associated with the membership of the Executive Council and of the Legislature, the Commander-in-Chief would be able to devote more time and attention to questions relating to the defence of India, and 'to maintain continuous personal contact with the whole army.'[7] It is further desirable, both in the interests of the dignity of his office and the efficiency of the Army, that his name should not be dragged into the quagmire of party politics. But it would be difficult to prevent this so long as he would continue to be a member of the Executive Council and also of the Legislature. Lastly, the day is not

[1] *The Army in India and its Evolution*, p. 50.
[2] *Ibid.* [3] *Ibid.* [4] *Ibid.* [5] *Ibid.*
[6] *The Indian Constitution*, p. 43; see also Sivaswamy Aiyer, *Indian Constitutional Problems*, pp. 176–80.
[7] See Sivaswamy Aiyer, *Indian Constitutional Problems*, p. 177.

far distant when the expenditure for defence will be a votable item, and it will then be 'much easier for a civilian member to secure the necessary grants for military expenditure from the Legislature than for a military expert'.[1]

The Home Department.

The Home Department[2] deals with all business connected with the general internal administration of British India. Internal politics, Indian Civil Service, law and justice, jails, police and a number of other subjects including the administration of the Arms Acts and of the penal settlement of Port Blair in the Andaman Islands are within the jurisdiction of this Department. As most of the subjects dealt with by this Department are under the administration of local Governments, the work of the Home Department is, to a large extent, the work of supervision, direction and control.

The Legislative Department.

The member in charge of the Legislative Department is known as the Law Member. If a Bill introduced into either Chamber of the Indian Legislature is referred to a Select Committee of the Chamber, the Law Member, if he is a member of the Chamber, must be Chairman of the Committee. Even if he does not happen to be a member of the Chamber, he has the right of attending at, and taking part in the deliberations of, the meetings of the Select Committee.[3] The chief functions of this Department are to prepare the drafts of all official Bills introduced into either Chamber of the Indian Legislature, to assist the other Departments of the Government with legal advice when necessary, and to examine the projects of legislation of local Governments when they are referred to the Government of India, or the Acts passed by local Legislatures. The Department is also consulted

[1] Sivaswamy Aiyer, *Indian Constitutional Problems*, p. 179.
[2] Vide *The Imperial Gazetteer of India*, vol. iv, p. 23.
[3] The Legislative Assembly Standing Order 40 and the Council of State Standing Order 39.

before any statutory rules having the force of law are issued.

The Department of Railways and Commerce.

The Department of Railways and Commerce deals [1] with all work connected with railways, shipping, trade and commerce including tariffs, import and export regulations, statistics, life assurance and actuarial work.

The Department of Industries and Labour.

The Department of Industries and Labour [2] is concerned with labour legislation, inter-provincial migration, Factories Act, International Labour Organization, Petroleum and Explosives Act, patents, designs and copyrights, steam-boiler and electricity legislation, stores, geology and minerals, printing and stationery, civil aviation, meteorology, development of industries (central aspects), Posts and Telegraphs, Public Works and Irrigation.

The Department of Education, Health and Lands.

The Department of Education, Health and Lands [3] deals with education, land revenue, civil veterinary, agriculture, forests, central research on above subjects, botanical survey, famine, control of food-stuffs, external emigration, Survey of India, Medical Services and Public Health, Zoology, local self-government, libraries and records, archæology and museums.

The Finance Department.

The Finance Member of the Government of India is in charge of the Finance Department. This Department is mainly concerned with the general administration of central finance; with some supervision of provincial finance; with questions relating to the salaries, leave and pensions of public officers; and with auditing and accounts, currency, banking, exchange, Mints and the public debt of India. A separate branch of this Department, known as the Military Finance Department, deals with all matters relating to the financial

[1] The Governor-General's Order, dated Simla, April 11, 1923.
[2] *Ibid.* [3] *Ibid.*

administration of the Army.[1] Subjects like customs, salt, opium, excise and stamps are administered by a Board of Revenue working as a part of this Department. It is the duty of the Finance Member to keep expenditure within legitimate limits. He has to examine, from the financial point of view, any scheme or proposal brought before the Governor-General in Council, which is likely to involve the expenditure of public money. He is, so to speak, the guardian of public revenue. He is the Chairman of the Committee on Public Accounts, to which we have referred before. His annual financial statement, known as the Budget, is looked forwad to with great eagerness, not unmixed with anxiety, throughout the country.[2]

How the Council works : the original system.

We shall now describe the manner in which the business of the Council is transacted. During the administration of the East India Company, every case, however unimportant, was supposed to be placed before all the members of the Government, and

[1] *Vide The Imperial Gazetteer of India*, vol. iv, p. 25.

[2] Describing the work of this Department, Sir Malcolm Hailey (sometime Finance Member) said in the course of one of his speeches in the Legislative Assembly as follows :—

'We have to explain what we have done with the money voted by the House during the past year. We have to explain whether our anticipations of revenue have been fulfilled or not. We have to explain to it (i.e., Assembly) why and how in any particular case we have exceeded the grants made to us. We have to lay before the House a very complete scheme of operations, not only of revenue and expenditure, but of ways and means finance for the coming year. We have to justify this to the House, and we have to obtain practically every penny of it in the form of a direct demand for a grant. . . . The second branch of my Department is concerned with such matters as financial rules, financial regulations and relations with the Provincial Governments. . . . Then comes a very important branch I mean that relating to what we call pure finance, that is, all those questions relating to the provision of ways and means, the adjustment of remittance transactions, the paper currency issue, the raising of loans, and the provision of everyday finance by means of Treasury Bills, advances from the Bank and the like.'—*Vide Legislative Assembly Debates*, pp. 1768-69 ; January 19, 1922. Also see Gyan Chand, *Financial System in India*, pp. 18-22.

to be decided by them collectively. As Sir William Hunter vividly describes,[1] 'under the Company every case actually passed through the hands of each Member of Council, circulating at a snail's pace in little mahogany boxes from one Councillor's house to another.' 'The system involved,' said a former Member of Council, 'an amount of elaborate minute writing which seems now hardly conceivable. The Governor-General and the Council used to perform work which would now be disposed of by an Under-Secretary.'[2] The work of the Council enormously increased in all directions as a consequence of the policy pursued by Lord Dalhousie's Government, and the necessity of changing the old cumbrous method of doing business collectively was keenly felt. Lord Canning abolished the old method and introduced[3] the beginning of the present 'Departmental' system, under which each member of the Council is placed in charge of one or more branches of the administration, only important matters being referred to the Viceroy, or to the whole Council. The arrangement made by Lord Canning was at first informal and was a matter of private understanding within the Council. It was legalized under the Indian Councils Act, 1861, which empowered[4] the Governor-General, as we have seen before, to make rules and orders for the more convenient transaction of business in his Council, and provided that any order made or act done in accordance therewith should be regarded as the order or act of the Governor-General in Council.

Introduction of the 'Departmental' system.

The system, as subsequently developed, has been thus described by Sir John Strachey[5]:— 'Although the

[1] *The Earl of Mayo* (Rulers of India Series), p. 81. Read in this connection chapter iii of that book.

[2] *Ibid.* [3] See *Indian Polity* by Sir George Chesney, p. 123.

[4] See Section 8 of the Indian Councils Act, 1861—P. Mukherji' *Documents*, vol. i.

[5] *India, Its Administration and Progress* (1903 ed.), pp. 60-61.

separation of departments in India is less complete than in England, and the authority of a member of Council much less extensive and exclusive than that of an English Secretary of State, the members of Council are now virtually Cabinet ministers, each of whom has charge of one of the great departments of the Government. Their ordinary duties are rather those of administrators than of councillors. The Governor-General regulates the manner in which the public business shall be distributed among them. He usually keeps the Foreign department in his own hands. . . . While the member of Council takes the place of the English Secretary of State, there is in each department a Secretary holding a position analogous to that of a permanent Under-Secretary in England. It is the duty of this Secretary to place every case before the Governor-General or member in charge of his department, in a form in which it is ready for decision. He submits with it a statement of his own opinion. In minor cases the member of Council passes orders which are final. If the matter be one of greater importance, he sends on the papers, with his own orders, to the Governor-General for his approval. If the Governor-General concurs, and thinks further discussion unnecessary, the orders are issued. If he does not concur, he directs that the case shall be brought before the Council, as in England an important case might come before the Cabinet. The duty rests upon the Secretary, apart from his responsibility towards the member of Council in charge of the department, of bringing personally to the knowledge of the Governor-General every matter of special importance. All orders of the Government are issued in the name of the Governor-General in Council.'[1]

[1] See in this connection also *The Earl of Mayo* by Sir William Hunter, pp. 83–4.

The present system.

The practice now in vogue[1] is substantially the same as described above. The Council meets usually once a week, but special meetings may be held at any time, if necessary. The meetings are not open to the public. The members of the Council cannot act otherwise than in Council, or 'by the implied authority of the Governor-General in Council.' Under the rules of business laid down by the Governor-General, minor matters relating to a Department are disposed of by the Member in charge of the Department, without being brought before the Viceroy or the Council. All important questions, and specially those in which two Departments fail to come to an agreement or a local Government has to be overruled, are referred to the Viceroy. He may himself pass orders in respect of such cases or may refer them to the whole Council. 'The Statutory rules framed under the Government of India Act require,' says an official communique,[2] 'that every case, which, in the opinion of the Member in charge of the Department to which the subject belongs, is of major importance, shall be submitted by him to the Governor-General with the orders proposed by him.' And lest there should be any case of omission to refer an important matter to the Viceroy, there is an additional safeguard provided 'through the position occupied by the Secretaries to the Government of India who, while they are charged with the duty of seeing that the rules of business are duly observed, are at the same time given a status independent of the members with the right of referring at their discretion any case at any stage for the Governor-General's orders.'[3] Sir Thomas Holland, who was once the Member in charge of

[1] *Vide* the *Fifth Decennial Report*, p. 53.

[2] The communique was issued on August 28, 1921, by the Government of India in the Industries Department on what is known as the 'Munitions Fraud Case.'

[3] See the communique on 'The Munitions Fraud Case,' dated August 28, 1921.

the Department of Industries, was practically censured by the Governor-General in Council and had to resign his membership of the Viceroy's Executive Council for his failure to submit a matter of public importance to the Governor-General before he issued orders thereon in the name of the Government of India. The facts[1] of the case were as follows:—

The Munitions Fraud Case and the resignation of Sir Thomas Holland: their constitutional significance.

