(3) They must enable the supreme Government to maintain its communication between the military stations and posts occupied by its forces and to avoid dangerous interruptions or break of jurisdictional gauge in the Imperial system of Railways and Telegraphs.

(4) Inasmuch as the Government of India acts for them in all international and interstatal arrangements, they must loyally carry out the obligations incurred by the Supreme Government to foreign powers or other States on their behalf.

(5) The perpetuation of their governments is incompatible with the dismemberment of their States, internal disorder, or gross misrule. They must, therefore, accept Imperial intervention to prevent or correct such abuses. The laws of natural justice and the principle of religious toleration must be observed.

(6) The right of self-preservation, with its incidental rights, gives to the British Government an indefinable right to protect Imperial interests where they may be injured by the unfriendly action of the King's allies: and it suggests a possible right of intervention in their internal affairs, as in the regulation of currency, or commerce, or in the establishment of postal unions. Each case of interference must, however, be justified by real necessity.

(7) Claiming as they do the protection of the King-Emperor the Indian Princes must seek the confirmation of the Viceroy to their successions, must treat with respect the representatives of the Imperial authority, accept the guidance of the Supreme Government during minorities, and generally prove their loyalty to the Crown.

Such are the extensive duties of the protected princes: but there are strict limitations upon the interference of the British Government. Parliament and the Legislatures of India have on their part recognised the fact that except in the case of British subjects or servants, British legislative and judicial authority cannot extend beyond the territorial limits of India under the King-Emperor. The judicial or legislative functions with which the British Government is invested in regard to the Native States must, therefore, be based on a full recognition of the fact that they are exercised in a foreign territory.

If International law deals only with nations or States whose intercourse with one another is based upon the theory that they are equal powers and have the right to form alliances and declare war,

and conclude peace, the Native States of India cannot claim an International position. The above-mentioned restrictions placed upon their independent action, and the obligations which habitually govern their external relations, and even to some extent their exercise of internal sovereignty, must be held to have deprived them of real International status. This view is confirmed alike by the action and explicit declaration of the British Government and by the opinions of eminent writers on International Law.

The action and declaration of the British Government as to its relations with the Native States will be evident on an examination of the Manipur Case, the importance of which lies in the principles which were enunciated and approved by the highest authority. These principles were—(1) the assertion of the right of the Government of India to settle successions and to intervene in case of rebellion against a chief; (2) the doctrine that resistance to Imperial orders constitutes rebellion; (3) the right of the Paramount Power to inflict capital punishment on those who had put to death its agents whilst discharging the lawful duty imposed upon them. But the most important principle—that of the repudiation by the Government of India of the application of International law to the protected States—was thus formulated in the *India Gazette* of August 21, 1891—"The principles of International Law have no bearing upon the relations between the Government of India as representing the Queen-Empress on the one hand, and the Native States under the suzerainty of Her Majesty. The paramount supremacy of the former presupposes and implies the subordination of the latter."

The testimony of writers of acknowledged authority is hardly less emphatic. According to Twiss the States are "protected dependent States." Sir Edward Creasy in his *First Platform of International Law* deals with the proposition "that titular independence is no sovereignty if coupled with actual subjection." "Such", he observes, "is the condition of the Native Princes of India. We all see clearly in them and in their subjects not independent political communities, which are sovereign States in the eye of International Law, but mere subordinate members of the larger and Paramount political society, the true sovereign State, the British Empire."

Thus the relation of the Native States to the British Crown is different from any relation known to International Law. The Native States are

subject to the suzerainty of Great Britain, and are debarred from all external relations. Even in their relations with the British Government they are declared not to be subject to the ordinary rules of International law. Nevertheless, for other purposes, and within the domain of private International law, such States are to be regarded as separate political societies, and as possessing an independent civil, criminal and fiscal jurisdiction. (*Sirdar Gurdyal Sing* vs. *the Rajah of Faridkotc. Pitt Cobbett, p. 227).*

Since the connexion between the British Government and the Native States is not one based on International Law, Prof. Westlake suggests that the connexion between the King's authorities in India and his protected allies or rulers of the Native States is a constitutional tie. "The Native Princes who acknowledge the Imperial Majesty of the United Kingdom have no International existence ; to International Law a State is sovereign which demeans itself as independent ;" and if no foreign relations are allowed it, Westlake will not allow it to be called even semi-sovereign, for "a State is semi-sovereign to the extent of the foreign relations which the degree of its practical dependence allows it." He goes on to argue that, since the British power alone represents to the outside world the unit, India, the political relations possessing any degree of fixity which exist between the component parts of the unit are constitutional. The position of a Native State "appears to be that of a separate part of the dominions of the King-Emperor, as New South Wales and British India are other such separate parts." The Governor-General in Council has been progressively receiving from Parliament power to make laws "for all servants of the Company within the dominions of the Princes and States in alliance with the Company ;" "for all British Subjects of Her Majesty, within the dominions of Princes and States in alliance with Her Majesty, whether in the service of the Government of India or otherwise" ; and "for native Indian subjects of Her Majesty without and beyond British India." But with this there comes into combination the fact that, as expressed in the preamble to the Indian Act XXI of 1879, "by treaty, capitulation, agreement, grant, usage, sufferance, and other lawful means, the Governor-General of *India* in Council"—this time not representing the special Government of British India, but as the executive organ for exercising the Imperial supremacy—"has power and jurisdiction within diverse places beyond the limits of British India." Thus reviewing the intrusion of foreign jurisdic-

tion into the States, Westlake argues that their position has been imperceptibly shifted from an International to an Imperial basis. The recent trend of events appears to confirm Professor Westlake's contention. According to the Government of India (Amendment) Act of 1916 rulers and subjects of the Native States can be appointed to civil posts and military commissions and nominated for the Legislative Councils. A Native Prince was invited to be present at the Imperial Conferences of 1917 and 1918. The Montagu-Chelmsford Reform Scheme contains proposals for the formation of a Council of Princes to be presided over by the Viceroy and for the joint deliberation and discussion between the Council of Princes and the Council of States. After all, both the Native States and the British Government are striving for the same end, *viz.* the progressive welfare of the people: the interests are so common, the points of contact are so many that it is inevitable that in the process of time the Native States should abandon their isolated, atomic existence and become joint partners in the great Imperial Commonwealth of Nations.

§ 2. "Declare war or commence hostilities."

The Governor-General in Council has certain powers of levying war without the previous approval of the Secretary of State in Council. If hostilities have actually begun or preparations made for beginning hostilities against British India or a dependent prince or state, or a prince or state protected by treaty of guarantee, he may declare war, commence hostilities, or make treaties for making war against the attacking power, and may even make treaties of guarantee in respect of the possessions of a prince or state in return for assistance against the assailing power. In any case where he commences hostilities or makes a treaty, the action must be reported to the Secretary of State. "*De facto*, of course, the time for serious exercise of these powers has disappeared. But the existence of the power is interesting; no Governor-General or Government of a Dominion has any legal authority to do a single act of sovereignty as regards the declaration of war, the making of peace, or of political treaties of any kind."—(*Keith.*)

PART V.

LOCAL GOVERNMENTS.

General.

45. (1) "Subject to the provisions of this Act and rules made thereunder"[1], every Local Government[2] 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.

Relation of Local Governments to Governor-General in Council. [1772, s. 9; 1793, ss. 24, 40, 41, 43, 44; 1833, ss. 65, 68; 1893, s. 1 (2); 1912, s. 1 (1); 1919, 2nd Sch. Pt. III.]

[(2)] *Repealed by the Government of India Act, 1919.*

(3) The authority of the Local Government is not superseded by the presence in its province of the Governor-General.

[1833, s. 67; 1912, s. (1).]

§ 1. "Subject to the provisions of this Act and rules made thereunder."

Before the passing of the Reforms Act of 1919, the Local Governments were merely responsible agents of the central Government of India—they were wholly responsible for all their acts to, and derived all their powers from, the central Government. But with the introduction of partial responsible government in the Provinces, the relations between the central and local governments have had necessarily to be altered. The Provincial Executive is now divided into two parts—the official, and the popular—each responsible to a different authority. The control of the Central Government over the popular half of the local Government cannot, there-

fore be as strict as that over the official half. The powers of the Central Government in regard to provincial subjects will henceforth vary according as the subjects are reserved or transferred. The intervention of the Central Government in transferred subjects will now generally be confined to two cases *viz.*, (1) to safe-guard the administration of All-India subjects, and (2) to decide questions arising between two or more provinces, failing agreement between the provinces concerned. In respect, however, of certain special subjects, the Government of India have the power to make the subjects "provincial subject to Indian legislation." In the case of reserved subjects there are now specific restrictions on the Government of India's general powers of control, but that control would presumably vary according as the subjects are administered by provincial governments as agents of the Government of India or as provincial functions properly so called. In respect of the former the Government of India's powers of control remain absolute, but in regard to the latter the Government of India are expected to exercise their power of control with regard to the purpose of the Reforms Act of 1919.

See paragraphs 16—41 of the Functions Committee's Report, pp. 232—251 of Part II of this book.

§ 2 "Local Government."

Sub-section (4) of Section 134 of this Act defines a Local Government thus—

"Local Government means, in the case of a Governor's province, Governor in Council or the Governor acting with ministers (as the case may require), and, in the case of a province other than a Governor's province, a Lieutenant-Governor in council, Lieutenant-Governor or Chief Commissioner."

By the Indian General Clauses Act (X of 1897) it is defined to mean the person authorized by law to administer executive government in the part of British India in which the Act containing the expression operates, and to include a Chief Commissioner.

Sub-section (2) of Section 45 authorising even Local Governments to commence hostilities and make treaties in case of sudden emergency or imminent danger has been repealed by the Government of India Act, 1919.

Classification of central and provincial subjects. [1919, s. 1.]

45A.—"(1) Provision may be made by rules under this Act.—

(*a*) for the classification of subjects,[1] in relation to the functions of government, as central and provincial subjects, for the purpose of distinguishing the functions of local governments and local legislatures from the functions of the Governor-General in Council and the Indian legislature ;

(*b*) for the devolution of authority[2] in respect of provincial subjects to local governments, and for the allocation of revenues[3] or other moneys to those governments ;

(*c*) for the use under the authority of the Governor-General in Council of the agency of local governments[4] in relation to central subjects, in so far as such agency may be found convenient, and for determining the financial conditions of such agency ; and

(*d*) for the transfer from among the provincial subjects of subjects (in this Act referred to as "transferred subjects") to the administration of the governor acting with ministers appointed under this Act,[5] and for the allocation of revenues or moneys for the purpose of such administration.[6]

(2) "Without prejudice to the generality of the foregoing powers, rules made for the above-mentioned purposes may—

(*i*) regulate the extent and conditions of such devolution, allocation, and transfer ;

(*ii*) provide for fixing the contributions payable by local governments to the Governor-

General in Council[7] and making such contributions a first charge on allocated revenues or moneys ;

(*iii*) provide for constituting a finance department[8] in any province, and regulating the functions of that department ;

(*iv*) provide for regulating the exercise of the authority vested in the local government of a province over members of the public services[9] therein ;

(*v*) provide for the settlement of doubts[10] arising as to whether any matter does or does not relate to a provincial subject or a transferred subject, and for the treatment of matters which affect both a transferred subject and a subject which is not transferred ; and

(*vi*) make such consequential and supplemental provisions as appear necessary or expedient :

"Provided that, without prejudice to any general power of revoking or altering rules under this Act, the rules shall not authorise the revocation or suspension of the transfer of any subject except with the sanction of the Secretary of State in Council.

(3) "The powers[11] of superintendence, direction, and control over local governments vested in the Governor-General in Council under this Act shall, in relation to transferred subjects, be exercised only for

such purposes as may be specified in rules made under this Act, but the Governor-General in Council shall be the sole judge[12] as to whether the purpose of the exercise of such powers in any particular case comes within the purposes so specified.

(4) "The expressions "central subjects" and "provincial subjects"[13] as used in this Act mean subjects so classified under the rules.

"Provincial subjects, other than transferred subjects, are in this Act referred to as "reserved subjects."

It is in the Provinces that the chief constitutional changes have been made in the first instance, and this section, which forms the first section of the Government of India Act, 1919, therefore deals with the Provinces.

§ 1. "Classification of Subjects."