Four persons, namely, C. S. Waite, Rai Bahadur Sukhlal Karnani, J. C. Banerji and H. Stringer, were charged with conspiring to cheat in regard to the supply of a quantity of wire rope to the Munitions Board in August, 1918. While the trial was proceeding, Sir Thomas Holland decided to withdraw the prosecution, and issued orders accordingly, on the ground that, if the prosecution of Karnani and Banerji were proceeded with, widespread commercial and industrial interests would be seriously affected by reason of the association of these persons with various business concerns, mainly of a *Swadeshi* character, and that the Government considered that it was preferable that these men, though guilty, should escape punishment rather than that a large number of innocent persons should suffer loss. Intense agitation, both in India and England, followed the withdrawal of the prosecution. Thereupon, the Government of India in the Industries Department issued a lengthy statement reviewing the whole case. It made it clear therein that it was impossible to justify the withdrawal in this case on the specific grounds given, and emphasized that withdrawal of a prosecution on the ground that a section of the financial or commerical community would suffer from a conviction was inconsistent with the principles on which justice should be administered, and called for the most emphatic repudiation from the Government. The Govern-

[1] See the communique on 'The Munitions Fraud Case,' dated August 28, 1921; also *India in 1921–22*, pp. 77–8.

ment also took the strongest exception to the suggestion that it might be preferable that men though guilty should escape punishment rather than that a large number of innocent persons should suffer loss. Continuing, the Governor-General in Council stated that Sir Thomas Holland had committed an error of judgment in failing to submit the matter to the Governor-General. Sir Thomas Holland himself expressed his deep regret for his omission to invite the attention of the Governor-General to the case during the period of its reconsideration or to take his instructions before issuing orders in modification of the previous decision favouring prosecution. No responsibility attached in this case to the Secretary in the Industries Department, since the matter had been placed outside his jurisdiction by a special resolution of the Government of India passed in February, 1921.

Questions raising important administrative issues or laying down general policies are invariably settled in the whole Council. In case of difference of opinion on any question, the vote of the majority prevails, subject, however, to the power of the Governor-General to override the majority in special cases. In case of an equality of votes on both sides, the Governor-General or any other person presiding has a casting vote.

The Royal Commission upon Decentralization on the transaction of the business of the Governor-General in Council.

We close this topic with an extract from the Report of the Royal Commission upon Decentralization in India. The reader will find in this extract a most detailed and interesting, and at the same time a most authoritative, description of the manner in which the business of the Governor-General in Council is transacted and also of the method of work in the Secretariat of the Government of India. [1]

[1] *Report of the Royal Commission upon Decentralization in India* (1909), vol. i, paras. 19–22.

'In regard to his own Department, each Member of Council is largely in the position of a Minister of State, and has the final voice in ordinary departmental matters. But any question of special importance, and any matter in which it is proposed to overrule the views of a local Government, must ordinarily be referred to the Viceroy. This latter provision acts as a safeguard against undue interference with the local Governments, but it necessarily throws a large amount of work on the Viceroy. In the year 1907–8, no less than 21·7 per cent. of the cases which arose in, or came up to, the Home Department, required submission to the Viceroy, The Home Department is, however, concerned with questions which are, in a special degree, subject to review by the Head of the Government, and we believe that in other Departments the percentage of cases referred to the Viceroy is considerably less. Any matter originating in one Department which also affects another must be referred to the latter, and in the event of the Departments not being able to agree, the case would have to be referred to the Viceroy.

'The Members of Council meet periodically as a Cabinet —ordinarily once a week—to discuss questions which the Viceroy desires to put before them, or which a Member, who has been overruled by the Viceroy, has asked to be referred to Council. The Secretary in the Department primarily concerned with a Council case attends the Council meeting for the purpose of furnishing any information which may be required of him. If there is a difference of opinion in the Council, the decision of the majority ordinarily prevails, but the Viceroy can overrule a majority if he considers that the matter is of such grave importance as to justify such a step.

'Each Departmental office is in the subordinate charge of a Secretary,[1] whose position corresponds very much to

[1] There are now two Secretaries—one Foreign and the other

that of a permanent Under-Secretary of State in the United Kingdom, but with these differences, that the Secretary, as above stated, is present at Council meetings; that he attends on the Viceroy, usually once a week, and discusses with him all matters of importance arising in his Department; that he has the right of bringing to the Viceroy's special notice any case in which he considers that His Excellency's concurrence should be obtained to action proposed by the Departmental Member of Council; and that his tenure of office is usually limited to three years. . . . The Secretaries have under them Deputy, Under and Assistant Secretaries, together with the ordinary clerical establishments. . . .

'A case coming up to a Government of India Secretariat is first of all noted on by the clerical branch of the office. It then goes, usually, to an Assistant or Under-Secretary, who, if he accepts the office note, signs his name below it. If he disagrees or desires to add anything, he notes accordingly. His work, in turn, goes to a Deputy Secretary or to the Secretary, who acts in the same way. A Deputy Secretary often submits cases direct to the Member in charge, but the papers come back through the Secretary, to enable the latter to see what is going on. Secretaries and their principal subordinates may dispose of petty cases of a routine character on their own responsibility, but lists of such cases go weekly to the Secretary and Member, so that any independent action by a subordinate which is deemed inadvisable may be checked. Otherwise, cases go on to the Member in charge, and if reference to the Viceroy or to some other Department is not required, his order is final. This elaborate system of noting . . . is held to be justified by the constant changes in the superior personnel of the Secretariats and Departments in India.

Political—in the Foreign and Political Department. *The Indian Year Book*, 1923, edited by Sir Stanley Reed, p. 26.

'In important cases the notes are printed, for future reference, along with the papers to which they relate, but these are only for confidential use in the Secretariats themselves. The Government of India, however, submit monthly volumes of their printed proceedings (without the notes) to the Secretary of State. . . .'

Nature of the Council: its irresponsible character.

We may notice here one more point in connection with the constitution and character of the Executive Council. The Council is not constituted, as we have seen before, on the principles on which the British Cabinet or the Canadian Ministry is formed.[1] Its members are not yet responsible to the Indian Legislature. A vote of censure on the Council by the Legislative Assembly, not to speak of the Council of State, cannot drive it out of power. Thus, so far as its relations to the people of the country are concerned, it is as irresponsible now as it was before the introduction of the Montagu-Chelmsford changes. The Government of India is responsible only to the Imperial Parliament. Subject to the ultimate control of that body alone, it has indisputable power in respect of all matters which it considers to be essential to the discharge of its responsibilities for the peace, order and good government of India. But there is one feature which the Council has in common with the British Cabinet, namely, 'the principle of united and indivisible responsibility.'[2] It

[1] It may also be noted here that in England the Prime Minister practically appoints every member of his own Government; but in India the Viceroy, to quote the words of Lord Curzon, 'does not appoint a single one of his immediate colleagues.' Indeed, on the solitary occasion on which he pressed for one such appointment, he was informed by the Secretary of State that the duty of advising the King on the choice of a Member of Council rested solely with the Secretary of State, and that no greater violation of the Constitution could be imagined than that this duty should degenerate into a mere formal submission to His Majesty of the views and recommendations of the Viceroy!—Curzon, *British Government in India*, vol. ii, p. 110.

[2] See para. 34 of *The Montagu-Chelmsford Report*.

Its Unity.

has been distinctly laid down by a former Secretary of State[1] that 'it should be understood that this principle (i.e. the principle of united and indivisible responsibility), which guides the Imperial Cabinet, applies equally to administrative and to legislative action; if in either case a difference has arisen, Members of the Government of India are bound, after recording their opinions, if they think fit to do so, for the information of the Secretary of State in the manner prescribed by the Act, either to act with the Government or to place their resignations in the hands of the Viceroy. It is moreover immaterial for the present purpose what may be the nature of the considerations which have determined the Government of India to introduce a particular measure. In any case, the policy adopted is the policy of the Government as a whole, and as such, must be accepted and promoted by all who decide to remain members of that Government.' From this it is evident that even if, in respect of a particular matter, the decision of the Government of India is in reality the decision of a single person, namely, the Viceroy, rather than that of the whole Council, that decision must be supported and acted upon by the members of the Council, or they must resign. As we have already stated, the proceedings of the Council are secret; and, therefore, 'it is not consonant with the practice of the Government of India or with the constitutional position on which that practice is based either to disclose the identity or to publish the individual views of the members of Government who have taken part in its proceedings.'[2] Thus, whatever differences of opinion may exist among the Members of the Council on any matter or matters, the Council must ordinarily act as a unit on all questions that may arise in the Indian Legislature or in

[1] See para. 34 of *The Montagu-Chelmsford Report*.
[2] 'Communique' on the Munitions Fraud Case.

connection with the administration of public affairs. Every Member of the Council must take the same oaths of allegiance and office as we have seen in the case of the Viceroy. Besides, he has to take the following oath of secrecy :—[1]

I, . . . , do swear that I will not directly or indirectly communicate or reveal to any person or persons any matter which shall be brought under my consideration, or shall become known to me as a member of the Executive Council except as may be required for the due discharge of my duties as such member, or as may be specially permitted by the Governor-General.

So help me God.

Restriction on the power of the Governor-General in Council to make war or treaty.

Section 44 of the Government of India Act sets forth the powers of the Governor-General in Council with regard to the making of war or treaty. He cannot, without the express sanction of the Secretary of State in Council, 'declare war or commence hostilities or enter into any treaty for making war against any Prince or State in India, or enter into any treaty for guaranteeing the possessions of any such Prince or State.' But he will not be subject to this restriction when hostilities have been actually commenced or preparations for their commencement have been actually made against the British Government in India or against any Prince or State dependent on it, or against any Prince whose territories the Crown is bound by treaty to defend or guarantee.

When he commences any hostilities or makes any treaty, he must forthwith communicate the same, with his reasons therefor, to the Secretary of State.

Section 71 of the Act provides a 'summary legislative procedure for the more backward parts of British India.'

[1] Vide *The Gazette of India*, June 11, 1921, pp. 850-51.

Under it the local Government of any part of British India may propose to the Governor-General in Council the draft of any regulation for the peace and good government of that part, with the reasons for proposing the regulation. Thereupon the Governor-General in Council may take the draft and reasons into consideration; and when the draft is approved by the Governor-General in Council and assented to by the Governor-General, it must be published in the *Gazette of India* and in the local official *Gazette*, if any, and will thereupon have the same force of law and be subject to the same disallowance as if it were an Act of the Indian Legislature. The Governor-General must send to the Secretary of State in Council an authentic copy of every regulation to which he has assented under this section. The Secretary of State may, by resolution in Council, apply this section to any part of British India and withdraw the application of this section from any part to which it has been applied.

Power to make regulations.

The authors of the Joint Report recommended that provision should be made (in the Government of India Act) for the appointment of members of the Legislative Assembly, not necessarily elected, nor even non-official, to positions analogous to those of Parliamentary Under-Secretaries in England.[1] The Governor-General in Council was opposed to appointments of this nature as he felt that it would be inadvisable to complicate the working of the Government of India in the difficult times that were before him by an arrangement which could not be justified on strong grounds, but which might be misconstrued as an attempt to introduce by a side issue the ministerial system into the Government of India.[2] The Joint Select Committee inserted,[3] however, a provision in

The Council Secretaries.

[1] *The Montagu-Chelmsford Report*, para. 275.
[2] Government of India's Despatch of March 5, 1919, para. 121.
[3] The Joint Select Committee's Report on Clause 29 of the Government of India Bill.

the Government of India Bill to allow of the selection of Members of the Legislature who would be able to undertake duties similar to those of the Parliamentary Under-Secretaries in England. It should be, it held, entirely at the discretion of the Governor-General to say to which Departments these officers should be attached, and to define the scope of their duties. This, in brief, is the history of Section 43A of the Act which provides, as has been stated before, that the Governor-General may at his discretion appoint, from among the members of the Legislative Assembly, Council Secretaries who will hold office during his pleasure and discharge such duties in assisting the Members of his Executive Council as he may assign to them. They are to be paid such salary as may be provided by the Indian Legislature. A Council Secretary must cease to hold office if he ceases for more than six months to be a member of the Legislative Assembly.

Advantages and disadvantages of the appointment of Council Secretaries.

No Council Secretary has been appointed so far (1929) in the Legislative Assembly since its inauguration. Early in 1922, Mr. R. A. Spence[1] (Bombay: European) moved a resolution in the Legislative Assembly requesting the Government to associate members of the Legislative Assembly with the Departments of the Government of India other than the Army and Foreign and Political Departments, in order that they might be trained up in the 'administration of government' and might relieve the Government Members and Secretaries of a part at least of their work in the sessions of the Legislature. His main argument was that such association would enable many members of the Assembly to see 'the inner working[2] of the Government Departments.' Sir

[1] See *India's Parliament*, vol. iii, pp. 332-40; or the Legislative Assembly Proceedings of March 28, 1922.
[2] *Ibid.*

William Vincent[1] (the then Home Member) pointed out, in the course of his reply, the advantages and disadvantages of the appointment of Council Secretaries. First, such appointments had their educative value. Non-officials, he said, by serving in the Secretariat as Council Secretaries, would undoubtedly obtain a considerable experience of the administration which might be very useful to them in future. Secondly, such appointments would afford relief to the permanent officials in the conduct of business in the Legislature. Thirdly, the appointment of Council Secretaries would necessarily bring the Government into closer touch with the non-official element in the Assembly. On the other hand, the Home Member pointed out, if the object of the appointment of Council Secretaries was to be realized, they would have to be chosen from the non-official members of the Assembly. 'Now,' he continued, 'if the Government appointed a Council Secretary and put him on the Government Benches, took him into their inner Councils and showed him the papers of the Department, he would have to support the Government policy throughout. That is a first essential: no one can deny that, and then the question at once arises whether it would be possible for such a member to discharge his responsibilities *vis-a-vis* the Government by which he is employed as well as his duty *vis-a-vis* his electorate. . . . He would often be torn in two directions by what he conceived to be his duty to the electorate and by what he conceived was demanded of him by loyalty to the Government. I fear indeed that his position would often be one of very great difficulty.' Another point to be noted in connection with this question, said he, was whether the services of the best men would be available for prolonged periods and whether they would sacrifice their

[1] See *India's Parliament*, vol. iii, pp. 332–40; or the Legislative Assembly Proceedings of March 28, 1922.

private careers and business to work in a Government office. Lastly, it was pointed out that whoever would be appointed Council Secretary would have to sever himself from the party to which he belonged.

The resolution moved by Mr. Spence was ultimately negatived by the Assembly. The matter since stands where it stood.

The authority of the Government of India over provincial administration is derived[1] 'from the provisions of a considerable number of statutes and regulations which specially reserve power to the Governor-General in Council, or require his previous sanction or subsequent approval to action taken by the provincial Governments.' The Government of India Act, 1915, vested the superintendence, direction and control of the civil and military government of India in the Governor-General in Council and required him to pay due obedience to all such orders as he might receive from the Secretary of State.[2] And every local Government was required by the same Act to obey the orders of the Governor-General in Council, and to keep him constantly and diligently informed of its proceedings and of all matters which should, in its opinion, be reported to him, or as to which he required information, and was declared to be under his superintendence, direction and control in all matters relating to the government of its province.[3] The substance of these provisions can be found in the Charter Acts of the earlier days of the Company's rule, and specially in the Act of 1833.[4] The general principles which

Relations between the Government of India and the provincial Governments—Before the Reforms.

[1] See para. 26 of the *Report of the Committee on Division of Functions*. [2] Section 33 of the Government of India Act, 1915.
[3] Section 45, *ibid.*
[4] We must ignore, however, the *formal* differences. See Sections 25, 39, 65 and 80 of the Charter Act of 1833.—P. Mukherji's *Constitutional Documents*, vol. i.

governed the relations between the Government of India and the provincial Governments in the pre-Reforms days were laid down so far back as 1834 and 1838 in two despatches[1] addressed by the Court of Directors to the Governor-General in Council. Both these despatches related to the Charter Act of 1833 with special reference to its enforcement. Among other things they contained the following :—

'The whole civil and military government of India is in your hands, and for what is good or evil in the administration of it, the honour or dishonour will redound upon you.

'With respect to the other powers which you are called upon to exercise, it will be incumbent upon you to draw, with much discrimination and reflection, the correct line between the functions which properly belong to a local and subordinate Government and those which belong to the general Government ruling over and superintending the whole.

'Invested as you are with all the powers of Government over all parts of India, and responsible for good government in them all, you are to consider to what extent, and in what particulars, the powers of Government can be best exercised by the local authorities, and to what extent, and in what particulars, they are likely to be best exercised when retained in your own hands. With respect to that portion of the business of government which you fully confide to the local authorities, and with which a minute interference on your part would not be beneficial, it will be your duty to have always before you evidence sufficient to enable you to judge if the course of things in general is

[1] Despatch from the Court of Directors to the Government of India, No. 44, dated December 10, 1834, and despatch from the Court of Directors to the Government of India, No. 3, dated March 28, 1838. *Vide* the *Report of the Royal Commission upon Decentralization in India*, 1909, pp. 22-3.

good, and to pay such vigilant attention to that evidence as will ensure your prompt interposition whenever anything occurs which demands it.

'It was impossible for the Legislature, and it is equally so for us in our instructions, to define the exact limits between a just control and a petty, vexatious, meddling interference. We rely on the practical good sense of our Governor-General in Council, and of our other Governors, for carrying the law into effect in a manner consonant with its spirit, and we see no reason to doubt the possibility of preserving to every subordinate Government its due rank and power, without impairing or neutralizing that of the highest.'

'Although a minute interference on your part in the details of the local administration of the subordinate presidencies is neither desirable nor practicable, yet we should hold you but ill-acquitted towards those whose interests are committed to your charge, if you should allow to pass without comment and, if necessary, without effective interference, any measures having, in your opinion, an injurious tendency either to one presidency or to the Empire at large.'[1]

Pre-Reforms distribution of the functions of Government.

The actual distribution of functions, before the Reforms, between the Government of India and the provincial Governments was the result, as the Decentralization Commission stated,[2] of gradual administrative evolution. Certain important subjects like the defence of India, currency, tariffs, general taxation, posts and telegraphs, auditing and accounts, relations with the Native States and neighbouring powers, and railways were retained by the central Government in its own hands. And subject to the control and

[1] This extract is from the Despatch No. 3, dated March 28, 1838.

[2] Para. 45 of its Report.

direction of the central Government, the provincial Governments were placed in charge of the ordinary internal administration, police, justice, the assessment and collection of revenues, education, local self-government and a number of other subjects. But in spite of this division of functions between the central and local authorities and the delegation of wide powers and responsibilities by the former to the latter, the Government of the country before the Reforms was one. The dominant conception that underlay the whole arrangement was that 'the entire governmental system was one indivisible whole and amenable to Parliament.'[1] Even in respect of matters which were primarily assigned to them, the provincial Governments were literally the 'agents' of the Government of India.[2]

How control was exercised by the Central Government.

The control of the Government of India over the provincial Governments used to be actually exercised in the following ways[3]:—

(1) By financial rules and restrictions, including those laid down by Imperial departmental codes (e.g., the Civil Service Regulations, the Civil Account Code, the Public Works Code, and the like).

(2) By general or particular checks of a more purely administrative nature, which might (*a*) be laid down by law or by rules having the force of law, or (*b*) have grown up in practice.

(3) By preliminary scrutiny of proposed provincial legislation, and sanction of Acts passed by the provincial legislatures.

[1] See *The Montagu-Chelmsford Report*, paras. 50, 90 and 120.

[2] *Ibid.*, para. 120. Also see para. 44 of the *Report of the Royal Commission upon Decentralization in India.*

[3] Para. 50 of the *Report of the Royal Commission upon Decentralization in India.* See also in this connection the *Report of the Committee on Division of Functions* (para. 26), and *The Montagu-Chelmsford Report*, paras. 112–18.

(4) By general resolutions on questions of policy, issued for the guidance of the provincial Governments. These were often based on the reports of commissions or committees, appointed from time to time by the Government of India to enquire into the working of the departments with which the provincial Governments were directly concerned.