This sub-section provides for the making of rules for the purpose of classifying subjects in relation to the functions of Government as central and Provincial subjects. The lists of Central and Provincial subjects, as approved by the Joint Select Committee, is to be found in Appendix F to the Minutes of Evidence taken by the committee (*printed post in Part II of this book*). The plan and principle of such division are thus described in para. 238 of the M. C. Report—

"It is time to show how we propose that the sphere of business to be made over to the control of the popular element in the Government should be demarcated. We assumed in paragraphs 212 and 213 above that the entire field of provincial administration will be marked off from that of the Government of India. We assumed further that in each province certain definite subjects should be transferred for the purpose of administration by the ministers. All subjects not so transferred will be reserved to the hands of the Governor in Council. The list of transferred subjects will of course vary in each province ; indeed, it is by variation that our scheme will be adjusted to varying local conditions. It will also be susceptible of modification at subsequent stages. The determination of the list for each province will be a matter for careful investigation, for

which reason we have not attempted to undertake it now. We could only have done so if after setting the general principles on which the lists should be framed we had made a prolonged tour in India and had discussed with the Government and people of each province the special conditions of its own case. This work should, we suggest, be entrusted to another special committee similar in composition to, but possibly smaller in size than, the one which we have already proposed to constitute for the purpose of dealing with franchises and constituencies. It may be said that such a task can be appropriately undertaken only when our main proposals are approved. We find it difficult, however, to believe that any transitional scheme can be devised which will dispense with the necessity for some such demarcation ; and for this reason we should like to see the committee constituted as soon as possible. It should meet and confer with the other committee which is to deal with franchises, because the extent to which responsibility can be transferred is related to the nature and extent of the electorate which will be available in any particular province. The committee's first business will be to consider what are the services to be appropriated to the provinces, all others remaining with the Government of India. We suggest that it will find that some matters are of wholly provincial concern, and that others are primarily provincial, but that in respect of them some statutory restrictions upon the discretion of provincial Governments may be necessary. Other matters again may be provincial in character so far as administration goes, while there may be good reasons for keeping the right of legislation in respect of them in the hands of the Government of India. The list so compiled will define the corpus of the material to which our scheme is to be applied. In the second place the committee will consider which of the provincial subjects should be transferred ; and what limitations must be placed upon the ministers' complete control of them. Their 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. As an illustration of the kind of matters which we think might be treated as provincial and those which might be regarded as transferred we have presented two specimen lists in an appendix to this report. We know that our lists cannot be exhaustive ; they will not be suitable to all provinces ; they may not be exactly suitable to any province ; but they will serve at all events to illustrate our intentions if not also as a starting point for the deliberations of the committee. Our lists are in the main mere categories of subjects. But we have mentioned by way of illustration some of the limitations which it will be necessary to impose or maintain. In dealing with each subject the powers of the provincial legislatures to alter Government of India Acts on that subject will have to be carefully considered. We have indicated in paragraph 240 below certain other reservations which seem to us necessary. On the publication of this report we should like to see the lists discussed in the provincial councils and considered by the provincial Governments, so that the committee may have ready at hand considered criticisms upon the applicability of our suggestions to the circumstances of each particular province."

The *Committee on Division of Functions* appointed in accordance with the above recommendations of the M. C. R. furnish two lists showing (i) all-India subjects and (ii) provincial subjects. Among the most important subjects included in the all-India list are—naval, military and aerial matters, foreign relations and relations with native states, railways (with certain exceptions), communications of military importance, posts and telegraphs, currency and coinage, sources of imperial revenue, law of stamps, property, civil rights, etc., commerce, shipping and major ports, criminal law, central police organization and railway police, possession and use of arms, central institutions of scientific and industrial research, ecclesiastic administration and all-India services. In the provincial list the most important items are—local self-government, medical administration and education (with certain exceptions), sanitation, provincial buildings, communication other than those of military importance, light and feeder railways (in certain cases), irrigation and canals, land revenue administration, agriculture, civil veterinary department, fisheries, co-operative societies, forests, excise, development of industries, administration of justice, police, prisons and reformatories, control of newspapers and presses, provincial borrowing. The above classification is the basis of the

division of functions between the central Government and the provincial Government.

§ 2. "The devolution of Authority."

The nature and method of the devolution of authority in respect of provincial subjects to local governments are thus described in para. 26 of the *Report of the Committee on Division of Functions*——

"The existing control by the Government of India over provincial administration finds expression in the provisions of a considerable number of statutes and regulations which especially reserve power to the Governor-General in Council, or require his previous sanction or subsequent approval to action taken by the provincial Governments. We have received from the provincial Governments a number of detailed proposals for the relaxation of this control in particular matters, either by the delegation of powers or by the amendment of the Act concerned ; and the Government of India have also supplied us with departmental Memoranda treating the question on similar lines. We are not in a position to deal with these detailed suggestions, but we recommend that the matter should be carefully examined now in the light of the material collected and of the new relations to be established between the central and provincial Governments. In the Memorandum dated the 19th February (Annexure III) the Government of India refer to the matter as follows 'In respect of these same subjects (*i.e.* subjects that the provinces administer but which are not transferred subjects) the Government of India will undertake a formal and systematic scheme of devolution of their authority, such scheme to be compatible with the exercise of their control in matters which they regard as essential to good government.' If, in the necessary interval before the reforms scheme takes effect, the existing statutes are revised so as to eliminate provisions necessitating references to the Government of India which are considered no longer necessary, the position will be simplified and the provinces will have from the start a freer hand in dealing with provincial subjects."

The Government of India accepted the above recommendation of the Functions Committee in para. 9 of their Fourth Despatch of April 16, 1919, and with the object of giving effect thereto they have since carefully examined all provisions of the kind referred to which are contained in the Indian Statute Book. The results of this examination are embodied in *the Devolution Act of 1920* or "An Act to relax the control in certain

respects of the Governor General in Council over Local Governments and to transfer to such Governments certain powers now exercisable by the Governor-General in Council" (Act No. XXXVIII of 1920, published in the Gazette of India, September 18, 1920) which has recently been passed by the Indian Legislative Council.

The amendments of the existing legislation are numerous but all fall under two classes. One class of amendments substitutes for the Governor-General in Council, the Local Government as the statutory authority for the performance of certain functions. The other class removes the necessity hitherto imposed on Local Governments for obtaining in certain cases the previous sanction of the Governor-General in Council or abrogates the control at present exercised by the Central Government over Local Governments. Taken together the amendments constitute a very substantial delegation of authority to Local Governments and are thus an important development of the policy embodied in the Government of India Act, 1919.

§3. "The Allocation of Revenues or moneys."

Rules based on the Meston Committee's Report (*printed post in Part II*) provide for the necessary financial arrangements between the Central and Provincial Governments, under which certain sources of revenue are definitely allocated to the Provinces in accordance with the following proposals in the Montagu-Chelmsford Report -

"The present settlements by which the Indian and Provincial Governments share the proceeds of such certain heads of revenues are based primarily on the estimated needs of the provinces, and the Government of India disposes of the surplus. This system necessariiy involves control and interference by the Indian Government in provincial matters. An arrangement which has on the whole worked successfully between two official Governments would be quite impossible between a popular and an official Government. Our first aim has therefore been to find some means of entirely separating the resources of the Central and Provincial Governments.

"*A new basis.*—We start with a change of standpoint. If provincial autonomy is to mean anything real clearly the provinces must not be dependent on the Indian Government for the means of provincial development. Existing settlements do indeed provide for ordinary growth of expenditure, but for any large and costly innovations provincial Govern-

ments depend on doles out of the Indian surplus. Our idea is that an estimate should first be made of the scale of expenditure required for the upkeep and development of the services which clearly appertain to the Indian sphere; that resources with which to meet this expenditure should be secured to the Indian Government; and that all other revenues should then be handed over to the provincial Governments which will thenceforth be held wholly responsible for the development, of all provincial services. This, however, merely means that the existing resources will be distributed on a different basis, and does not get over the difficulty of giving to the central and provincial Governments entirely separate resources. Let us see how this is to be done.

"*Complete separation of revenues.*—Almost everyone is agreed that a complete separation is in theory desirable. Such differences of opinion as we have met with have mostly been confined to the possibility of effecting it in practice. It has been argued for instance that it would be unwise to narrow the basis on which both the central and provincial fiscal systems are based. Some of the revenues in India, and in particular land revenue and excise, have an element of precariousness; and the system of divided heads, with all its drawbacks, has the undeniable advantage that it spreads the risks. This objection will however, be met if, as we claim, our proposed distribution gives both the Indian and Provincial Governments a sufficient measure of security. Again we have been told that the complete segregation of the Government of India in financial matters will lower its authority. This argument applies to the whole subject of decentralization and provincial autonomy. It is not necessary for us to meet it further. Our whole scheme must be even and well-balanced, and it would be ridiculous to introduce wide measures of administrative and legislative devolution and at the same time to retain a centralized system of finance.

"*Abolition of divided heads.*—There are two main difficulties about complete separation. How are we to dispose of the two most important heads which are at present divided—land-revenue and income-tax—and how are we to supplement the yield of the Indian heads of revenue in order to make good the needs of the central Government? At present the heads which are divided in all or some of the provinces are:—land revenue, stamps, excise, income-tax and irrigation. About stamps and excise there is no trouble. We intend that the revenue from stamp duty should be discriminated under the already well-marked sub-heads *General* and *Judicial*; and that the former should be made an Indian

and the latter a provincial receipt. This arrangement will preserve uniformity in the case of commercial stamps where it is obviously desirable to avoid discrepancies of rates; and it will also give the provinces a free hand in dealing with Court-fee-stamps, and thus provide them with an additional means of augmenting their resources. Excise is at present entirely a provincial head in Bombay, Bengal, and Assam, and we see no valid reason why it should not now be made provincial throughout India. At this stage the difficulties begin. Land revenue, which is by far the biggest head of all, is at present equally shared between the Indian and all the Provincial Governments, except that Burma gets rather more than one-half and the United Provinces get rather less. Now land revenue assessment and collection is so intimately concerned with the whole administration in rural areas that the advantages of making it a provincial receipt are obvious. But other considerations have to be taken into account. One substantial difficulty is that, if land revenue is made entirely provincial, the Government of India will be faced with a deficit and its resources must be supplemented by the provinces in some form or other. Moreover, famine expenditure and expenditure on major irrigation works are for obvious reasons closely connected with land revenue, and if the receipts from that head are made provincial it logically follows that the provinces should take over the very heavy liability for famine relief and protective works. An argument of quite another character was also put forward. We were told that in the days of dawning popular government in the provinces it would be well that the Provincial Government should be able to fall back on the support of the Government of India (as, if the head were still divided, it would be able to do) when its land-revenue policy was attacked. But it is just because divided heads are not regarded as merely a financial expedient but are, and so long as they survive will be, viewed as a means of going behind the Provincial Government to the Government of India, that we feel sure that they should be abolished. We propose, therefore, to make land revenue, together with irrigation, wholly provincial receipts. It follows that the provinces will become entirely liable for expenditure on famine relief and protective irrigation works. We shall explain shortly what arrangements we propose for financing famine expenditure. The one remaining head is income-tax. We see too very strong reasons for making this an Indian receipt. First, there is the necessity of maintaining a uniform rate throughout the country. The inconveniences, parti-

cularly to the commercial world, of having different rates in different provinces are manifest. Secondly in the case of ramifying enterprises with their business centre in some big city, the province in which the tax is paid is not necessarily the province in which the income was earned. We have indeed been told that income tax is merely the industrial or professional complement of the land revenue ; and that to provincialize the latter, while Indianizing the former, means giving those provinces whose wealth is more predominantly agricultural, such as the United Provinces and Madras, an initial advantage over a province like Bombay, which has very large commercial and industrial interests. Another very practical argument is that the tax is collected by provincial agency, and that if provincial Governments are given no inducement, such as a share of the receipts or a commission on the collections which is only such a share in disguise, there will be a tendency to slackness in collection and a consequent falling off in receipts. We admit that these arguments have force ; but we are not prepared to let them stand in the way of a complete separation of resources. Equality of treatment as between one province and another must be reached so far as it is possible in the settlements as a whole, and it is not possible to extend the principle of equality to individual heads of revenue. If it should be found that receipts fall off it may be necessary to create an all-Indian agency for the collection of the tax, but this we should clearly prefer to retaining it as a divided head. To sum up : we propose to retain the Indian and provincial heads as at present, but to add to the former income-tax and general stamps, and to the latter land revenue, irrigation, excise, and judicial stamps. No heads will then remain divided."—*M. C. R. paras. 200-203.*

As regards this difficult question of allocation of revenues the Joint Committee in their report on the Draft Rules, adopt the fundamental features of the scheme formulated by Lord Meston's *Committee on Financial Relations.* The Joint Committee are definitely opposed to making income-tax a provincial asset. They believe that the dissatisfaction which has been expressed particularly in three Presidencies and by the Bombay Government is inevitable in distributing resources between the Central Government and the Provincial Government and that the impossibility of removing by a stroke of the pen the inequalities which have resulted from long-standing historical causes has been overlooked.

The Joint Committee by way of alleviating disappointments ordain approximately a twenty-five per cent. provincial share of income-tax and

supertax receipts. The assessment of this is governed by the new rule fifteen. In no case is the initial contribution payable by any province to the Central Government to be increased, but a gradual reduction of the aggregate contribution should be the sole means of attaining the theoretical standards recommended by the Meston Committee in paragraph twenty-seven.

The Joint Committee strongly urge that the Government of India and the Secretary of State should, in regulating the financial policy, make it their constant endeavour to render the Central Government independent of provincial assistance at the earliest possible date. The Committee specially recognise the peculiar financial difficulties of Bengal which they specially commend to the Government of India's special consideration.

For further details see the Government of India's First Reforms Despatch, paras. 56-61, the Functions Committee's Report, the Meston Committee's Report (all printed in Part II of this book), and the Montagu-Chelmsford Report (paras. 205-207, Documents I, pp. 497-499).

§ 4. "Use of the agency of local Governments."

Provincial subjects represent the special sphere of activity allotted to the Provinces, but, apart from the administration of Provincial subjects the Provincial Governments have to discharge in their own Provinces many duties on behalf of the Central Government in relation to central subjects, *i.e.*, subjects which are to remain under the full control of the Central Government, such for instance, the administration of customs and shipping laws. The distinction between these agency functions of the Provincial Governments and their functions in relation to Provincial subjects is thus stated in para 12 of the Functions Committee's Report—

"We recognise the distinction drawn between the two classes of functions discharged by provincial Governments—(1) Agency functions in relation to All-India subjects and (2) Provincial functions properly so called. The distinguishing feature of the work done in discharge of agency functions is that it relates to subjects in which All-India interests so far predominate that full ultimate control must remain with the Government of India, and that, whatever the extent of the authority in such matters for the time being delegated by the Government of India to the provinces as their agents, it must always be open to the Government of India to vary the authority and, if need be, even to withdraw the authority altogether. Provincial functions relate to subjects in which, to use

the words of the Government of India Memorandum, the interests of the provinces essentially predominate, and in which provincial Governments are therefore to have acknowledged authority of their own. We recognise the difficulty of stating the matter in more precise terms. Circumstances, and the experience gained in the working of the existing local Governments, have largely decided in practice what subjects must fall in the provincial class ; but the general subordination of local Governments to the Government of India under the terms of the Government of India Act, and centralization in finance, have in the past tended to obscure the actual dividing line between All-India and provincial subjects, which also governs the separation in the provinces of agency from provincial functions." In the case of Provincial subjects authority is, with certain qualifications, definitely committed to Provincial Governments ; in the case of Central subjects their agency is employed merely as a matter of convenience, and it is, therefore, always open to the Central Government to cease to employ such agency, and itself to undertake the entire work of administration through its own officials. The position with regard to the "agency functions" of Provincial Governments is to be defined by rules providing for use by the Government of India of the agency of Local Governments in relation to central subjects, so far as it may be found convenient to use such agency.

§ 5. "Transfer of subjects to the administration of the governor acting with ministers appointed under this Act."

The Announcement of 20th August, 1917, was based on the principle that the goal of responsible government is to be reached by a gradual transfer of responsibility to representatives of the people. A new type of Executive Government has been established in the Provinces for the purpose of giving effect to this plan of gradual transfer of responsibility. The new Provincial Governments are of a composite character, and contain both an official and a non-official, or popular, element. On the official side the Government is carried on by a Governor assisted by an Executive Council ; on the popular side, the new Government consists of the Governor and of Ministers who are elected members of the Legislative Council appointed by the Governor. For the purpose of allotting to each section of this dual Government its own sphere of duty, the work of the Provincial Government has been divided into two parts: certain subjects, called

"transferred subjects", are administered by the Governor acting with the Minister in charge of the subjects, while other subjects, called "reserved subjects," remain in charge of the Governor in Council. Each side has thus its own share in the conduct of the Government of the Province, and the respective shares have been defined in such a way as to fix on each section responsibility for its own work, while co-ordination is achieved by the influence of the Governor, who is associated with both halves of the Government, and has power to summon meetings of his Executive Council and his Ministers for the purpose of joint deliberation whenever he sees fit to do so. Future progress will be made by the transfer of further portions of the field of administration from the official to the non-official section of the Government after periodical surveys of existing conditions by Commissions appointed by Parliament. These are the essential features of the plan, described in para 218* of the Montagu-Chelmsford Report and embodied in the Reforms Act of 1919, on which the development of responsible Government in the Provinces depends.

The criticisms to which this plan of "dyarchy", or, as Lord Sinha put it, "the system of specific devolution," has been subjected are reviewed in the Government of India's First Reforms Despatch and in the speeches delivered in the House of Lords by Lords Sinha and Selborne (*all printed in Part II of this book*). But we should notice here the alter-

* "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 this 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. It has been urged that the latter should be an elected member of the provincial legislative council. It is unreasonable that choice should be so limited. It should be open to the Governor to recommend whom he wishes. In making his nominations, the Governor should be free to take into consideration the names of persons who had won distinction whether in the legislative council or any other field. 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; and they would be appointed for the lifetime of the legislative council, and if re-elected to that body would be re-eligible for appointment as members of the executive. As we have said, they would not hold office at the will of the legislature but at that of their constituents. We make no recommendation in regard to pay."

native scheme for a Unitary Government which was put forward by the heads of five Provinces (*See Majority Minute by Heads of Provinces Part II, pp. 23-30*). This scheme provided for an Executive Council which was to consist of an equal number of officials and non-officials, the latter being selected from the elected members of the legislative council ; there was to be no division of subjects, and no distinction within the council between the functions of official and non-official members. The Government of India have made a careful examination of this alternative scheme. They point out that it admittedly does not enable responsibility for any act of Government to be fixed on any member of the Executive, and that, while claiming to be a unitary form of Government, it is open to the objection that in fact it involves a disguised dualism, which, owing to the different mandates of the official and non-official members, will, in the absence of any division of functions, almost inevitably involve them in conflict over the whole range of their duties. In H. E. Lord Chelmsford's Minute *(Part II, p. 144)* stress is laid on the failure of this alternative scheme to give effect to the basic principle of the gradual transfer of responsibility. The Rt. Hon. Mr. Montagu thus summarises the position in his *Memorandum on the Reforms Bill of 1919* :——

"While the scheme for dyarchy, or a dualised form of Government in the Provinces has been a target for much criticism, no alternative plan has yet been put forward which is consistent with the Announcement of the 20th August in providing for the gradual transfer of responsibility and thus enabling advance to be made step by step to the ultimate goal. The alternative plans suggested which attempt to eliminate dualism are subject to two fatal defects :—(1) at the outset they give no such responsibility to the non-official element in the Government as will be recognizable by the Councils or their electorates, and no certainty of control to the Councils over any functions of Government ; and (2) they provide no means whereby such responsibility and control could be ultimately secured except by a sudden change from official to popular Government, which would take effect simultaneously with respect to all provincial functions. The scheme of the Joint Report does give immediate responsibility to the Ministers who represent the popular element in the Legislative Councils in respect of some departments of the administration though as long as there is a division of functions between an official and a non-official section, such responsibility cannot be complete ; at the same time by bringing the Ministers into touch, both at joint meetings and in the discharge

of their own duties, with the work of the reserved departments, it gradually familiarises them with the needs of those departments and considerations affecting their administration, and thus prepares the way for the assumption by Ministers of further responsibility by degrees as additional subjects are transferred, until the ultimate goal of complete responsibility has been attained."

This sub-section provides for the making of rules for the transfer of some Provincial subjects to the administration of the Governor acting with the Ministers in charge of the subject. Provincial subjects other than transferred subjects, referred to as "reserved subjects" remain in charge of the Governor in Council. It should be noted that the Governor in Council, in addition to being responsible for reserved subjects, is also normally responsible for the work which falls upon a local Government as the Agent of the Governor-General in Council in relation to central subjects.

See Notes under Sec. 19A.

§ 6 "Allocation of revenues or moneys for the administration of Transferred Subjects."

This sub-section also authorises the making of rules for the allocation of provincial funds for the administration of transferred subjects. The proposals contained in the Montagu Chelmsford Report (*paras 255-257, Documents I. pp. 535-538*) are to the effect that the revenue from reserved and transferred subjects shall be thrown into a "*common pool*" from which the two halves of the Government will draw funds for their respective requirements. The amount which each is to draw is to be settled annually by the Executive Government as a whole, the Governor being the deciding authority where the Executive Council and Ministers fail to agree.

"The first charge on Provincial revenues will be the contribution to the Government of India ; and after that the supply for the reserved subjects will have priority. The allocation of supply for the transferred subjects will be decided by the Ministers. If the revenue is insufficient for their needs, the question of new taxation will be decided by the Governor and the Minister". (M. C. R. para. 256).

These proposals have been criticised by the Government of India in their First Reforms Despatch of 5th March, 1919, in which a scheme for what is called the "*separate purse*" system, under which each section of

the Provincial Government is to have a separate purse, instead of both sections drawing on a joint purse, has been put forward (*Despatch, paras 64-73, Part II, pp. 83-96*).

The terms in which the power of making rules as to allocation of provincial funds has been conferred by this sub-section leave open the question as to whether provincial finance is to be on the basis of one joint purse or of two separate purses.

The Joint Select Committee have given much attention to the difficult question of the principle on which the provincial revenues and balances should be distributed between the two sides of the provincial governments. "They are confident that the problem can readily be solved by the simple process of common sense and reasonable give-and-take, but they are aware that this question might, in certain circumstances, become the cause of much friction in the provincial government, and they are of opinion that the rules governing the allocation of these revenues and balances should be framed so as to make the existence of such friction impossible. They advise that, if the Governor, in the course of preparing either his first or any subsequent budget, finds that there is likely to be a serious or protracted difference of opinion between the executive council and his ministers on this subject, he should be empowered at once to make an allocation of revenue and balances between the reserved and transferred subjects, which should continue for at least the whole life of the existing legislative council. The Committee do not endorse the suggestion that certain sources of revenue should be allocated to reserved, and certain sources to transferred subjects, but they recommend that the Governor should allocate a definite proportion of the revenue, say, by way of illustration, two-thirds to reserved and one-third to transferred subjects, and similarly a proportion, though not necessarily the same fraction, of the balances. If the Governor desires assistance in making the allocation, he should be allowed at his discretion to refer the question to be decided to such authority as the Governor-General shall appoint. Further, the Committee are of opinion that it should be laid down from the first that, until an agreement which both sides of the Government will equally support has been reached, or until an allocation has been made by the Governor, the total provisions of the different expenditure heads in the budget of the province for the preceding financial year shall hold good."

"The Committee desire that the relation of the two sides of the Government in this matter, as in all others, should be of such mutual sym-

pathy that each will be able to assist and influence for the common good the work of the other, but not to exercise control over it. The budget should not be capable of being used as a means for enabling ministers or a majority of the legislative council to direct the policy of reserved subjects; but on the other hand the executive council should be helpful to ministers in their desire to develop the departments entrusted to their care. On the Governor personally will devolve the task of holding the balance between the legitimate needs of both sets of his advisers." (J. S. C. R.)

§ 7. "Fixing the contributions payable by Local Governments to the Governor-General in Council."

With regard to this subject the Montagu-Chelmsford Report contains the following suggestion—

"We agreed that in fixing contributions it was undesirable and unnecessary to pay regard to the growing revenues of the provinces. We agreed also that the contributions should be of fixed amounts. We saw that equality of contribution was impracticable, because we have not a clean slate. In spite of the variations in income which result from the permanent settlement in some areas, stereotyped scales of expenditure have grown up, which make it useless to attempt any theoretic calculation on which a uniform contribution from the provinces could be based, such as an equal percentage of revenues or a contribution fixed on a population basis. This led us to look for some plan which would fit most closely into the existing facts.

"Starting with an estimate (based on the budget figures for 1917-18 subject to some adjustments) of the gross revenue of all provinces when all divided heads have been abolished, and deducting therefrom an estimate of the normal expenditure of all provinces, including provision for expenditure on famine relief and protective irrigation, we arrived at Rs. 1564 lakhs as the gross provincial surplus. The deficit in the Government of India's budget was Rs. 1362 lakhs. This left Rs. 201 lakhs, or about 13 per cent. of the total gross surplus as the nett surplus available to the provinces. We would propose to assess the contribution from each province to the Government of India as a percentage of the difference between the gross provincial revenue and the gross provincial expenditure. On the basis of the figures which we have taken this percentage would be 87. The contributions to the Government of India would form the first

charge upon the provincial revenues. The way in which our plan would work out in practice can be gathered from the following figures :—

Province.	Gross provincial revenue.	Gross provincial expenditure.	Gross Provincial surplus.	Contribution (87 per cent. of col. 4).	Nett provincial surplus.
1	2	3	4	5	6
Madras ...	13,31	8,40	4,91	4,28	·63
Bombay ...	10,01	9,00	1,01	88	13
Bengal ...	7,54	6,75	70	69	10
United Provinces.	11,22	7,47	3,75	3,27	48
Punjab ...	8,64	6,14	2,50	2,18	32
Burma ...	7,69	6,08	1,61	1,40	21
Bihar and Orissa.	4,04	3,59	45	39	6
Central Provinces.	4,12	3,71	41	36	5
Assam ...	1,71	1,50	21	18	3
Total ...	68,28	52,64	15,64	13,63	2,01

N. B.—The Punjab figures in column 5 should be reduced and those in column 6 raised by $3\frac{1}{2}$ lakhs in each case to allow for the continued compensation which the province is entitled to receive for the cession of a crore of its balances to the Government of India in 1914.