(5) By instructions to particular local Governments in regard to matters which might have attracted the notice of the Government of India in connection with the departmental administration reports periodically submitted to it, or the proceedings-volumes[1] of a local Government.

(6) By action taken upon matters brought to notice by the Imperial Inspectors-General.

(7) In connection with the right of appeal possessed by persons dissatisfied with the actions or orders of a provincial Government.

The present position as regards the control exercised by the Government of India over local Governments.

The position is somewhat different now as there has been a large measure of devolution of powers to the provincial Governments under the Reforms Scheme, though, be it noted, nothing has yet been done, as has been shown before, in law and theory, to destroy the unitary character of our constitutional system. The Government of our country is, theoretically, still one. The Government of India Act and the Rules made thereunder have provided, however, for the classification of functions of Government as central and provincial and for the division of the provincial subjects into Reserved and Transferred. The central subjects are under the direct administration of the Government of India and subject to legislation by the Indian Legislature. The provincial subjects, on the other hand, are administered by the provincial Governments and

[1] *I.e.*, the proceedings of the local Government which had to be sent to the Government of India every month. This is required by the Act even now.

subject to legislation by the provincial Legislatures except where otherwise stated by the Act and the Rules made thereunder. For instance, some provincial subjects, though administered by the provincial Governments, are subject to legislation by the Indian Legislature.[1] For the administration of the central subjects the Government of India is responsible to the Secretary of State and to the Imperial Parliament. We have previously discussed the question of its relation to the Home Government. We shall now consider the nature of its present control over the local Governments.

Let us first of all consider the exact legal position. The Government of India Act lays down :—

Subject to the provisions of the Act and Rules made thereunder,—

(1) the superintendence, direction and control of the civil and military government of India is 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 ; [2] and

(2) every local Government shall 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 requires information, and is under his superintendence, direction and control in all matters relating to the government of its province.[3]

It will be seen from the above that the Government of India Act has simply re-enacted the relevant provisions of the Act of 1915, as stated before,[4] with this limitation only that those provisions are now subject to some of its own provisions and Rules made thereunder. The phrase

[1] See Appendix B, Schedule 1, part 11.
[2] Section 33 of the Act.
[3] Section 45 of the Act.
[4] See page 386 *ante*.

'subject to the provisions of the Act and Rules made thereunder' has a special significance in view of the fact that, so far as the administration of the Transferred subjects is concerned, the responsibility of the local Governments is not to Parliament or to its representatives, the Secretary of State and the Government of India, but to the local Legislative Councils, and also in view of the fact that the control of the Governor-General in Council, and thus of the Secretary of State, over those subjects has been restricted by Rules within very narrow limits. We have, in the preceding chapter,[1] discussed the nature of the control which the Secretary of State can exercise over the administration of the Transferred subjects. We have also shown in that connexion where the previous sanction of the Secretary of State in Council or of the Governor-General in Council is required by Rules for including a proposal for expenditure on a Transferred subject in a demand for a grant. As regards the control of the central Government over the Transferred subjects, however, it is laid down in Devolution Rule 49 as follows:—

Central control over Transferred subjects.

'The powers of superintendence, direction and control over the local Government of a Governor's province vested in the Governor-General in Council under the Act shall, in relation to Transferred subjects, be exercised only for the following purposes, namely:—

(1) to safeguard the administration of central subjects;

(2) to decide questions arising between two provinces, in cases where the provinces concerned fail to arrive at an agreement; and

(3) to safeguard[2] the due exercise and performance of any powers and duties possessed by, or imposed on, the Governor-General in Council under, or in connexion with,

[1] See pp. 327–33.

[2] See page 329 *ante*.

or for the purposes of, the following provisions of the Act, namely, section 29A, section 30(1-A), Part VIIA, or of any rules made by, or with the sanction of, the Secretary of State in Council.'

We may note in this connection the observations of the Joint Select Committee on the above Rule. The Committee said[1]:—

'A clause has been added, identical in form, *mutatis mutandis*, with a clause added to the corresponding rule under section 33 (of the Act of 1919), in order to enable intervention in transferred administration for the purposes of carrying out the provisions of the Act relating to the office of High Commissioner, the control of provincial borrowing, the regulation of the services, the duties of the Audit Department, and for the enforcement of certain rules which are intended to place restrictions on the freedom of Ministers, such as the rules[2] requiring the employment of officers of the Indian Medical Service and the rules[3] contained in Schedule III.'

It is true that the assent of the Governor-General is still essential to the validity of a provincial Act, whether it relates to a Reserved or to a Transferred subject, and, therefore, it may be said that he may control provincial legislation by exercising his right of withholding his assent. But it is extremely unlikely that his assent will be ordinarily refused to any provincial Act which has already received the assent of the Governor of the province concerned, as such refusal will precipitate a constitutional crisis.

Finally, we may observe here that the power of control vested at present in the Government of India and in the Secretary of State in Council over the administration of the Transferred subjects, should be further reduced substantially

[1] Second Report from the Joint Select Committee on the Government of India Act, 1919 (Draft Rules). See also page 329 *ante*.
[2] See Devolution Rule 12. Appendix B. [3] See Appendix B.

and be truly restricted, as the Joint Select Committee recommended, within the narrowest possible limits. This reduction is essentially necessary for the independence and dignity of Ministers and also for making the control of the Legislative Council over them more effective and real.

Central control over Reserved subjects.

The provincial Governments are still responsible for the administration of the Reserved subjects to the Government of India, and ultimately to Parliament through the Secretary of State. In the case of these subjects there is no such statutory Rule restricting the power of control and interference vested in the Government of India (or the Secretary of State) as there is in the case of the Transferred subjects. The Joint Select Committee was opposed to any 'statutory divestment of control except over the transferred field.'[1] Thus the authority of the Governor-General in Council remains unimpaired in respect of the Reserved subjects. Recommendations have been made, however, by authoritative persons and bodies as to what should be the attitude of the central Government towards them. In the sphere of legislation the central Government should not, according to the authors of the Joint Report, interfere in provincial matters unless the interests for which it is itself responsible are directly affected.[2] As regards administrative interference in provincial matters, however, the authors remarked[3] :—

'We recognize that, in so far as the provincial Governments of the future will still remain partly bureaucratic in character, there can be no logical reason for relaxing the control of superior official authority over them nor indeed would any general relaxation be approved by

[1] Second Report from the Joint Select Committee on the Government of India Act, 1919 (Draft Rules)—Rule under Section 33 of the Act of 1919.

[2] Joint Report, para. 212.

[3] *Ibid.*, para. 213

Indian opinion; and that in this respect the utmost that can be justified is such modification of present methods of control as aims at getting rid of interference in minor matters, which might very well be left to the decision of the authority which is most closely acquainted with the facts.'

The Crewe Committee stated[1]:—'It appears to us to follow from our general reasoning that, in so far as provincial action comes under the cognizance of the Secretary of State, either directly or through the Government of India, he should regulate his intervention with regard to the principle which we have sought to apply to the working of the central Government, namely, that where the Government find themselves in agreement with a conclusion of the Legislature, their joint decision should ordinarily be allowed to prevail.' The Joint Select Committee also recommended[2]:—'In purely provincial matters, which are Reserved, where the provincial Government and Legislature are in agreement, their view should ordinarily be allowed to prevail, though it is necessary to bear in mind the fact that some Reserved subjects do cover matters in which the central Government is closely concerned.' Finally, it is laid down in the Royal Instructions[3] to the Governor-General as follows:—

'In particular it is Our will and pleasure that the powers

[1] Majority Report, para. 18.

[2] The Joint Select Committee's Report on Clause 33 of the Government of India Bill, 1919.

The Committee also said in another part of its Report:—

'India is not yet ripe for a true federal system, and the central Government cannot be relegated to functions of mere inspection and advice. The Committee trust that there will be an extensive delegation, statutory and otherwise, to provincial Governments of some powers and duties now in the hands of the Government of India; and they trust also that the control of that Government over provincial matters will be exercised with a view to preparing the provinces for the gradual transfer of power to the provincial Government and Legislature.' Report on Clause 3 of the Government of India Bill.

[3] See Appendix N. Vide *The Indian Year Book*, 1923, p. 44.

of superintendence, direction and control over the said local Governments vested in Our said Governor-General and in Our Governor-General in Council shall, unless grave reason to the contrary appears, be exercised with a view to furthering the policy of the local Governments of all Our Governors' provinces, when such policy finds favour with a majority of the members of the Legislative Council of the province.'

To what extent the above recommendations have actually been followed in practice, it is difficult for us to say, as we have no intimate knowledge of the working of the administrative machinery. By the Devolution Act of 1920, however, the control of the Governor-General in Council over local Governments has been relaxed in certain directions, and certain powers which used to be formerly exercised by the Government of India have now been delegated to the local Governments. This has been done partly in pursuance of a recommendation of the Committee on Division of Functions, which was accepted by the Government of India, and partly for the furtherance of the purposes of the Government of India Act. In regard to the question of the financial powers of the local Governments under the Reforms Scheme, we propose to deal with it in a subsequent chapter.

Duty of local Governments to supply information.

Every local Government is required by Devolution[1] Rule 5 to furnish to the Governor-General in Council from time to time such returns and information on matters relating to the administration of provincial subjects as the Governor-General in Council may require and in such form as he may direct. Besides, it is required to submit its own proceedings to the Government of India.

[1] See Appendix B.

Power to declare and alter boundaries of provinces.

Finally, we may note here that the 'Governor-General in Council may,[1] by notification, declare, appoint or alter the boundaries of any of the provinces into which British India is for the time being divided, and distribute the territories of British India among the several provinces thereof in such manner as may seem expedient,' subject, however, to the following qualifications, namely:—

(1) 'an entire district may not be transferred from one province to another without the previous sanction of the Crown, signified by the Secretary of State in Council; and

(2) any such notification may be disallowed by the Secretary of State in Council.'

[1] Section 60 of the Act.