"We recognize, of course, that the objection will be taken that some provinces even under this plan will bear a very much heavier proportion of the cost of the Indian Government than others. Madras and the United Provinces will be paying 47.4 per cent. and 41.1 per cent. of their remaining revenues to the Government of India, while Bengal and Bombay are paying only 19·1 per cent. and 9.6 per cent. respectively. Our answer is that the objection is one that applies to existing inequalities which we admit that our scheme fails for the present to remove. It merely conti-

nues the disparity which is at present masked by the system of divided heads. But the immediate settlement proposed improves the position of the provinces as a whole by upwards of one million sterling. It is not intended to be of a final nature ; and when revenues develop and a revision takes place under normal conditions an opportunity will arise for smoothing out inequalities. We have already mentioned at the beginning of this part of our report that our proposals generally do not relate to the minor administrations. Their financial transactions are classified as All-Indian ; and with them separate arrangements must continue. (*M. C. R. Para 206.*

For fuller details see Notes under sec. 45A (1) and the Report of Lord Meston's Committee on Financial Relations (printed in Part II of this book).

§ 8. "A Finance Department."

See para 74-75 of the Government of India's First Reforms Despatch, Part II, pp. 96-99.

§ 9. "The exercise of authority over members of the Public Services"

The Committee on Division of Functions recommended that the Public Services employed under provincial governments be classified into three divisions, namely, Indian, Provincial and Subordinate. The chief criterion will be the appointing authority. The *Indian services* will be recruited according to methods laid down in statutory orders by the Secretary of State and appointments to these services will be made by the Secretary of State, who will also fix rates of pay, sanction all new appointments, and secure pensions by statutory orders under the Government of India Act. The Committee recommend that statutory rules should provide that no orders affecting adversely emoluments or pensions shall be passed in regard to officers of All-India services in transferred departments without the concurrence of the Governor. As a special measure of protection in the case of the Indian Medical Service they propose that if the medical department is transferred, statutory order should provide that the private practice of officers of the Indian Medical Service will be regulated only by the Secretary of State. They further recommend that the Governor should be charged with the protection of the public services and with the duty of seeing that no orders affecting adversely the pension or emoluments of any officer are passed before they have been considered by both

parts of the government. Appeals against such orders should lie to the Government of India and the Secretary of State, and no officer of an all-India service should be liable to dismissal except by order of the Secretary of State. Questions of promotion, posting and discipline of officers with duties in both reserved and transferred departments should be treated in the manner explained above in connection with the relations of Governor in Council and ministers.

Provincial Division: Pending legislation which will regulate recruitment, training, discipline, and the general conditions of the provincial services, it is proposed that the existing rules should *mutatis mutandis* be binding on ministers as regards transferred departments. In regard to pay, allowances, leave etc., the local Governments will be granted wide powers. In the matter of discipline, the main features of the procedure proposed for all-India services should apply to existing members of Provincial services. In case of future entrants all orders affecting emoluments and pensions, and orders of dismissal, should require the personal concurrence of the Governor.

Subordinate Division: The rights and privileges of present incumbents should be maintained by means of directions to the Governor in Council as regards reserved subjects and instructions to the Governor in respect of transferred subjects. So far as future entrants are concerned the Governor in Council and Governor and ministers must be left to regulate the entire working of the services.

In conclusion the committee suggest that as far as possible members of all-India services should be secured in the benefits of the conditions under which they were recruited. The principle that alterations shall not press hardly on members of the services should be formally recognised in the future.

See the Government of India's Memorandum on "The Public Services under the Reforms" (being Annexture IV to the Functions Committee's Report, printed post, Part II) and paras. 68—71 of the Functions Committee's Report, Part II, pp. 299—303.

§ 10. "The Settlement of Doubts."

This sub-section authorises the making of rules for the settlement of doubts as to whether any matter does or does not belong to a transferred subject, and for the treatment of matters which affect both a transferred subject and a subject which is not transferred. It empowers the Gover-

nor to settle any question of disputed jurisdiction as between the two sections of the Provincial Government in accordance with the following proposal of the Montagu-Chelmsford Report—

"We realize that no demarcation of subjects can be decisive in the sense of leaving open no matter for controversy. Cases may arise in which it is open to doubt into which category a particular administrative question falls. There will be other cases in which two or more aspects of one and the same transaction belong to different categories. There must, therefore, be an authority to decide in such cases which portion of the Government has jurisdiction. Such a matter should be considered by the entire Government, but its decision must in the last resort lie definitely and finally with the Governor. We do not intend that the course of administration should be held up while his decision is challenged either in the law courts or by an appeal to the Government of India."—*M. C. R. para. 239.*

As for the treatment of matters which affect both transferred subjects and subjects which are not transferred, reference should be made to paragraphs 60-63 of the Functions Committee's Report (*See pp. 282-286, of Part II of this book*), in which it is proposed that the Governor shall in certain cases submit questions for joint consideration by both sections of his Government, and shall, in case of disagreement, himself be responsible for the decision. (cf. sec. 49 as to the Governor's rule-making power).

It is important to note that, though the Act provides for a division of functions between the Central Government and Provincial Governments similar to that which is to be found in Federal Constitutions, it is not contemplated that questions as to the dividing line between the spheres of the Central and Provincial authorities shall be the subject of legal decision in the Courts. (*M. C. R. paragraph 212 and paragraph 239*). Provision is made by this sub-section for the making of rules which will provide for the settlement of doubts as to whether "any matter does or does not belong to a Provincial subject," and the intention is that the Rules to be framed shall provide for such doubts being decided by administrative authority, *i.e.*, by the Governor-General in Council subject to the control of the Secretary of State, whose duty it will be to check any tendency on the part of the Central Government to take too restrictive a view as to the subjects included in the Provincial sphere. Reference should also be made to sec. 52B which expressly excludes such questions from consideration by the Courts.

§ 11. "Powers exercised by the Governor-General in Council over transferred subjects."

With regard to the control to be exercised in future by the Governor-General in Council over the administration of Provincial subjects, it is provided by sub-sec. (3) that in relation to transferred subjects, *i.e.*, those Provincial subjects which are transferred to the charge of Ministers, the general powers of control vested in the Governor-General in Council shall be exercised only for the purposes specified in rules. (*Functions Report, paragraphs 16, 17 and 22 pp. 232, 233 and 236 of Part II of the Book*). The purposes for which it is proposed in the Functions Report that the Government of India shall retain power to exercise control in relation to transferred subjects are two, namely :—(1) to safeguard the administration of all-India (or central) subjects ; (2) to decide questions arising between two or more Provinces, failing agreement between the Provinces concerned. The Act contains no express provision as to the control of the Governor-General in Council over the Provincial Governments in relation to reserved subjects, that is, those Provincial subjects which remain in charge of the official part of the Government (the "Governor in Council"), but sec. 19A enables the Secretary of State in Council by rules to regulate and restrict the exercise of the existing wide powers of control vested in the Secretary of State, the Secretary of State in Council or the Governor-General in Council "in such manner as may appear necessary or expedient in order to give effect to the purposes of this Act" ; this section will therefore cover the making of rules regulating the control to be exercised in future by the Government of India over Provincial Governments in relation to reserved subjects (*Functions Report, parapraphs 18-22 pp. 234-237 Part. II*).

§ 12. "The Governor-General in Council shall be the sole judge."

These words are added "in order to make it clear that we do not contemplate such a limitation of the powers of the Governor-General in Council as would render the exercise of powers open to challenge in the Courts. Our acceptance of the proposal with regard to the specification in rules of the purposes to which the exercise of the powers of the Governor-General in Council will be restricted in relation to transferred subjects is based on the assumption that the making of rules under this provision will be subject to effective Parliamentary control." (*Functions Committee's Report, para 22.*)

§ 13. "Central Subjects and Provincial Subjects."

The Government of India hold that where extra-provincial interests predominate the subject should be treated as "Central", while, on the other hand, all subjects in which the interests of the provinces essentially predominate should be "provincial," and in respect of these the provincial Governments will have acknowledged authority of their own. (*See Functions Committee's Report paras 9-14, and notes under sub-sec. (1) (a) and (1) (c) above.*) For lists of all-India and Provincial subjects, See Part 3 of the Functions Committee's Reports pp. 252-268 of Part II. of this book, and Appendix F. to the Minutes of Evidence before the Joint Select Committee (printed in Part. II. of this book).

§ 14 "Reserved Subjects and Tansferred Subjects."

For what are Reserved and Transferred subjects, *See Notes under sec. 19A* ; and for list of Provincial Subjects for transfer, *see Functions Committee's Report, pp. 289-299 and Notes under sec. 19A.*

Governorships.

Revised system of local government in certain provinces.
[1919, s 3 (1).]

46. "(1) The presidencies[1] of Fort William in Bengal, Fort St. George, and Bombay, and the provinces known as the United Provinces, the Punjab, Bihar and Orissa, the Central Provinces, and Assam, shall each be governed, in relation to reserved subjects, by a governor[2] in council, and in relation to transferred subjects (save as otherwise provided by this Act) by the governor acting with ministers appointed under this Act.

"The said presidencies and provinces are in this Act referred to as "governor's provinces" and the two first-named presidencies are in this Act referred to as the presidencies of Bengal and Madras."

"(2) The governors of the said presidencies are appointed by His Majesty by warrant under the Royal Sign Manual, and the governors of the said provinces shall be so appointed after consultation with the Governor-General."

[1919, s. 3 (2).]

(3) The Secretary of State may, if he thinks fit, by order revoke or suspend, for such period as he may direct, the appointment of a council for any or all of "the governors' provinces"; and whilst any such order is in force the governor of the "province" to which the order refers shall have all the powers of the Governor thereof in Council.

[1919, 2nd Sch. Pt. II.]

§ 1. "The Presidencies."

These eight Provinces which are referred to as "Governors' Provinces" are in future to be governed under the dual system of government. Each Province will have a governor, who will be advised in relation to some of the functions of Government (those relating to reserved subjects) by an Executive Council, and in relation to other functions (those relating to transferred subjects) by Ministers. The new form of Provincial Government is not applied to Burma, which, for reasons indicated in M. C. R. para. 198 requires separate treatment.

See sec. 53. See also Notes under sec. 45A.

§ 2. "Governor."

It is to be observed that, although the heads of all the eight provinces are called "Governors," their position and status are not identical. As the Montagu-Chelmsford Report (para. 218) says, "this 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." The differences arise mainly from the mode of their appointment and the amount of their salaries. The

Governors of Bengal, Madras and Bombay are appointed by His Majesty by warrant under the Royal Sign Manual; apparently it is meant that such Governors are to be recruited mainly from the ranks of distinguished men who have made their mark in English public life and His Majesty is given an unfettered choice of selection, (though, according to Mr. Montagu, "there is nothing in the law which prevents a civil servant being appointed to a Presidency Governorship"—*P. D. H. C.* The Governors of the remaining five provinces are also appointed by His Majesty by warrant under the Royal Sign Manual, but *only after consultation with the Governor- General*; the implication is that they are to be *generally, though not always*, recruited from the ranks of the members of the Indian Civil Service who are distinguished for their administrative ability and experience. The words "*after consultation with the Governor-General*" are expressly inserted, said the Rt. Hon. Mr. Fisher in the course of the debate on the Government of India Bill in the House of Commons, 'in order to give the Governor-General an opportunity of recommending for appointment to these great responsible posts members of Indian Civil Service who, in his opinion, are found fit to discharge these responsibilities."—*P. D. H. C., Dec. 3, 1919*: That this is not to be the invariable rule is exemplified by the appointment of H. E. Lord Sinha to the Governorship of Bihar and Orissa.

If a vacancy occurs in the office of Governor-General, when there is no successor in India to supply the vacancy, the senior among the Presidency Governors alone holds the office of Governor-General. (Sec. 90). The differences in the amount of the salaries of Governors also bear witness to the original differences among the several provinces arising out of their past history and their inequalities in size and development. From the point of view of salary the Governors of Bengal, Madras and Bombay (and the United Provinces which has been recognised ever since 1833 as an equal with the three older Presidencies), retain their primacy, for they get the highest salary among the Provincial Governors *viz.*, Rs. 1,28,000 per annum. The Governors of the Punjab and Bihar and Orissa get the same salary as Lieutenant-Governors, *viz.* a lakh of rupees per annum, while the Governors of the Central Provinces and of Assam get respectively Rs. 72,000 and Rs. 66,000 per annum.

Further, the Governors of Bengal, Madras and Bombay enjoy the traditional privilege of corresponding direct with the Secretary of State on certain matters; the other Governors have not got this privilege.

Although the several Governors differ in position and status, they wield almost identical powers, and are to be guided by an "Instrument of Instructions." In Appendix II to their Despatch on the Functions Committee's Report the Government of India give the following draft *Instrument of Instructions* to be issued to Governors on appointment by the Secretary of State in Council—

"The Governor is responsible to Parliament for doing his utmost, consistently with the general purpose of the Government of India Act, 1919, to maintain the standards of good administration and to further all changes tending to make India fitted for self-government. He is required to encourage religious toleration, co-operation and good-will among all creeds and classes, to protect the interests of all minorities, to maintain the standards of conduct of the public service and the probity of public finance, and to promote all measures making for the moral, social and industrial welfare of the people and tending to fit all classes of the population without distinction to take their due share in the public life and government of the country.