CHAPTER XXI

PROVINCIAL GOVERNMENTS

How the domain of the provincial Government came to be partitioned into two fields—Governors' provinces—Inequality of their status—Duties and responsibilities of the Governor—Royal Instructions to him—The Executive Council of a Governor—Procedure at meetings of the Executive Council—Nature of the Council—Salaries of Councillors—Ministers and the methods of their appointment—Practice in other countries—Tenure of office of a Minister—The colonial system—The British system—The Minister's salary—Can the salary of the Minister be refused *in toto*?—How to express want of confidence in a Minister or to pass on him a vote of censure—The Bengal case—The law relating to the Minister's salary should have been more definite—Relation of the Governor to Ministers—The Transferred Subjects (Temporary Administration) Rules—Council Secretaries—Business of the Governor in Council and the Governor with his Ministers—Position of the Governor in the Government of his province—Matters affecting both Reserved and Transferred subjects—Allocation of revenues for the administration of Transferred subjects—Regulation of the exercise of authority over the members of public services—Provincial Finance Department and its functions—Agency employment of local Governments—Classification of the functions of Government, how made—How further transfers can take place—Revocation or suspension of transfer—Constitution of a new Governor's province—Provision as to backward tracts—Lieutenant-Governorships—Chief Commissionerships—Legislative Councils in Lieutenant-Governors' and Chief Commissioners' provinces, how constituted—Their functions.

How the domain of the provincial Government came to be partitioned into two fields.

The historic announcement made on August 20, 1917, began with the following declaration of the policy of His Majesty's Government with regard to India :—

'The policy of His Majesty's Government, with which the Government of India are in complete accord, is that of the increasing association of Indians in every branch of the administration and the gradual development of self-governing

institutions with a view to the progressive realization of responsible government in India as an integral part of the British Empire. They have decided that substantial steps in this direction should be taken as soon as possible. . . .'

In order that effect might be given to the underlying spirit of this policy, the authors of the Joint Report made, among others, the following recommendation[1] :—

'The provinces are the domain in which the earlier steps towards the progressive realization of responsible government should be taken. Some measure of responsibility should be given at once, and our aim is to give complete responsibility as soon as conditions permit. This involves at once giving the provinces the largest measure of independence, legislative, administrative and financial, of the Government of India which is compatible with the due discharge by the latter of its own responsibilities.'

Discussing the structure of the provincial Executive, the authors said[2] :—'We start with the two postulates that complete responsibility for the government cannot be given immediately without inviting a breakdown, and that some responsibility must be given at once if our scheme is to have any value. . . . We do not believe that there is any way of satisfying these governing conditions other than by making a division[3] of the functions of the provincial

[1] Joint Report, para. 189. [2] Joint Report, para. 215.

[3] We may also note here the observations of the authors on the principle of such division :—

The guiding principle 'should be to include in the transferred list those departments which afford most opportunity for local knowledge and social service, those in which Indians have shown themselves to be keenly interested, those in which mistakes which may occur though serious would not be irremediable, and those which stand most in need of development. In pursuance of this principle we should not expect to find that departments primarily concerned with the maintenance of law and order were transferred. Nor should we expect the transfer of matters which vitally affect the well-being of the masses who may not be adequately represented in the new councils, such for example as questions of land revenue or tenant rights'.—Joint Report, para. 238.

Government between those which may be made over to popular control and those which for the present must remain in official hands. . . . We may call these the "transferred" and "reserved" subjects, respectively.' Continuing, they said further[1] :—

'We propose therefore that in each province the executive Government should consist of two parts. One part would comprise the head of the province and an executive council of two members. In all provinces the head of the Government would be known as Governor, though the common designation would not imply any equality of emoluments or status, both of which would continue to be regulated by the existing distinctions, which seem to us generally suitable. One of the two executive councillors would in practice be a European, qualified by long official experience, and the other would be an Indian. . . . The Governor in Council would have charge of the reserved subjects. The other part of the Government would consist of one member, or more than one member, according to the number and importance of the transferred subjects, chosen by the Governor from the elected members of the Legislative Council. They would be known as ministers. They would be members of the executive Government, but not members of the Executive Council.'

This, in brief, is the history of the partition of the domain of the provincial Government into two fields, one of which has, as we shall soon see, been made over to Ministers appointed from among the elected members of the provincial Legislative Council while the other has remained under the administration of the Governor in Council. Under Section 46 of the Act, the presidencies of Bengal, Madras and Bombay, and the provinces known as the United Provinces, the Punjab, Bihar and Orissa, the

Governors' provinces.

[1] Joint Report, para. 218.

Central Provinces and Assam are each governed, in relation to Reserved subjects, by a Governor in Council, and in relation to Transferred subjects, ordinarily[1], by the Governor acting with Ministers appointed under the Act. The province of Burma, as has been stated before, was at first excluded from the scheme of Reforms introduced by the Act of 1919; but since January 2, 1923, it has been constituted a Governor's province under the Government of India Act. We may note here that the presidencies and provinces mentioned above are referred to in the Act as 'Governors' provinces'. But they do not enjoy the same status. The Governors of Bengal, Madras and Bombay are appointed by the Crown,[2] and are usually chosen from among persons of high rank and administrative experience in Great Britain. The Governors of the other provinces are appointed by the Crown after consultation with the Governor-General.[3] The intention of the framers of the Act in making this distinction probably was that these Governorships would ordinarily be filled by the appointment of distinguished members of the Indian Civil Service; and as a matter of fact, they have generally[4] been so filled hitherto. It may be noted here that there is nothing in the Act to prevent all the Governors being appointed from among the members of the Indian Civil Service.

Inequality of their status.

Secondly, the presidency Governments enjoy the privilege of direct correspondence with the Secretary of State on certain matters, and can appeal to him against orders of the Government of India;[5] but such an appeal must

[1] See Appendix D.
[2] Section 46 (2) of the Act.
[3] *Ibid.*
[4] The appointment of Lord Sinha as Governor of Bihar and Orissa was a notable exception.
[5] *Decentralization Commission's Report*, para 26.
This 'right,' says Sir Malcolm Seton, 'had not always been viewed with benevolent eyes by the Government of India, but restrictive

pass through, or be communicated, to the latter. Again, if a vacancy occurs in the office of Governor-General when there is no successor in India to fill the vacancy, the Governor of a presidency, 'who was first appointed to the office of Governor of a presidency', is to hold and execute the office of Governor-General until a successor arrives or until some person in India is duly appointed thereto.[1]

Finally, there are differences in the maximum annual salaries payable to the Governors under the Act. The Governors of Bengal, Madras, Bombay and the United Provinces are each entitled to the maximum salary of Rs. 1,28,000 per annum; those of the Punjab, Burma and Bihar and Orissa to Rs. 1,00,000 per annum; and those of the Central Provinces and Assam to Rs. 72,000 and Rs. 66,000 per annum respectively.[2]

Duties and responsibilities of the Governor.

The Governor of a province is charged with various heavy duties and responsibilities. They have been imposed on him either by statute or by the Instrument of Royal Instructions issued to him. We have previously referred to some of

rules and the modern standardisation of Indian administration, following on the amalgamation of the once separate Presidency Civil Services and the Presidency Armies, prevent the danger of cross-purposes in the official correspondence.'—*The India Office*, pp. 48–49.

[1] Section 90 of the Act. It may also be noted here that a temporary vacancy in the office of Governor in any province may be filled by the Vice-President, or, if he is absent, by the senior member of the Governor's Executive Council, or, if there is no Council, by the Chief Secretary to the local Government, until a successor arrives, or until some other person is duly appointed thereto. Every such acting Governor is entitled to receive the emoluments and advantages appertaining to the office of Governor, 'foregoing the salary and allowances appertaining to his office of member of council or secretary.' Section 91 of the Act. But see also pp. 363–64 *ante* and *Appendix O*.

[2] Second Schedule to the Government of India Act. The actual amount, within the maximum, is fixed in each case by the Secretary of State in Council. The Governors of Bengal, Bombay, Madras and the United Provinces actually receive each a salary of Rs. 1,20,000, per annum; those of the Punjab, Burma and Bihar and Orissa each Rs. 1,00,000 per annum; and those of the Central Provinces and Assam receive Rs. 72,000 and Rs. 66,000 per annum respectively.

them in relation to his Legislative Council. We shall have occasion in future to describe others, specially those in relation to his Ministers. We may, in particular, mention here that he is specially enjoined [1] by the Royal Instructions—

Royal Instructions to him.

(1) to further the purposes of the Government of India Act to the end that the institutions and methods of Government provided therein are laid upon the best and surest foundations, that the people of his province acquire such habits of political action and respect such conventions as will best and soonest fit them for self-government, and that the authority of the Crown and of the Governor-General in Council is duly maintained;

(2) to see that whatsoever measures are in his opinion necessary for maintaining safety and tranquillity in all parts of his province, and for preventing occasions of religious or racial conflict are duly taken and that all orders issued by the Secretary of State or by the Governor-General in Council on behalf of the Crown, to whatever matters relating, are duly complied with;

(3) to take care that due provision is made for the advancement and social welfare of those classes amongst the people committed to his charge who, whether on account of the smallness of their number, or their lack of educational or material advantages, or from any other cause, specially rely upon his protection and cannot as yet fully rely for their welfare upon joint political action, and that such classes do not suffer or have cause to fear neglect or oppression;

(4) to see that every order of his Government and every act of his Legislative Council are so framed that none of the diverse interests of, or arising from, race, religion, education, wealth, etc., may receive unfair advantage or may

[1] See Appendix M.

unfairly be deprived of privileges or advantages which they have heretofore enjoyed, or be excluded from the enjoyment of benefits which may be conferred on the people at large;

(5) to safeguard all members of the services employed in his province in the legitimate exercise of their functions, and in the enjoyment of all recognized rights and privileges, and to see that his Government order all things justly and reasonably in their regard, and that due obedience is paid to all just and reasonable orders and diligence shown in their execution; and

(6) finally, to take care that no monopoly or special privilege, which is against the common interest, is established in his province and no unfair discrimination is made therein in matters affecting commercial or industrial interests.

The Governor enjoys the same legal immunities as the Viceroy,[1] and he has, as has been seen before, to take the same oaths of allegiance and office as the latter.

The Executive Council of a Governor.