In particular and without prejudice to the generality of the foregoing:—

I. The Governor is responsible for maintaining the safety and tranquillity of his province and for using his influence to compose religious and racial animosities, and to prevent religious and racial conflicts;

II. The Governor has a general responsibility for seeing that the administration of the transferred subjects by ministers is properly conducted. He will assist his ministers by all the means in his power with information and advice. He will restrict the exercise of the power to act in opposition to his ministers' advice, which is vested in him under section 4 (3) of the Government of India Act, 1919 to cases in which he considers that the consequences of acquiescence would be serious, bearing specially in mind his responsibility for the reserved subjects and the responsibilities laid upon him in clauses I, IV and VII to XII of these instructions.

III. The Governor is required to advise his ministers in regard to their relations with the provincial legislative council, to support them generally in difficulties so far as possible, and in the event of an adverse vote in the legislative council to

require the resignation of a minister only when it seems to him that the minister has lost the confidence of the council.

IV. The Governor is responsible for the due compliance with any orders affecting the administration of transferred subjects which may be issued by the Secretary of State or the Government of India.

V. The Governor is responsible for bringing to the notice of the minister concerned any observations on the administration of a transferred subject which may be communicated to him by the Government of India.

VI. In the case of any provincial Bill which appears to the Governor likely to affect any matter hereby specially committed to his charge, or any all-India subject, or any general principles laid down by the Secretary of State or the Government of India for the administration of a reserved subject, the Governor shall, before assenting to such Bill, consider whether he should reserve it for the consideration of the Governor-General.

VII. The Governor is required to see that no monopoly or special privilege which is inconsistent with the public interest is granted to any private undertaking and that no unfair discrimination in matters affecting commercial or industrial interests is permitted.

VIII. The Governor is responsible for the safeguarding of the legitimate interests of the European and Anglo-Indian community.

IX. The Governor is responsible for the protection of all members of the public services in the legitimate exercise of their functions, and in the enjoyment of all recognised rights and privileges.

X. The Governor is required to secure that in all extensions of educational facilities adequate provision is made for the special needs of the Muslim and any other minority community.

XI. The Governor is required to secure that the interests of existing educational institutions maintained or controlled by religious bodies are duly protected in the event of any changes of educational policy affecting them adversely.

XII. The Governor is required to secure that due provision is made for the advancement and social protection of depressed and backward classes and aboriginal tribes.

For further details see Functions Committee's Report para, 67.

Statutory Powers of Governors. 1. The three Presidency Governors are appointed by His Majesty by warrant under the Royal Sign Manual and the five other provincial Governors are so appointed after consultation with the Governor-General [Sec. 46 (2)].

2. If the appointment of a Council is by order of the Secretary of State revoked or suspended in a Province, the Governor of that Province shall have all the powers of a Governor in Council. [Sec. 46 (3).]

3. Every Governor of a Province shall appoint a member of his Executive Council to be Vice-president thereof. [Sec. 48].

4. The Governor may, by rule, direct the manner of authentication of the orders and proceedings of his Government. [Sec. 49 (1)].

5. He may make rules and orders for the more convenient transaction of business in his Executive Council and with his ministers, and for regulating the relation between his Executive Council and his ministers [Sec. 49 (2).]

6. If the members of his Council are equally divided on any question the Governor shall have a casting vote. [Sec. 50 (1)]

7. He may overrule his Council in certain cases. [Sec. 50 (2).]

8. The three Presidency Governors of Bengal Madras and Bombay may, with the approval of the Secretary of State in Council, and by notification extend the limits of the towns of Calcutta, Madras and Bombay respectively. [Sec. 62.]

9. The Governor shall not be a member of the Legislative Council, but shall have the right of addressing the Council, and may for that purpose, require the attendance of its members. [Sec. 72A (1).]

10. The Governor may dissolve the Council before the expiry of its term, or may extend it for a period not exceeding one year. [Sec. 72B (*a*) (*b*).]

11. After the dissolution of the Legislative Council the Governor is to appoint a date for the next session of the Council. [Sec. 72B (c).]

12. The Governor is to appoint times and places for holding the sessions of his Legislative Council [Sec. 72B (2)] He may also prorogue the Council. [Sec. 72B (2).]

13. For the first four years the Governor is to appoint and fix the salary of the President of the Legislative Council. [72C (1) and (5).]

14. His approval is necessary for the elected Deputy President of the Legislative Council. [72C (2).]

15. The Legislative Council may be overruled it in the case of a demand relating to a reserved subject, the Governor certifies that the expenditure provided for by the demand is essential to the discharge of his responsibility for the subject. [72D 2 (*a*).]

16. The Governor has power in cases of emergency to authorize such expenditure as may be in his opinion necessary for the safety or tranquillity of the Province or for the carrying on of any department. [72D 2 (6).]

17. No proposal for the appropriation of any revenues or other moneys for any purpose shall be made except on the recommendation of the Governor communicated to the Council. [72D (2) (*c*).]

18. If any question arises whether any proposed appropriation of the money does or does not relate to the heads of expenditure specified in [Sec. 72D (3)] the decision of the Governor shall be final. [72D (3)]

19. The Governor may certify, under certain circumstances that a bill or any clause of it or any amendment affects the safety or tranquillity of British India, or any part thereof, and may direct that no further proceedings shall be taken by the Chamber in relation to that Bill. [72D (4).]

20. If a Governors' Legislative Council fails to pass essential legislation the Governor may certify that the passage of the Bill is essential for the discharge of his responsibility for a reserved subject and thereupon the bill becomes an Act on the signature of the Governor. [72E (1).]

21. The previous sanction of the Governor is necessary if any member of any Local Legislative Council introduces any measure affecting the public revenues of a Province or imposing any charge on those revenues. [80 (1)].

22. When a bill has been passed by a Local Legislative Council the Governor may declare that he assents to or withholds his assent from the bill, or he may return the bill to the Council for reconsideration. If he withholds his assent the bill shall not become an Act. In spite the Governors' assent the Governor-General may invalidate the Act by withholding his assent to it (81 and 81A).

23. If the Governor, saving the cases of leave on special duty, or on leave on medical certificate, departs from India to return to Europe his office shall, thereupon, become vacant. [87 (1).]

24.
25.
26. } *Same as items No. 44, 45, 46 on p. 166 ante.*

47. (1) The members of a Governor's executive council[1] shall be appointed by His Majesty by warrant under the Royal Sign Manual, and shall be of such number, not exceeding four,[2] as the Secretary of State in Council directs.

Members of executive councils. [1793, s. 24; 1833, ss. 56, 57; 1869, c. 97 s. 8; 1909, s. 2 (1); 1912, s. 1 (1).]

(2) "One" at least of them 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.

[1793, s. 25; 1909 s. 2 (1); 1912, s. 1 (1); 1919, s. 5 (1).]

"(3) Provision may be made by rules under this Act as to the qualifications[3] to be required in respect of members of the executive council of the Governor of a province in any case where such provision is not made by the foregoing provisions of this section."

[1919, s. 5 (2).]

§ 1. "The members of a Governor's Executive Council."

The members of a Governor's Executive Council in all the governors' provinces are all appointed by His Majesty by warrant under the Royal Sign Manual: His Majesty may or may not consult the authorities in India in exercising this power. It is thus a curious anomaly that in the five provinces of the Punjab, the United Provinces, Bihar and Orissa, the Central Provinces and Assam, the status of the members of the Executive Council should appear to be higher than that of the Governors who are appointed by His Majesty *after consulting the Governor-General.* The maximum number of members of Council is four, of which one at least

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. The *italicised* words imply that he must have put in at least twelve years' *continuous* service under the Crown in India and that, *at the time of his appointment* as member of the Governor's Executive Council, he must still be in service. It should be noted in this connection, that (1) the words '*at the time of his appointment*' do not occur in the section dealing with the appointment of the members of the Governor-General's Executive Council (*See Sec. 36 and the notes thereunder*) ; (2) the wording of this section does not seem to imply that this one member must belong to the Indian Civil Service : he may be recruited from any of the Civil Services of the Crown in India (referred to in sec. 96 B) ; and (3) the person is to have been for at least twelve years (not ten years, as in case of the members of the Governor-General's Executive Council) in the service of the Crown, not in *British India*, but in *India*.

§ 2 "Of such number, not exceeding four."

The Executive Councils will be constituted similarly to the existing Executive Councils in the Presidencies, and the provisions of the Act (sections 46 to 51) relating to Governors in Council will apply. Section 47 of the Government of India Act, 1915, provided that members of a Governor's Executive Council should be appointed by His Majesty by Warrant, and should be of such number, not exceeding four, as the Secretary of State in Council directed, and that two at least of such members must be "persons who at the time of their appointment have been for at least 12 years in the service of the Crown in India." Under the existing system the Executive Councils in the three Presidencies consist normally of three members, of whom two are members of the Indian Civil Service and the third is an Indian. This sub-section provides that the requirement as to previous service under the Crown in India is in future to apply only to one of the members of a Governor's Executive Council, and also repeals a provision, which has become obsolete, that the Commander-in-Chief, while resident in the capital of a Presidency, is temporarily added to the Executive Council of that Presidency. The maximum number of members of an Executive Council is to remain at the existing figure, four. The Montagu-Chelmsford Report proposed that under the new system the Governor's Executive Council should consist of two ordinary members only (paragraph 218), of whom one was in practice to be a European quali-

fied by long official experience and the other an Indian. It was also proposed (paragraph 220) that the Governor should be entitled to appoint one or two additional members to the Council as Members without Portfolio for the purpose of consultation and advice. This proposal met with much criticism, and, in view of the difficulties which its adoption involved (Despatch of 5th March, para. 37), was abandoned. But, as the maximum number of four remains, it will be open to the Secretary of State to sanction larger Councils than those proposed in the M. C. Report, and there will be nothing to debar him from advising the appointment of more than one official member if he sees fit to do so. It has been considered undesirable to include in the Act any provision for racial qualification, and the suggestion made by the Government of India, that one seat should be reserved by statute for an Indian (Despatch of 5th March, para. 39), has, therefore, not been adopted; but it is contemplated that in any event Executive Councils will continue to include at least one Indian member, and that, if a second European member is added, there will also be a second Indian member.

The statute puts a definite limit to the number of members of the Executive Council of Governors or, shortly speaking, "Councillors," but, from the wording of sec. 52 it appears that there is to be no statutory limit to the number of ministers who can be appointed by the Governor; "in no province will there be need for less than two ministers while in some provinces more will be required" (*J. S. C. R.*)

The Joint Select Committee are of opinion that the normal strength of an executive council, specially in the smaller provinces, need not exceed two members. They have not, however, reduced the 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 non-official Indian members. The Executive Councils of Governors will thus generally contain either (1) one European official member and another non-official Indian, or (2) two official European members and two non-official Indians.

§3. "Qualifications of members of Executive Councils"

The Rules under this sub-section are apparently meant to lay down the qualifications for those members who have not the qualifications mentioned in sub-section (2) above; they are apparently meant to lay down qualifications for the non-official Indian Councillors.

Vice-President of council. [1909, s. 4; 1912, s. 1 (1); 1919, 2nd Sch Pt, II.]

48. Every governor of a "province" shall appoint a member of his executive council to be vice-president thereof.

According to Sec. 51 the vice-president is to preside at a meeting of the executive council with the full powers of a Governor, should the latter be obliged to absent himself from the meeting owing to indisposition or any other cause.

Business of governor in council and governor with ministers. [1919, s. 6.]

49.—(1) "All orders and other proceedings of the Government of a Governor's province shall be expressed to be made by the Government of the province, and shall be authenticated as the Governor may by rule direct, so, however, that provision shall be made by rule for distinguishing orders and other proceedings[1] relating to transferred subjects from other orders and proceedings.

"Orders and proceedings authenticated as aforesaid shall not be called into question in any legal proceeding on the ground that they were not duly made by the Government of the province.

(2) "The Governor may make rules and orders for the more convenient transaction of business in his executive council and with his ministers, and every order made or act done in accordance with those rules and orders shall be treated as being the order or the act of the Government of the province.

"The Governor may also make rules and orders for regulating the relations between his executive

council and his ministers[2] for the purpose of the transaction of the business of the local Government:

"Provided that any rules or orders made for the purposes specified in this section which are repugnant to the provisions of any "other" rules made under this Act shall, to the extent of that repugnancy, but not otherwise, be void."

§ 1. "Distinguishing orders and other proceedings"

One fundamental principle of the Reforms is that the responsibility of both halves of the Provincial Executive Governments must be clear and distinct. This principle requires that it should be perfectly clear to all concerned by which of the two authorities—Councillors or Ministers—a particular order is issued. Both will have equal authority as orders of Government; but the electorate will be able, if they wish to know whence any given order originates. In their First Reforms Despatch (para. 106) the Government of India express a strong desire "to see the two cases distinguished in some way (whether by a change of style, or by some marginal indication of the authority in possession of the case) that will enable the recipients to recognise which of the two halves of the Government is accountable for the decision."

§ 2. "Relation between Governor's Executive Council and his ministers."

See paragraphs 62-63 of the Functions Committee's Report, pp. 280-286 *in Part II of this book. See also paragraphs 219-221 of the M. C. R. and paragraphs 101-103 of the Government of India's First Reforms Despatch, pp.* 118-122 *of Part II. of this book.*

The Joint Select Committee desire at this point to give a picture of the manner in which they think that, under this Bill, the Government of a province should be worked. There will be 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 the highest importance to the principle that, when once opinions have been freely exchanged and the last word has been said, there ought then to be no doubt whatever as to where the responsibility for the decision lies. Therefore, in the opinion of the Committee, after such consultation, and when it is clear that the decision lies within the jurisdiction of one or other half of the Government, that decision in respect of a reserved subject should be recorded separately by the executive council, and in respect of a transferred subject by the ministers, and all acts and proceedings of the government should state in definite terms on whom the responsibility for the decision rests. It will not always, however, be clear, otherwise than in a purely departmental and technical fashion, with whom the jurisdiction lies in the case of questions of common interest. In such cases it will be inevitable for the Governor to occupy the position of informal arbitrator between the two parts of his administration; and it will equally be his duty to see that a decision arrived at one side of his government is followed by such consequential action on the other side as may be necessary to make the policy effective and homogeneous.

"The position of the Governor will thus be one of great responsibility and difficulty, and also of great opportunity and honour. He may have to hold the balance between divergent policies and different ideals, and to prevent discord and friction. It will also be for him to help with sympathy and courage the popular side of his government in their new responsibilities. He should never hesitate to point out to ministers what he thinks is the right course or to warn them if he thinks they are taking the wrong course. But if, after hearing all the arguments, ministers should decide not to adopt his advice, then, in the opinion of the Committee, the Governor should ordinarily allow ministers to have their way, fixing the responsibility upon them, even if it may subsequently be necessary for him to veto any particular piece of legislation. It is not possible but that in India, as in all other countries, mistakes will be made by ministers, acting with the approval of a majority of the legislative council, but there is no way of learning except through experience and by the realisation of responsibility.

"In the debates of the legislative council members of the executive council should act together and ministers should act together, but mem-

bers of the executive council and ministers should not oppose each other by speech or vote; members of the executive council should not be required to support either by speech or vote proposals of ministers of which they do not approve, nor should ministers be required to support by speech or vote proposals of the executive council of which they do not approve; they should be free to speak and vote for each other's proposals when they are in agreement with them. All other official members of the legislative council should be free to speak and vote as they choose." *J. S. C. R.*

50. (1) If any difference of opinion arises on any question brought before a meeting of a governor's executive council, the Governor in Council shall be bound by the opinion and decision of the majority of those present, and if they are equally divided the governor or other person presiding shall have a second or casting vote.

Procedure in case of difference of opinion, [1909, s. 2 (2); 1912, s. 1 (1).]

(2) Provided that, whenever any measure is proposed before a Governor in Council 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, and he is of opinion either that the measure proposed ought to be adopted and carried into execution, or that it ought to be suspended or rejected, and the majority present at a meeting of the council dissent from that opinion, the governor may, on his own authority and responsibility, by order in writing, adopt, suspend or reject the measure, in whole or in part.

[1793, ss. 47, 48; 1912, s. 1 (1); 1919, 2nd Sch., Pt. II.]

(3) In every such case the governor and the members of the council present at the meeting shall mutually exchange written communications (to be recorded at large in their secret proceedings) stating the grounds of their respective opinions, and the order of the governor shall be signed by the governor and by those members.

(4) Nothing in this section shall empower a governor to do anything which he could not lawfully have done with the concurrence of his council.

[1793, s. 49; 1912, s. 1 (1).]

51. If a governor is obliged to absent himself from any meeting of his executive council, by indisposition or any other cause, the vice-president, or, if he is absent, the senior member present at the meeting, shall preside thereat, with the like powers as the governor would have had if present:

Provision for absence of governor from meetings of council. [1800, s. 12; 1861, c. 67, s. 34; 1909, s. 4; 1912, s. 1 (1).]

Provided that if the governor is at the time resident at the place where the meeting is assembled, and is not prevented by indisposition from signing any act of Council made at the meeting, the act shall require his signature; but, if he declines or refuses to sign it, the like provisions shall have effect as in cases where the governor, when present, dissents from the majority at a meeting of the Council.

[1800, s. 12; 1912, s. 1 (1); 1919, 2nd. Sch., Pt. III.]

52. "(1) The Governor of a Governor's Province may, by notification, appoint ministers,[1] not being members of his executive council or other officials, to administer transferred subjects[2], and any ministers so appointed shall hold office during his pleasure[3].

Appointment of ministers and council secretaries. [1919, s. 4.]

"There may be paid to any minister so appointed in any Province the same salary[4] as is payable to a member of the executive council in that province, unless a smaller salary is provided by vote of the legislative council of the province.

"(2) No minister shall hold office for a longer period than six months, unless he is or becomes an elected member of the local legislature.

"(3) In relation to transferred subjects, the governor shall be guided by the advice of his ministers[5], 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: Provided that rules may be made under this Act for the temporary administration of a transferred subject where, in cases 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.

"(4) The Governor of a Governor's province may at his discretion appoint from among the non-official members of the local legislature council secretaries,[6]

who shall hold office during his pleasure, and discharge such duties in assisting members of the executive council and ministers, as he may assign to them.

There shall be paid to council secretaries so appointed such salary as may be provided by vote of the legislative council.

A council secretary shall cease to hold office if he ceases for more than six months to be a member of the legislative council."

§ 1. "Appoint ministers".

While the members of the Executive Councils would be appointed by His Majesty by warrant under the Royal Sign Manual, ministers, being advisers of the Governor, would necessarily be appointed by the Governor. The Ministers are to administer the transferred subjects : they must not be officials, and hold office during the Governor's pleasure, and not for the life-time of the Legislative Council as proposed in the Montagu-Chelmsford Report. (*M. C. R. para 218; Government of India's First Reforms Despatch, para 40 ; Functions Committee's Report, para 61*). This alteration, coupled with the power of the Councils to vote the supply for transferred subjects, involves making the Ministers directly responsible to the legislative councils. A Minister must be at the time of appointment, or become, within six months after his appointment as such, an elected member of the local legislature. This sub-section is modelled on corresponding provisions contained in the Dominion Constitutions (Australian Commonwealth Act, 1915, sec. 64 ; South Africa Act, 1909, sec. 14.) *See Notes under sec. 80B.*

§ 2 "Transferred subjects".

See Notes under Sec. 45A.

§ 3. "During his pleasure."

A person holding office during pleasure can be removed without any reason for his removal being assigned. [*See Notes under sec. 102 (1)*].

The Ministers hold office during the Governor's pleasure, and not for the life-time of the Legislative Council as originally proposed in the Montagu-Chelmsford Report.

§ 4 "The same salary etc".

The Joint Select Committee recommend that the ministers' salaries should be fixed by the legislative council : that is the only way of making them really responsible to it. This section gives the legislative council liberty to pay the Ministers the same salaries as are paid to the members of the executive council—*i.e.* the maximum salary that may be paid to ministers cannot exceed the different maxima fixed by the second schedule to this Act for the executive councillors of the different provinces : the maximum salary of ministers will thus vary according to provinces. The Joint Select Committee suggest to the legislative councils that the Indian ministers of governors should be paid on a lower scale of remuneration than the European executive councillors on the same principle by which the Indian members of the council of India in London are paid a higher scale of remuneration than those members of the council domiciled in the United Kingdom. We think that, according to the same principle, the non-official Indian members of the governors' executive councils should receive a lower scale of remuneration than their European colleagues. If the principle is to be rigidly applied, the Indian ministers and the non-official Indian executive councillors should receive the same scale of remuneration.

§ 5. . "Guided by the advice of ministers"

"The Committee 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 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. The Committee

are of opinion that in no province will there be need for less than two ministers, while in some provinces more will be required. In these circumstances they think that it should be recognised from the commencement that ministers may be expected to act in concert together. They probably would do so ; and in the opinion of the Committee it is better that they should, and therefore that the fact should be recognised on the face of the Bill. They advise 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."—*J. S. C. R.*

§ 6. "Council Secretaries."

This sub-section makes provision for the appointment, at the governor's discretion, of non-official—elected or nominated—members of the legislative council to fill a role somewhat similar to that of the Parliamentary Under-Secretary in England. In the course of the debate on the Bill in the House of Commons Lieutenant-Commander Kenworthy moved an amendment suggesting that these council secretaries should be chosen only from among the *elected non-official* members of the legislative council. In opposing this amendment Mr. Montagu said :—"It is intended to give an opportunity of familiarising young members of the legislative council with the difficulty of the work, but I do not think it would be wise to restrict the appointments to elected members. It cannot apply to officials, but in these early days there will be a certain number of members, non-official, who have been nominated, and they are equally entitled to a share of these posts. I think the preference will probably be given to elected members, but I do not want to shut out a nominated Indian prince, for example". (*P. D. H. C. Dec. 3, 1919.*) It is to be noticed that these council secretaries are to be appointed to assist both councillors and ministers : there is no statutory limit to the number of such council secretaries ; apparently, however, one council secretary will be attached to each councillor and minister. Their salaries are to be voted by the legislature and they will, therefore be, like the ministers, responsible to the legislature . An important question arises in this connection—what will be the position of a member of the Executive Council if his Council Secretary who is his responsible proxy is censured by the Legislature or if a vote of want of confidence is passed against him ? The council secretaries will, of course, form part of the Ministry and will resign with the ministers.

Non-official members who will be appointed council secretaries will cease to be members of the legislative council (sec. 80B) : They must have to be re-elected or re-nominated within six-months of their appointment, if they are to continue to hold office as council secretaries. (*See notes under sec. 80B.*)

Constitution of new provinces, etc., and provision as to backward tracts. [1919, s. 15.]

52A. "(1) The Governor-General in Council may, after obtaining an expression of opinion from the local government and the local legislature affected, by notification, with the sanction of His Majesty previously signified by the Secretary of State in Council, constitute a new governor's province or place part of a governor's province under the administration of a deputy-governor to be appointed by the Governor-General, and may in any such case apply, with such modifications as appear necessary or desirable, all or any of the provisions of this Act relating to governors' provinces, or provinces under a lieutenant-governor or chief commissioner, to any such new province or part of a province.

"(2) The Governor-General in Council may declare any territory in British India to be a "backward tract," and may, by notification, with such sanction as aforesaid, direct that this Act shall apply to that territory subject to such exceptions and modifications as may be prescribed in the notification. Where the Governor-General in Council has, by notification, directed as aforesaid, he may, by the same or subsequent notification, direct that any Act of the Indian legislature shall not apply to the territory in

question or any part thereof, or shall apply to the territory or any part thereof subject to such exceptions or modifications as the Governor-General thinks fit, or may authorise the governor in council to give similar directions as respects any Act of the local legislature."

In all the eight provinces are included certain backward areas where the people are primitive and there is as yet no material on which to found political institutions. "We do not think there will be any difficulty in demarcating them. They are generally the tracts mentioned in the schedules and appendices to the Scheduled Districts Act, 1874, with certain exceptions and possibly certain additions, which the Government of India must be invited to specify. The typically backward tracts should be excluded from the jurisdiction of the reformed provincial Governments and administered by the head of the province" (*M. C. R. para 199*).

"The (Joint Select) Committee have two observations to make on the working of this section. On the one hand, they do not think that any change in the boundaries of a province should be made without due consideration of the views of the legislative council of the province. On the other hand, they are of opinion that any clear request made by a majority of the members of a legislative council representing a distinctive racial or linguistic territorial unit for its constitution under this Clause as a sub-province or a separate province should be taken as a *prima facie* case on the strength of which a commission of inquiry might be appointed by the Secretary of State, and that it should not be a bar to the appointment of such a commission of inquiry that the majority of the legislative council of the province in question is opposed to the request of the minority representing such a distinctive territorial unit."—*J. S. C. R.*

52B. "The validity of any order made or action taken after the commencement of the Government of India Act, 1919 by the Governor-General in Council or by a local government which would have been within the

Saving. [1919, s. 16(1) & (3).]

powers of the Governor-General in Council or of such local government if that Act had not been passed, shall not be open to question in any legal proceedings on the ground that by reason of any provision of that Act or this Act or of any rule made by virtue of any such provision such order or action has ceased to be within the powers of the Governor-General in Council or of the government concerned.

"The validity of any order made or action taken by a governor in council, or by a governor acting with his ministers, shall not be open to question in any legal proceedings on the ground that such order or action relates or does not relate to a transferred subject, or relates to a transferred subject of which the minister is not in charge."

See Notes under sec. 45 A (2) (7).

Lieutenant-Governorships and other Provinces.

Lieutenant-Governorships. [1919 and Sch. 1 Pt. II.]

53. (1) The province of Burma, is, subject to the provisions of this Act, governed by a lieutenant governor.[1]

[1861, c. 6, ss. 46, 49.]

(2) The Governor-General in Council may, by notification, with the sanction of His Majesty previously signified by the Secretary of State in Council, constitute a new province under a lieutenant-governor,

§ 1. "Lieutenant-Governor."