The members of a Governor's Executive Council are appointed by the Crown.[2] Their actual number, within the statutory maximum of four, is as determined by the Secretary of State in Council.[3] One at least of the members must be a person who at the time of his appointment has been for at least twelve years in the service of the Crown in India.[4] Provision may be made by Rules under the Act as to the qualifications to be required in respect of the other members of the Council. The Governor appoints a member of his Executive Council to be its Vice-President. We may note in this connection the following observations[5] of the Joint Select Committee

[1] Section 110 of the Act. Also see pp. 356–57 *ante*.
[2] *Ibid*. 47 of the Act.
[3] *ibid*. [4] *Ibid*.
[5] The Joint Select Committee's Report on Clause 5 of the Government of India Bill.

on the constitution of the provincial Executive Councils :—

'The Committee are of opinion that the normal strength of an executive council, especially in the smaller provinces, need not exceed two members. They have not, however, reduced the existing statutory maximum of four ; but if in any case the council includes two members with service qualifications, neither of whom is by birth an Indian, they think that it should also include two unofficial Indian members.'

As a matter of fact, the number of Councillors in the different Executive Councils constituted under the Reforms has varied from two to four.[1]

The Secretary of State may, if he thinks fit, revoke or suspend, for such period as he may direct, the appointment of a Council for any or all of the Governors' provinces ; and during the period of such suspension or revocation the Governor of the province concerned has all the powers of the Governor thereof in Council.[2]

Procedure at meetings of the Executive Council.

If any difference of opinion arises on any question brought before a meeting of a Governor's Executive Council, the Governor in Council is bound by the decision of the majority of those present, and, if they are equally divided, the Governor or any other person presiding has a second or casting vote.[3] If, however, any measure is proposed in the meeting whereby the safety, tranquillity or interests of his province, or of any part thereof, are, or may be, in the judgment of the Governor, essentially affected, he (i.e., the Governor) may, like the Governor-General, override the

[1] There were in 1927 four Executive Councillors in each of the presidencies of Bengal, Madras and Bombay and two in each of the remaining Governor's provinces. *The Combined Civil List for India* (1927), The Pioneer Press.

[2] Section 46 (3) of the Act.

[3] Section 50 (1) of the Act.

majority of his Council if they dissent from his view and act on his own authority and responsibility.[1] In every such case the Governor and the members of his Council present at the meeting must mutually exchange written communications, to be recorded in their secret proceedings, stating the grounds of their respective opinions, and the order of the Governor must be signed by the Governor and by those members. It may be noted in this connection that the Governor cannot, in the exercise of his overriding power, do anything which he could not lawfully have done with the concurrence of his Council.[2] The power to overrule the majority of his Council was first conferred upon the provincial Governor by the Charter Act of 1793. The only Governors then were the Governors of Madras and Bombay.

If a Governor absents himself from any meeting of his Executive Council owing to indisposition or any other cause, the Vice-President, or, if he too is absent, the senior member present at the meeting, will preside thereat,[3] and will have, while so presiding, the same powers as the Governor would have had if present. If, however, the Governor, although absent from the meeting, is at the time resident at the place where the meeting is held, and 'is not prevented by indisposition from signing any act of council made at the meeting', the act will require his signature; but if he refuses to sign it, the act will become null and void.[4]

Nature of the Council.

The members of a Governor's Executive Council are not responsible to his Legislative Council for the administration of the Reserved subjects. The Governor in Council is, as noted before, responsible for their administration to the Government of India and ultimately to the Imperial Parliament through the

[1] Section 50 (2) of the Act.
[2] Section 50 (4) of the Act.
[3] Section 51 of the Act.
[4] *Ibid.*

Secretary of State. The principle of the united and indivisible responsibility with all its implications, which, as we have previously seen, is a feature of the central Executive Council, applies equally to a provincial Executive Council, every member of which is required to take the same oaths of allegiance, office, and secrecy as a member of the Viceroy's Executive Council has to take.[1] The members of an Executive Council, central or provincial, enjoy the same legal immunities as the Viceroy or the Governor.[2]

Salaries of Councillors.

The salaries of the members of a Governor's Executive Council are not the same in all provinces. In Bengal, Madras, Bombay, and the United Provinces, an Executive Councillor receives annually sixty-four thousand rupees as his salary; in the Punjab, Burma, and Bihar and Orissa, sixty-thousand rupees; in the Central Provinces, forty-eight thousand rupees; and in Assam, forty-two thousand rupees.[3]

Ministers and the method of their appointment.

The Governor of a province is empowered by Section 52 of the Act to appoint, by notification, Ministers for the administration of the Transferred subjects. Such Ministers will hold office during the pleasure of the Governor.[4] No official can be appointed to be a Minister. It may be interesting to note here that the authors of the Joint Report proposed that Ministers should be appointed for the lifetime of the provincial Legislative Council.[5] The Government of India opposed this proposal and stated in its first Despatch[6] on Indian Constitutional Reforms as follows:—

'We feel bound at all events to proceed on the assumption that a minister who finds himself at variance with the

[1] But in the case of the oath of secrecy, substitute 'Governor' for 'Governor-General': See p. 382 *ante* and Appendix N.
[2] Section 110 of the Act.
[3] These are also the maximum amounts payable under the Act.
[4] Section 52 of the Act. [5] Joint Report, para. 218.
[6] See para. 40 of the Despatch of March 5, 1919.

views of those who are in a position to control his legislation and his supply and to pass votes of censure upon his administration will recognize that he must make way for a more acceptable successor. That being so, we think that ministers must be assumed from the outset to be amenable to the legislature. It follows that they would not be appointed for the life-time of the Legislative Council but at pleasure; they would (in the absence of definite reasons to the contrary) be removable by an adverse vote of the Legislative Council; and, following the accepted practice elsewhere, the Governor would have power to dismiss them if he felt that the situation required such a course.'

Similarly, the Committee[1] on Division of Functions said:—'Our proposal assumes that Ministers will hold office during the Governor's pleasure, and that he will have power to dismiss them. This seems essential if deadlocks are to be avoided.' In view of these suggestions, the proposal contained in the Joint Report was modified as stated above.

Practice in other countries.

It has been seriously suggested by many that the power of appointing Ministers should be taken away from the Governor and be vested in the Legislative Council. The idea is that the Council will formally elect its own Ministers. But the constitutional practice in England and in the self-governing Dominions like Canada, Australia and South Africa, is different. The Ministers of State in these countries are appointed, and may be dismissed, by the head of the Executive Government—the King in England and the Governor-General in the Dominions. This is the position in law; in actual practice, however, the choice of the Ministers by the head of the Executive Government is restricted within very narrow limits. But that is a

[1] See para. 61 of its Report.

different question. The practice which has stood the test of time in those countries and which has, as will be evident on a little reflection, its obvious merits,[1] should not be departed from in our country in view of the fact that the Parliamentary form of Government, already introduced partially, will be established in the near future in every sphere of Indian administration.

Whatever the position may be in theory, the power of the Governor to choose his own Ministers is actually limited[2] in practice, because the Joint Select Committee recommended that the Ministers selected by the Governor to advise him on the Transferred subjects should be elected

[1] As Prof. Garner says :—

'Both reason and experience teach that election by the legislature not only impairs the independence of the executive and tends to make him subservient to its will, but creates a powerful temptation to an ambitious candidate to gain the support of the legislature by promises of official reward or influence. Once elected, he is under the same temptation to secure re-election. To be fully independent of legislative control and free of such temptations, the executive must owe his office to a different source.

Finally, it should be observed that the imposition of so important a political duty upon the legislature is likely to interfere with its normal function of law-making, by introducing into its procedure a distracting element which on occasions of great and exciting contests must necessarily consume its time, lead to conflicts and deadlocks, and give a party colouring to the consideration of many measures which are in reality non-partisan in character."—*Introduction to Political Science*, p. 536.

[2] "The main principle which characterizes a system of responsible representative government is that the Executive should be selected from that group or party which comprises a majority of the legislature and that it should resign, if and when the majority of the legislature refuses to support it. This principle was intended by Parliament to operate here so far as the administration of Transferred subjects was concerned. A Governor is expected to select Ministers who can obtain the support of a majority of the members of the Legislative Council, but, should he fail to do so, the Council has the remedy in its own hands and can compel the resignation of the Ministers. . . . . Only such Ministers as can secure the support of the Council can remain in office. . . . . I have the wish, and I have no power if I had the wish, to appoint Ministers who are unacceptable to the Council."—From a speech by His Excellency Lord Lytton, Governor of Bengal, delivered in the Bengal Legislative Council on January 11, 1927.

members of the Legislative Council, enjoying its confidence and capable of leading it. It is not possible for a Minister who does not enjoy such confidence, to remain long in office[1].

Tenure of office of a Minister.

A Minister is not an official in the legal sense of the term for electoral purposes. It is specially laid down in the Act that, for such purposes, 'a Minister shall not be deemed to be an official and a person shall not be deemed to accept office on appointment as a Minister'.[2] Nor is he required, after accepting office, to vacate his seat and to seek re-election. No Minister can hold office for a longer period than six months, unless he is or becomes an elected member of the local legislature.[3] This clause, as Mr. Montagu said in a Memorandum,[4] is modelled on the corresponding provisions[5] contained in some of the Dominion Constitutions. It does not mean that the Governor can arbitrarily appoint any person to be a Minister, or can retain in office a Minister, who has not been re-elected, for a further period of six months, after the expiration of the duration of one Legislative Council, or after its dissolution, against the wishes of the majority of the next Council. Were he to do so, the new Council would drive such a Minister out of office by passing, at its earliest opportunity, a motion of want of confidence in him (the Minister). The clause, in our opinion, has been inserted in order to enable the Governor to appoint as

The colonial system.

[1] The Joint Select Committee's Report on Clause 4 of the Government of India Bill.

[2] Sec. 80 B of the Act. See pp. 72-3 in this connexion.

[3] Sec. 52 (2) of the Act.

[4] This Memorandum related to the Government of India Bill, 1919, and was presented to Parliament.

[5] See South Africa Act, 1909, Section 14 and the Commonwealth of Australia Act, 1900, Section 64. But it may be noted here that both in South Africa and Australia no Minister can hold office for a longer period than *three* months unless he is or becomes a member of either House of Parliament.

Minister a prominent party leader who may have been defeated at the previous election or who may not, for some other reason, happen to be a member of the Council for the time being, but who nevertheless, if appointed to the office of Minister, will be able to command a majority in the Council. Thus the Minister so appointed is given six months' time in which to secure a seat in the Council. And it may not be really difficult for him to secure his election after his appointment, if a member of his party is induced to vacate his seat in his favour. This is done also in England. It may be of interest to note here that even in the case of the British Parliament, the principle that every member of the Cabinet must be a member of one or the other House of the Legislature, is not absolute. Sir John Marriott has given, from the constitutional history of England in the nineteenth century, a number of specific instances [1] of the temporary exclusion of Cabinet Ministers from Parliament.

The British system.

The Joint Select Committee recommended [2] that the status of Ministers should be similar to that of the members of the Executive Council, but that their salaries should be fixed by the Legislative Council. Accordingly, it has been laid down in the Act [3] as follows :—

The Minister's salary.

'There may be paid to any minister so appointed in any province the same salary as is payable to a member of the

[1] 'In 1880 Sir William Harcourt, when Secretary of State for the Home Department, found himself temporarily without a seat in Parliament. The same fate befell Mr. Goschen when appointed Chancellor of the Exchequer in 1887. . . . More striking because more deliberate was the refusal of Mr. Gladstone to seek re-election at Newark when appointed by Sir Robert Peel to the Colonial Secretaryship in December 1845. As a result he was, though a leading member of the Cabinet, out of Parliament during the difficult and momentous Session of 1846.'—*English Political Institutions* by Sir John Marriott, p. 80.

[2] The Joint Select Committee's Report on Clause 4 of the Government of India Bill.

[3] Section 52 (1) of the Act

executive council in that province, unless a smaller salary is provided by vote of the legislative council of the province.'

Can the salary of the Minister be refused *in toto*?

It is evident from this clause that the salary of the Minister in a province may be less than what is paid to a Member of the Executive Council in that province, if the Legislative Council so determines it; though ordinarily, it will be equal to it. The question has been raised whether or not the salary of the Minister can be totally refused under the Act. This question involves a very difficult point of law, especially in view of the word 'may' in the clause. In the Commonwealth of Australia Act, 1900, the section [1] relating to the salaries of the Ministers of State is very clear and definite in its meaning, as will appear from the following quotation :—

'There *shall* be payable to the Queen, out of the Consolidated Revenue Fund of the Commonwealth, for the salaries of the Ministers of State, an annual sum, which until the Parliament otherwise provides, shall not exceed twelve thousand pounds a year.'

Contrasted with this, the Government of India Act is rather vague and indefinite on the question of the salary of the Minister. In spite of this, the expression 'smaller' in the clause quoted above indicates, negatively, that it could never have been the intention of the framers of the Act that the salary of the Minister could ever be lawfully refused *in toto*, and, positively, that the Minister *must* have a salary, however small its amount may be.[2]

[1] Section 66 of the Commonwealth of Australia Constitution Act, 1900.

[2] That our contention is right is specially proved by the fact that the original Government of India Bill, 1919, as presented to the House of Commons by Mr. Montagu, contained the following provision relating to the salary of the Minister :—

'There shall be paid to any minister so appointed such salary as the Governor, subject to the sanction of the Secretary of State, may determine'—(Section 3 (1) of the Government of India Bill, 1919).

It has been contended, however, that since Section 72D (2) of the Act empowers the Legislative Council to assent, or refuse its assent, to a demand, the demand for a grant on account of the salary of the Minister can be quite legally refused under this Section. It may be said against this contention that the question of the Minister's salary is to be treated as an exception to the general rule relating to the power of the Council in regard to the demands for grants. Were it not so, it would not have been specially provided for in Section 52 (1) of the Act. The clause relating to the Minister's salary is apparently incompatible with the clause relating to the general power of the Council with regard to the demands for grants. In such a case of incompatibility we should be guided by the generally accepted principles of interpretation of statutes. 'Where a general intention is expressed,' says Sir Peter Maxwell,[1] 'and also a particular intention which is incompatible with the general one, the particular intention is considered an exception to the general one. Even when . . . the later part of the enactment is in the negative, it is sometimes reconcilable with the earlier one by so treating it. If, for instance, an Act in one section authorized a corporation to sell a particular piece of land, and in another prohibited it from selling "any land," the first section would be treated not as repealed by the sweeping terms of the other, but as being an exception to it.'

Again :—

'A statute [2] is the will of the Legislature; and the fundamental rule of interpretation, to which all others are subordinate, is that a statute is to be expounded "according to the intent of them that made it."'

If the above reasonings are, as we believe them to be,

[1] See *On the Interpretation of Statutes* by Sir Peter Benson Maxwell (sixth edition), pp. 301-2.

[2] *Ibid.*, p. 1.

correct, it follows as a corollary that, if the salary of the Minister is totally refused, and if he continues in office after the refusal of his salary, he may, notwithstanding such refusal, be legally paid the same salary as is paid to a member of the Executive Council. It may be argued against this proposition that, if it is not lawful to increase by a single pie the salary of the Minister when it has been reduced by the Council to an abnormally low figure, say, of one rupee, it cannot be reasonably held to be legal to pay to the Minister the same salary as is paid to a member of the Executive Council in the province, when his salary has been refused *in toto*. The question, however, is not one of propriety, but of law. The Government of India Act being what it is, we hold that such payment, however, unreasonable, is still legal. But whether a Minister *ought* to continue in office after his salary has been rightly or wrongly refused, is a different question, and belongs to the domain of constitutional ethics rather than of constitutional law.

How to express want of confidence in a Minister or to pass on him a vote of censure.

It has been held by many that the Council may use the weapon of the refusal of the salary of the Minister to express its want of confidence in him, or to pass a vote of censure on him, in order to drive him out of office. But according to well-established Parliamentary conventions, the total refusal of the salary of a Minister is neither required, nor resorted to, for the purpose of expressing want of confidence in him or for passing upon him a vote of censure.[1] As His Excellency Lord Lytton, Governor of Bengal, stated in a letter,[2] addressed to the Secretary, Indian Association (Calcutta) :—

'The motive of those who record a vote is a relevant

[1] See also pages 290–91 *ante* in this connexion.

[2] This letter was written in reply to the 'memorandum submitted by the Indian Association for a reconsideration of the decision

consideration when the effect of the vote is capable of different interpretations; for instance, a reduction of a demand for a grant may indicate either an expression of censure on the policy of the Government making the demand, or a desire for reduction in the expenditure covered by the demand, and, since the vote is capable of either interpretation, the intention of those recording it may be gathered from the speeches which preceded it. . . . There are several ways in which the wish of the Legislative Council for the resignation of Ministers may be expressed. The first is by a resolution expressing want of confidence in the Ministers.[1] This may be moved in any session and must take the chance of the ballot together with other resolutions. Another method, which is only available during the debate on the budget or in connection with the demands for grants for Transferred departments, is to move a nominal reduction of, say, Rs. 100 in the demand for Ministers' salaries, or in any demand for a grant made by the Ministers.[2]

'Finally, in any sudden or special circumstances, where the other opportunities are not available, the Government may be asked to give time for the discussion of a resolution of censure.'[3]

It may be also pointed out here that even the passing by the Council of a nominal reduction of one rupee in the demand for the salary of the Minister is sure to be treated as a vote of censure upon the latter and to be followed by his resignation.[4] Thus it is open to the Council to adopt

proroguing the Council and submission of a fresh demand for Ministers' salaries in a new session'.—See *The Statesman* (Dak edition) of October 4, 1924.

[1] But see pp. 290–91 *ante* in this connexion.

[2] See in this connexion Lowell's *Government of England*, vol. i, pp. 282 and 346–48.

[3] But see pp. 290–91 *ante*.

[4] 'In order that the Council may express its opinion of each Minister individually, the Government will this year show separately the salary of each Minister in the estimate under the heading "General Administration", and any member will have an opportunity of

any of these methods for expressing its dissatisfaction with the Minister, and it need not go the length of refusing his salary in order to drive him out of office.

The Bengal case.

The demand for Ministers' salaries had been twice rejected by the Bengal Legislative Council in the course of the year 1924—once on March 24th and again on August 26th. And the rejection on the second occasion was followed by the resignation of the Ministers and the temporary assumption by the Governor of the administration of the Transferred departments. The Government of Bengal accepted this rejection as final, as would appear from the following extracts from the Governor's letter already referred to above :—

'It is immaterial what the objects of those who voted for refusal may have been, as the consequences of the refusal are that no money is available and the purpose for which the demand was made (in this case the appointment of Ministers) cannot be carried out.'

Again :

'Those who voted for the total refusal of Ministers' salaries may assign what motives they please to their votes ; but no explanation can alter the fact that the refusal to provide any salaries has made the appointment of any Ministers impossible so long as that decision remains unaltered.'

Still, we believe that the questions yet remain undecided as to whether or not the Council, in rejecting the demand for the Ministers' salaries, acted legally, and also whether the Ministers might not be lawfully paid their salaries, if

expressing his want of confidence in either of the Ministers whom I have selected by moving a token reduction of one rupee in the salary demanded.'—From a speech by His Excellency Lord Lytton, Governor of Bengal, delivered in the Bengal Legislative Council on January 11, 1927. A token reduction of one rupee may also be moved for the purpose 'of criticizing some detail of a Minister's policy without necessarily requiring his resignation.'—*Ibid.*

they chose to continue in office, in spite of the rejection by the Council of the demand for them. But, though opinions may be rightly divided as to whether or not the Council, in rejecting the demand, acted against the letter of the Constitution, there can be no doubt about the fact that in doing so it acted against its spirit, and also against the intention of its framers. And it must be said to the credit, on the other hand, of many of those members of the Council who voted for the rejection, that they made no secret of their belief that they were in the Council, not to work the system of government set up in the provinces by the Act of 1919, but to destroy it altogether, with a view to having a better system of government established in its place.

The law relating to the Minister's salary should have been more definite.

In conclusion, we must say that the clause in the Government of India Act relating to the salary of the Minister ought to have been better drafted, and the intention of the authors of the Act regarding it ought to have been more clearly and definitely expressed.

Relation of the Governor to Ministers.