Sec. 46 of the Act lays down that the *three* Presidencies of Fort William in Bengal, Fort St. George and Bombay and the *five* Provinces known as the United Provinces, the Punjab, Bihar and Orissa, the Central Provinces, and Assam shall each be governed, in relation to reserved subjects, by a *Governor in Council* and in relation to transferred subjects (save as otherwise provided by this Act) by the governor acting with ministers appointed under this Act. Burma is the only province which is left to be governed by a lieutenant-governor.

The Governor-General in Council may, by notification, with the sanction of His Majesty previously obtained and signified by the Secretary of State constitute a new province under a lieutenant-governor ; and the lieutenant-governor is appointed by the Governor-General with the approval of His Majesty. *See* secs. 53 (2) and 54 (1).

Qualifications of Lieutenant-Governors—A lieutenant-governor must have been, at the time of his appointment, at least ten years in the service of the Crown in India. [sec 54 (2).]

An executive council may be created in any province under a lieutenant-governor by the Governor-General in Council with the approval of the Secretary of State in Council. (Sec. 55.)

The points in which a lieutenant-governor differs from a governor may be summarised as follow—(1) he is styled only "His Honour" while a governor is addressed as "His Excellency" ; (2) he is appointed by the Viceroy from among the members of the Indian Civil Service, while a governor is appointed by the Crown not only from among distinguished members of the Indian Civil Service but also from members of the aristocracy in Great Britain ; (3) he may or may not have an executive council to assist him ; (4) his powers are more narrowly circumscribed and he is subject to more detailed interference by the Central Government ; (5) he has no right to communicate directly with the Secretary of State.

See notes under sec. 73.

Lieutenant-Governors. [1835, s. 2; 1853, ss. 15, 16, 17 ; 1858, s. 29.]

54. (1) A lieutenant-governor is appointed by the governor-general with the approval of His Majesty.

(2) A lieutenant-governor must have been, at the time of his appointment, at least ten years in the service of the Crown in India.

[3] *Repealed by the Government of India Act, 1919, 2nd Sch., Pt. III.*

55. (1) The Governor-General in Council, with the approval of the Secretary of State in Council, may, by notification, create a council in any province under a lieutenant-governor, for the purpose of assisting the lieutenant-governor in the executive government of the province, and by such notification—

Power to create executive councils for lieutenant-governors. [1909, s. 3 (1), (2); 1912, s. 2; 1919 2nd Sch., Pt. III.]

(*a*) make provision for determining what shall be the number (not exceeding four) and qualifications of the members of the Council; and

(*b*) make provision for the appointment of temporary or acting members of the council during the absence of any member from illness or otherwise "and for supplying a vacancy until it is permanently filled" and for the procedure to be adopted in case of a difference of opinion between a lieutenant-governor and his council, and in the case of equality of votes, and in the case of a lieutenant-governor being obliged to absent himself from his council by indisposition or any other cause:

Provided that, before any such notification is published, a draft thereof shall be laid before each House of Parliament for not less than sixty days during the session of Parliament, and if, before the expiration of that time, an address is presented to His Majesty by either House of Parliament against the draft or any part thereof, no further proceedings shall be taken thereon without prejudice to the making of any new draft.

(2) Every notification under this section shall be laid before both Houses of Parliament as soon as may be after it is made. [1909, s. 7.]

(3) Every member[1] of a lieutenant-governor's executive council shall be appointed by the Governor-General, with the approval of His Majesty. [1909, s. 3(4).]

§ 1. "Every member"

Difference between a member of a governor's executive council and that of a lieutenant-governor's council. Sec. 47 lays down that the members of a governor's executive council shall be *appointed by His Majesty* by warrant under the Royal Sign Manual and the *Secretary of State* for India *determines the number of members* which is not to exceed four ; whereas this section lays down that members of a lieutenant-governor's council shall be *appointed by the Governor-General with the approval of His Majesty.* This section further provides that the maximum number of members shall be four ; but the *number of members* is to be *determined by the Governor-General with the approval of the Secretary of State in Council.*

56. A lieutenant-governor who has an executive council shall appoint a member of the council to be vice-president thereof, and that vice-president shall preside at meetings of the council in the absence of the lieutenant-governor.

Vice-president of council. [1909, s. 4.]

57. A lieutenant-governor who has an executive council may, with the consent of the Governor-General in Council, make rules and orders for more convenient transaction of business in the Council, and every order made, or act done, in accordance with such rules and orders, shall be treated as being the order or the act of the lieutenant-governor in Council.

Business of Lieutenant-Governor in Council. [1909, s. 3 (3), 1919, 2nd Sch. Part II.]

"An order made as aforesaid shall not be called into question in any legal proceedings on the ground that it was not duly made by the lieutenant-governor in Council."

58. Each of the following provinces, namely, those known as the North-West Frontier Province, British Baluchistan, Delhi, Ajmer-Merwara, Coorg, and the Andaman and Nicobar Islands, is, subject to the provisions of this Act, administered by a chief commissioner[1].

Chief Commissioners. [1919, 2nd Sch, Pt. II].

§ 1. **"A chief commissioner."**

The chief commissioners have a lower status than the lieutenant governors. Their appointment is not specifically provided for by the Act

The territories under their charge are in theory "under the immediate authority and management of the Governor-General," who appoints chief commissioners at his discretion and delegates to them such powers as are necessary for the purposes of administration.

So far, however, as the application of Indian enactments is concerned, chief commissioners are, by virtue of the definition contained in the General Clauses Act, 1897, and in sec. 134 (cl. 4) of this Act placed on the footing of local governments. The North-West Frontier Province and British Baluchistan are charges of less magnitude, and the chief commissioners are at the same time the Governor-General's agents for dealing with tribes and territories outside British India. The four remaining provinces are small charges, not comparable in area with the rest, though the new province of Delhi has a special importance of its own The Agent to the Governor-General in Rajputana and the Resident in Mysore are ex-officio Chief Commissioners of Ajmere-Merwara and Coorg respectively, while the Superintendent of the Penal Settlement of Port Blair, from which the islands derive their administrative importance, is Chief Commissioner of the Andaman and Nicobar islands.

Power to place territory under authority of Governor-General in Council. [1854, s. 3.]

59. The Governor-General in Council may, with the approval of the Secretary of State, and by notification, take any part of British India under the immediate authority and management of the Governor-General in Council, and thereupon give all necessary orders and directions respecting the administration of that part, by placing it under a chief commissioner or by otherwise providing for its administration.

This section is to be used when it is desired to transfer the administration of a territory from a Governor in Council or a lieutenant-governor to a chief commissioner; The section need not be used, and is not ordinarily used, when the administration of a territory already under the administration of the Governor-General in Council is transferred from one local agency to another.

The transfer of territory under this section does not change the law in force in the territory (see below, sec. 61).

Boundaries.

60. The Governor-General in Council may, 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 to these qualifications, namely :—

Power to declare and alter boundaries of provinces. [1800, s. 1; 1833, s. 38; 1853, s. 17; 1861, c. 67, ss. 47, 49; 1865, c. 17, s. 4; 1912, s. 4 (2).]

(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 [1865, c. 17, s. 5.]

(2) any notification under this section may be disallowed by the Secretary of State in Council.

61. An alteration in pursuance of the foregoing provisions of the mode of administration of any part of British India, or of the boundaries of any part of British India, shall not affect the law for the time being in force in that part.

Saving as to laws. [1854, s. 3, prov.; 1861, c. 67, s. 47, prov.; 1912, s. 3.]

The power to take territory under the immediate authority of the Governor-General in Council (reproduced by sec. 59 above) is qualified by the proviso that no law or regulation in force at any such time as regards any such portions of territory shall be altered or repealed except by law or regulation made by the Governor-General of India in Council (17 & 18 Vict. c. 77, s. 3.)—*Ilbert.*

62. The Governor of Bengal in Council, the Governor of Madras in Council, and the Governor of Bombay in Council may, with the approval of the Secretary of State in Council, and by notification, extend the limits of the towns of Calcutta, Madras and Bombay, respectively; and any Act of Parliament, letters patent, charter, law or usage conferring jurisdiction, power or authority within the limits of those towns respectively shall have effect within the limits as so extended.

Power to extend boundaries of presidency-towns. [1815, s. 1; 1912, s. 1 (2).]

PART VI.

THE INDIAN LEGISLATURE.

63. "Subject to the provisions of this Act, the Indian legislature[1] shall consist of the Governor-General and two chambers, namely, the Council of State and the Legislative Assembly.

Indian legislature. [1919, s. 17.]

"Except as otherwise provided[2] by or under this Act, a Bill shall not be deemed to have been passed by the Indian legislature unless it has been agreed to by both chambers, either without amendment or with such amendments only as may be agreed to by both chambers."

§ 1. "The Indian legislature."

Landmarks in the evolution of the Indian and local legislatures.—(1) In British India it was originally the Executive Government itself that was empowered "to make regulations and ordinances," for the good govern-

ment of the factories or territories at first acquired in India, "so as they be not repugnant to the laws and customs of the United Kingdom." The laws (known as "Regulations" up to 1833) could be passed by the Governor-General in Council or by the Governors of Madras and Bombay in Council: Such regulations, however, were not to be valid or of any force until they were duly registered in the Supreme Court, with the consent and approbation of the Court of Directors (The earliest regulation bears date 17th April, 1780). An appeal from a regulation so registered and approved lay to the King in Council, but the pendency of such appeal was not allowed to hinder the immediate execution of the law. The Governments were bound to forward all such rules and regulations to England, power being reserved to the King to disapprove of them at any time within two years.

(2) By the Charter Act of 1833 the Governor-General's Council was augmented by a fourth or extraordinary member who was not entitled to sit or vote except at meetings for making laws and regulations. He was to be appointed by the Directors, subject to the approval of the Crown, from among persons, not servants of the company. The first such member was Thomas Babington Macaulay. The Governor-General in Council was empowered to make "Laws and Regulations" for the whole of India, withdrawing from the Governors of Madras and Bombay all legislative functions, but leaving to them the right only of proposing draft schemes. Acts (not "Regulations" as heretofore called) passed by the Governor-General in Council were liable to be disallowed by the Court of Directors and were also required to be laid before Parliament, but no registration in India was necessary. It was also expressly enacted that they were to have the force of Acts of Parliament.

(3) In 1853 the Council of the Governor-General was again remodelled by the admission of the fourth or legislative member as an ordinary member for all purposes; while six special members were added for the object of legislation only *viz.*, one member from each of the four then existing presidencies or lieutenant-governorships and also the Chief Justice and one of the judges of the Supreme Court. Thus the first Indian Legislative Council as constituted under the Act of 1853 consisted only of 12 members *viz.*, the Governor-General and the four members of his Council, the commander-in-chief, and six special members. The Governor-General was also empowered by this Act to appoint, with the sanction of the Court, two civilian members, but this power was never

exercised. From this time onwards the sittings of the legislative council were made public and their proceedings officially published.

(4) By the Indian Councils Act of 1861 the power of legislation was restored to the Presidencies of Madras and Bombay, and a legislative council was appointed for Bengal, while the Governor-General in Council retained legislative authority over the whole of India. For legislative purposes the Governor-General's Council consisted of five ordinary members, the commander-in-chief as extraordinary member, and the Governor or Lieutenant-Governor of the Province in which the Council happened to meet, together with from 6 to 12 members nominated for a period of two years by the Governor-General. Of these last not less than one-half was to be non-official persons, and in practice some of them were always Indians. The extent of the powers of the Legislative Council was thus defined—

"For all persons, whether British or Native, foreigners or others, and for all courts of justice whatever, and for all places and things whatever within the said territories and for all servants of the Government of India within the dominions of princes and states in alliance with Her Majesty."

Certain subjects were expressly reserved for Parliament, including the several statutes regulating the constitution of the Indian Government, any future statute affecting India, any statute for raising money in England, the Mutiny Act, and the unwritten laws and constitution of England, so far as regards allegiance and sovereignty. No measure could be introduced without the sanction of the Governor-General if it affected the public debt or revenues, the religious usages of the people, military discipline or foreign relations. No law was to be valid until the Governor General had given his express assent to it; and an ultimate power of signifying disallowance was reserved to the Crown. In cases of emergency the Governor-General, apart from the Legislative Council, could make "ordinances for the peace and good government" of the country, which had the force of laws for six months. Local legislatures were constituted for Madras and Bombay, in addition to the ordinary councils, consisting in each presidency of the Advocate-General, together with from four to eight other persons, of whom one-half were to be non-official nominated by the Governors. Besides the subjects forbidden to the Governor-General's Council, these local legislatures were not to take into consideration proposals affecting general taxation, the currency, the post office and telegraphs, the penal code, patents and copyrights. The assent

of the Governor-General as well as that of the Governor was necessary to give validity to any law. A similar local legislature was directed to be constituted for the lower Provinces of Bengal and power was given to constitute Legislative Councils for what was known as the North-Western Provinces and for the Punjab and for any other lieutenant-governorship that might be formed in the future. Such were the chief provisions of the Indian Councils Act of 1861.