The views of the authors of the Joint Report[1] on the question of the relations between the Governor and his Ministers were thus stated:—

"The portfolios dealing with the transferred subjects would be committed to the ministers, and on these subjects the ministers together with the Governor would form the administration. On such subjects their decisions would be final, subject only to the Governor's advice and control. We do not contemplate that from the outset the Governor should occupy the position of a purely constitutional Governor who is bound to accept the decisions of his ministers. Our hope and intention is that the ministers will gladly avail themselves of the Governor's

[1] Joint Report, para. 219.

trained advice upon administrative questions, while on his part he will be willing to meet their wishes to the furthest possible extent in cases where he realizes that they have the support of popular opinion. We reserve to him a power of control, because we regard him as generally responsible for his administration, but we should expect him to refuse assent to the proposals of his ministers only when the consequences of acquiescence would clearly be serious. Also we do not think that he should accept without hesitation and discussion proposals which are clearly seen to be the result of inexperience. But we do not intend that he should be in a position to refuse assent at discretion to all his ministers' proposals.'

In accordance with these proposals the following clause[1] has been inserted in the Act for the purpose of regulating the relations between the Governor and his Ministers :—

'In relation to transferred subjects, the Governor shall be guided by the advice of his ministers, unless he sees sufficient cause to dissent from their opinion, in which case he may require action to be taken otherwise than in accordance with that advice.'

Commenting on this clause in the Government of India Bill, the Joint Select Committee made the following observations :—

'The Committee[2] are of opinion that the ministers selected by the Governor to advise him on the transferred subjects should be elected members of the legislative council, enjoying its confidence and capable of leading it. A minister will have the option of resigning if his advice is not accepted by the Governor ; and the Governor will have the ordinary constitutional right of dismissing a minister

[1] Section 52 (3) of the Act.

[2] The Joint Select Committee's Report on Clause 4 of the Government of India Bill.

whose policy he believes to be either seriously at fault or out of accord with the views of the legislative council. In the last resort the Governor can always dissolve his legislative council and choose new ministers after a fresh election; but if this course is adopted, the Committee hope that the Governor will find himself able to accept such views as his new ministers may press upon him regarding the issue which forced the dissolution.'

Again:

'Ministers [1] who enjoy the confidence of a majority in their legislative council will be given the fullest opportunity of managing that field of government which is entrusted to their care. In their work they will be assisted and guided by the Governor, who will accept their advice and promote their policy whenever possible. If he finds himself compelled to act against their advice, it will only be in circumstances roughly analogous to those in which he has to override his executive council—circumstances which will be indicated in the Instrument of Instructions furnished to him on his appointment by His Majesty.'

The Royal Instrument [2] of Instructions referred to above directs the Governor to act as follows:—

'You shall assist Ministers by all the means in your power in the administration of the transferred subjects, and advise them in regard to their relations with the Legislative Council.

'In considering a Minister's advice and deciding whether or not there is sufficient cause in any case to dissent from his opinion, you shall have due regard to his relations with the Legislative Council and to the wishes of the people of the province as expressed by their representatives therein.'

[1] The Joint Select Committee's Report, para. 5.
[2] See Appendix M.

We shall later on describe what the relations between the Governor and his Ministers have been in the different provinces since the inauguration of the Reforms.

The Transferred Subjects (Temporary Administration) Rules.

Rules[1] may be made under the Act for the temporary administration of a Transferred subject where, in case of emergency, owing to a vacancy, there is no Minister in charge of the subject, by such authority and in such manner as may be prescribed by the Rules. Accordingly, the following Rules have been made :—

In case of emergency where, owing to a vacancy, there is no Minister in charge of a Transferred subject, the Governor—[2]

(1) must, if another Minister is available and willing to take charge of the subject, appoint him to administer the subject temporarily ; or

(2) must, if the vacancy cannot be provided for in the above way, himself temporarily administer the subject, and, while so doing, must exercise, in relation to it, all such powers in addition to his own powers as Governor as he could exercise if he were the Minister in charge thereof.

If the Governor himself undertakes temporarily to administer a Transferred subject, he must certify that an emergency has arisen in which, owing to a Ministerial vacancy, it is necessary for him to do so, and must forthwith forward a copy of such certificate to the Governor-General in Council. Such temporary administration by the Governor can continue until a Minister is appointed to administer the subject. The Governor cannot exercise, in respect of such subject, the power of certification of legislation vested in him by Section 72E of the Act.[3] Nor, it must be noted here, does the subject cease to be a Transferred subject in

[1] Proviso to Section 52 (3) of the Act. [2] See Appendix D.
[3] See pp. 221-22 *ante*.

such circumstances. As we shall see later, the revocation or suspension of transfer can only be made, under Devolution Rule 6, by the Governor-General in Council with the previous sanction of the Secretary of State in Council. But it is really difficult to say to whom the Governor is responsible when he takes over temporarily the administration of Transferred subjects. Lord Lytton's interpretation of the Act is that, 'according to the Constitution, he (i.e., the Governor) is responsible for the conduct of these subjects neither to the Legislative Council nor to the British Parliament[1]' . . . In the absence of anything to the contrary in any document connected with the Act, it seems to us that His Excellency's interpretation is correct. This is one of the anomalies in the existing Constitution of our country.

It may be of interest to mention here that when in 1924, the second rejection[2] of the demand for Ministers' salaries by the Bengal Legislative Council was followed by the resignation of the Ministers, the Governor (of Bengal) took over[3] temporarily the administration of the Transferred departments. Similarly, when the Ministers in the Central Provinces resigned early in the same year on account of their salaries having been reduced to a ridiculously low figure[4] by the local Legislative Council, the administration of the Transferred subjects was taken over temporarily by the Governor.

The Governor may[5] at his discretion appoint, from among the non-official members of his Legislative Council,

[1] This extract has been taken from a speech delivered by His Excellency Lord Lytton, Governor of Bengal, on November 24, 1924. Vide *The Statesman* (Dak edition) of November 26, 1924.

[2] This took place on August 26, 1924.

[3] In September, 1924.

[4] 'The Ministers' salaries were voted at Re. 1 a year for each Minister.'—App. 6 to the Report of the Reforms Enquiry Committee, 1924, Oral Evidence, vol. i, p. 2.

[5] Section 52 (4) of the Act.

Council Secretaries.

Council Secretaries, who will hold office during his pleasure and discharge such duties in assisting the members of his Executive Council and his Ministers as he may assign to them. The Council Secretaries must be paid such salaries as may be provided by a vote of the Legislative Council. A Council Secretary must cease to hold office if he ceases for more than six months to be a member of the Legislative Council.

This provision for the appointment of Council Secretaries has been made in accordance with the proposals contained in paragraph 224 of the Joint Report, which says :—

'The suggestion has been made to us that in some provinces it might be convenient, where the press of work is heavy, to appoint some members of the Legislative Council, not necessarily elected, to positions analogous to that of a parliamentary under-secretary in Great Britain, for the purpose of assisting the members of the executive in their departmental duties and of representing them in the Legislative Council. We feel no doubt that the elaboration of the machinery which is inevitable in future will impose greater burdens on the members of the Government. We suggest therefore that it may be advisable and convenient to take power to make such appointments.'

We have in another connection discussed the advantages and disadvantages of the appointment of Council Secretaries. Such appointments were made in some provinces with more or less success[1] in different departments. But

[1] 'In fact it may be said generally that Council Secretaries have proved the utility of the institution and have contributed towards the smooth working of the Council.'—Letter from the Government of Madras to the Reforms Enquiry Committee, 1924.

On the other hand :

'Council Secretaries did not make their influence felt in any marked degree or win a recognized position in the provincial constitution. This experiment must be classed as a failure.'—Letter from

if the experiment is to be made a real success, two main conditions must be fulfilled: the services of really able men, who will be available for prolonged periods and who will sacrifice their private careers and business to work in Government offices, have to be secured; and, secondly, they must be paid reasonable salaries.

Business of the Governor-in-Council and the Governor with Ministers.

All orders and other proceedings of a provincial Government must be expressed to be made by the Government of the province concerned. The Governor of each province has been empowered to make provision by rules for distinguishing orders and other proceedings relating to Transferred subjects from other orders and proceedings.[1] He has also been empowered to make rules and orders for the more convenient transaction of business in his Executive Council and with his Ministers, and, further, for regulating the relations between them.[2]

Instructions have been given by authoritative persons and bodies as to how the business of the Government of a Governor's province should be transacted. First of all, the authors of the Joint Report observed[3]:—

'It is our intention that the Government thus composed

the Government of the Central Provinces to the Reforms Enquiry Committee, 1924.

(Vide *Reports of the Local Governments on the working of the Reformed Constitution* (1924), pp. 41–42 and also p. 315.)

It is clear from the above two quotations that there is a difference of opinion regarding the usefulness of Council Secretaries. The Reforms Enquiry Committee recommended, however, that the provisions relating to Council Secretaries in the provinces should be so modified (*a*) as to provide that they must get a reasonable salary the amount of which would be determined by an Act of the local legislature: and (*b*) that 'on the transferred side the Minister should make recommendations for appointment as Council Secretaries for the approval of the Governor, and that, when appointed, they should hold and vacate office with the Minister.'—Majority Report, para. 105; also recommendation 22.

[1] Section 49 (1) of the Act. [2] Section 49 (2) of the Act.

[3] Joint Report, para. 221.

and with this distribution of functions shall discharge them as one Government. It is highly desirable that the executive should cultivate the habit of associated deliberation and essential that it should present a united front to the outside. We would therefore suggest that, as a general rule, it should deliberate as a whole, but there must certainly be occasions upon which the Governor will prefer to discuss a particular question with that part of his Government, directly responsible. It would therefore rest with him to decide whether to call a meeting of his whole Government, or of either part of it, though he would doubtless pay special attention to the advice of the particular member or minister in charge of the subjects under discussion. The actual decision on a transferred subject would be taken, after general discussion, by the Governor and his ministers; the action to be taken on a reserved subject would be taken, after similar discussion, by the Governor and the members of his Executive Council.'

Next, the Joint Select Committee gave a picture of the manner in which it thought that the Government of a province should be worked under the Reforms. 'There will be,' it said,[1] 'many matters of administrative business, as in all countries, which can be disposed of departmentally. But there will remain a large category of business, of the character which would naturally be the subject of Cabinet consultation. In regard to this category the Committee conceive that the habit should be carefully fostered of joint deliberation between the members of the executive council and the ministers, sitting under the chairmanship of the Governor. There cannot be too much mutual advice and consultation on such subjects; but the Committee attach

[1] The Joint Select Committee's Report on Clause 6 of the Government of India Bill, 1919.