(5) The next landmark in the evolution of the Indian legislature was the passage of the Indian Councils Act of 1892. The changes introduced by this Act were, broadly speaking, three in number. The first was the concession of the privilege of financial criticism in both the supreme and provincial legislative councils; the second was the concession of the right of asking questions; the third made an increase in the size of the legislative councils and changes in the method of nomination—changes which fore-shadowed the introduction of the elective element into the Indian legislatures.

(6) We come next to the constitutional reforms of 1909 associated with the names of Lords Morley and Minto. *(See "Documents" Vol. I.)* Under the Minto-Morley scheme the Legislative Council of the Governor-General consisted, in addition to the seven members of his Executive Council, of 60 members, of whom 27 were elected and 33 nominated making a total of 69, inclusive of the Governor-General, and the Head of the Province in which the Council assembled. Many of the provincial legislatures were given non-official majorities. Power was given to move resolutions on matters of general public interest and to ask supplementary questions.

(7) Finally, we come to the Montagu-Chelmsford Reforms of 1919 under which the constitution and functions of the Indian and provincial legislatures have undergone further development and change. The main objects of reforming the constitution of the Indian Legislature are—

(1) to provide in the case of the Legislative Assembly a body substantially larger and of a more representative character than the hitherto existing Governor-General's Legislative Council, with a majority of elected members. (*M. C. R. para. 273.*)

(2) to provide a real revising body—a true Second Chamber.

Sections 63 to 64 provide for an Indian Legislature consisting of the Governor-General and two Chambers, namely, the Council of State and the Legislative Assembly, constituted in accordance with the proposals

of the Montagu-Chelmsford Report (*paras. 273 to 278, see Documents I, pp. 549 to 554*), subject to modifications recommended by the Franchise Committee (*Franchise Committee's Report, paras. 31 to 33 and 39 and 40, see Part II, pp. 211 to 213, and pp. 217-218*) and by the Parliamentary Joint Select Committee.

The Montagu-Chelmsford Report proposed that the strength of the Legislative Council to be known henceforth as the Legislative Assembly of India should be raised to a total strength of about 100 members. Two thirds of this total should be returned by election : one third to be nominated by the Governor-General and of this third not less than a third again should be non-officials representing minorities or special interests such as European and Indian Commerce.' The normal duration of an Assembly was proposed to be three years The Report also proposed the creation of a second chamber known as the Council of State for the special object of enabling the Government of India "to obtain its will in essential matters" necessary for the good government of the land. The proposal was that the Council of State should take part in ordinary legislative business and should be the final legislative authority in matters which government regarded as essential. The object was to make assent by both bodies the normal condition of legislation ; but to establish the principle that in the case of legislation certified by the Governor-General as essential to the interests of peace, order and good government, the will of the Council of State was to prevail. The proposals of the Montagu-Chelmsford Report regarding the constitution of the Council of State may be thus summarised—

The Council of State will be composed of 50 members exclusive of the Governor-General who would be President. Not more than 25 members including the members of the Executive Council would be officials, and four would be non-officials nominated by the Governor-General. There would be 21 elected members returned by non-official members of the provincial legislative councils, each council returning two members with the exception of Burma, the Central Provinces and Assam which would return one member each. The remaining 6 elected members are to supplement the representation of the Muhammadans and the landed classes and to provide for the representation of the chambers of commerce The Council of State is to possess senatorial character and the qualifications of candidates for election should be so framed as to secure men of the status and position worthy of the dignity of a revising

chamber. Five years would be the normal duration of a Council of State.

The above proposals of the M. C. Report underwent considerable revision at the hands of the Franchise Committee and the Parliamentary Joint Select Committee: This will be evident from a perusal of the notes under the succeeding sections below. But we should refer here to one great change made by the Joint Select Committee; the Committee do not accept the device propounded in the Montagu-Chelmsford Report, of "carrying government measures through the Council of State without reference to the Legislative Assembly, in cases where the latter body cannot be got to assent to a law which the Governor-General considers essential. Under the scheme which the Committee propose to substitute for this procedure, there is no necessity to retain the Council of State as an organ for government legislation. It should, therefore, be reconstituted from the commencement as a true Second Chamber. They recommend that it should consist of sixty members, of whom not more than twenty should be official members. The Franchise Committee advise that the non official members should be elected by the same group of persons as elect the members of the Legislative Assembly and in the same constituencies. This is a plan which the Committee could, in no circumstances, accept. They hope and believe that a different system of election for the Council of State can be devised by the time the constitution embodied in this Bill comes into operation, and they recommend that the Government of India be enjoined forthwith to make suggestions accordingly, to which effect can be given without delaying the inauguration of the new constitution."—*J. S. C. R.*

The Indian Legislature is thus a truly bicameral legislature and has been brought into line with the Dominion Legislatures.

[*N. B.*—It should be noted that there is no statutory provision for the payment of any salary or allowance to members of either House of the Indian Legislature or of the local legislatures. Every member of the British House of Commons (except those forming the Ministry) gets an annual salary of £400. In the Australian Commonwealth each Senator and each member of the House of Representatives receives an allowance of £400 a year. In the Dominion of Canada each member of the Senate and the House of Commons is entitled to an allowance of ten dollars per day for his attendance at Parliament during a session not exceeding thirty days in

duration. For a session lasting longer than thirty days each member is paid 1000 dollars.

The system of the payment of members of the Legislature has been the subject of prolonged controversy in British Colonies during the last fifty years. and it is now generally regarded as an essential condition of denocratic government, especially in young communities. It is in force in most of the responsible government colonies, though in several instances it was not carried without bitter opposition and memorable contests.]

§ 2. "Except as otherwise provided."

Normally, a Bill cannot become an Act of the Indian Legislature unless it has been assented to by the Legislative Assembly, the Council of State and the Governor-General. Sub-section 3 of sec. 67 provides for removing deadlocks, should any arise, between the two legislative chambers. If any Bill which has been passed by one chamber is not, within six months after the passage of the Bill by that chamber, passed by the other chamber either without amendments or with such amendments as may be agreed to by both chambers, the Governor-General may, in his discretion, refer the matter, for decision, to a joint sitting of both chambers.

Section 67B provides for cases in which the Governor-General may use his "certifying power" to secure the passage of Bills which are essential for "the safety, tranquillity or interests of British India or any part thereof." This is the "exceptional" circumstance under which the normal procedure for the passage of Bills gives way to a special procedure which is described in sec. 67B below.—*See M. C. R. paras. 279-282, Documents I, pp. 554-557.*

Council of State. [1919, s. 18.]

63A. "(1) The Council of State[1] shall consist of not more than sixty members nominated or elected in accordance with rules made under this Act, of whom not more than twenty shall be official members.

"(2) The Governor-General shall have power to appoint, from among the members of the Council of

State, a president[2] and other persons to preside[3] in such circumstances as he may direct.

"(3) The Governor-General shall have the right of addressing the Council of State, and may for that purpose require the attendance of its members."

§ 1 "Council of State."

Composition of Council of State.—The Council of State consists of (1) thirty three elected members; (2) twenty seven members nominated by Governor-General of whom not more than twenty may be officials and one is a person nominated as the result of an election held in Berar.

The thirty three elected members are elected from the different constituencies as follow:—

	Non-Mahomedan.	Mahomedan.	European Commerce.	Sikh.	General.
Madras	4	1	...	...	...
Bombay	3	3	...	...	...
Bengal	3	2	1	...	...
United Provinces ...	3	2	...	...	...
The Punjab	1	...	...	1	...
Bihar and Orissa ...	2*	1	...	...	...
Central Provinces ...	...	...	...	...	1
Burmah	...	...	1	...	1
TOTAL ...	16	9	2	1	2=30

* The Bihar and Orissa Non-Mahomedan constituency is entitled to elect a third member to the second, fourth and succeeding alternate Councils of State according to the following scheme:—

List of Constituencies entitled to representation by rotation.

	Number of members.
East Punjab—Mahomedan	2
West Punjab—Mahomedan	
Bihar and Orissa—Non-Mahomedan ...	
Assam—Mahomedan	1
Assam—Non-Mahomedan	
	3

See paras 39-42 of the Franchise Committee's Report pp. 217-219 of Pt. II of this book.

§ 2. "The Governor-General to appoint a president"

The original proposal in the draft Bill was that the Governor-General, when present, was to preside at meetings of the Council of State and was to appoint from among the members of the Council of State a vice-president. Subsequently however, it has been enacted that the Governor-General is not to be the President of the Council of State, though he will have the right of addressing it: he is to appoint, from among *members* of the Council of State, a president to preside at meetings of the Council of State. Now *members*, as such, include, (1) such members of the Governor-General's Executive Council as may be nominated as members of the Council of State, (2) other nominated officials or non-officials, and (3) elected non-official members. The President of the Council of State may therefore be either a member of the Governor-General's Executive Council, or any other nominated official or a nominated non-official or an elected non-official. As a matter of fact Mr. A. P. Muddiman has been appointed to be the first President of the Council of State and he is the first nominated official appointed to the post by the Government of India.

By the Canadian Constitution the Governor-General is authorised from time to time to appoint a Senator to be Speaker of the Senate and to remove him and appoint another in his stead. The Constitution of the Australian Commonwealth vests in the Senate itself the power of choosing and removing its Presidents. The President is not elected for any particular term, but he will cease to hold office (1) if he ceases to be a Senator; (2) if he is removed from office by a vote of the Senate; (3) if he resigns his office.

The duties of President are those usually assigned to and exercised by the presiding officers of legislative bodies: among these may be—to maintain order and decorum; to enforce the rules of debate; to recognise a member who wishes to speak and thus to give him the floor; to put the question before the House: to ascertain and declare the will of the House, either on the voices, or as the result of a division; to appoint tellers to take a division; to supervise the officers of the House and see that the votes and the proceedings are properly recorded, so far as those duties are not otherwise regulated by the standing orders of the House passed in conformity with the constitution; and finally, to assist in the enforcement of the law of the Constitution.

3. "Other persons to preside."

Provision has to be made for the absence, for any reason, of the appointed President of the Council of State from meetings of the Council of State: there might also arise special circumstances when somebody, other than the appointed President, may have to preside. This section seems to provide for the appointment of a Vice-President or a Deputy President of the Council of State.

63B. "(1) The Legislative Assembly shall consist of members nominated or elected in accordance with rules made under this Act.

Legislative Assembly. [1919, s. 19.]

"(2) The total number of members of the Legislative Assembly[1] shall be one hundred and forty. The number of non-elected members shall be forty, of whom twenty-six shall be official members. The number of elected members shall be one hundred:

"Provided that rules made under this Act may provide for increasing the number of members of the Legislative Assembly as fixed by this section, and may vary the proportion which the classes of members bear one to another, so, however, that at least five-sevenths of the members of the Legislative Assembly shall be

elected members, and at least one-third of the other members shall be non-official members.

"(3) The Governor-General shall have the right of addressing the Legislative Assembly, and may for that purpose require the attendance of its members."

1. "Number of members of the Legislative Assembly."

According to sub-section (2) of sec. 63 (B) the total number of members of the Legislative Assembly is to be 140 of whom 100 are to be elected members, 26 are to be nominated official members, and 14 are to be nominated non-official members. The proviso to this sub-section, however, enacts that rules made under this Act may provide for increasing the number of members of the Legislative Assembly and may vary the proportion which the classes of members bear one to another, so, however, that at least five-sevenths of the members of the Assembly shall be elected members and at least $\frac{2}{11}$ of them shall be non-official members.

The rules made under this Act provide for 144 members of the Legislative Assembly of whom 103 are elected members, 26 are nominated officials and 15 are nominated non-officials (including one nominated as the result of an election held in Berar). *Vide Government of India Notification No. 767 F dated Simla, July 27, 1920; published in the Gazette of India, July 29, 1920.*

See paras 31 to 38 of the Franchise Committee's Report, pp. 211-217 of Pt. II. of this book.

List of Constituencies entitled to representations in the Legislative Assembly

PROVINCE.	Non-Mahomedan.	Mahomedan.	European Commerce.	Sikh.	Landholders.	Indian Commerce.	Non-European.
Madras	10	3	1	...	1	1	...
Bombay	7	2	2	...	...	1	...
Bengal	6	6	3	...	1	...	...

List of Constituencies entitled to representations in the Legislative Assembly—continued.

PROVINCE.	Non-Mahomedan.	Mahomedan.	European Commerce.	Sikh.	Landholders.	Indian Commerce.	Non-European.
United Provinces ...	8	6	1	...	1	...	...
The Punjab	3	6	...	2	1	...	...
Bihar and Orissa ...	8	3	...	...	1	...	...
Central Provinces ...	3	1	...	...	1	...	...
Assam	2	1	...	...	...	...	...
Burmah	...	...	1	...	...	...	1
Delhi	...	General 1		...	...	...	...

List of Constituencies entitled to representation in rotation.

Bombay—Mahomedans ... { Province of Sindh ... ... / The Northern Division ... } —1

Bombay—Mahomedans ... { The Central Division ... / The Southern Division ... } —1

Bombay—Landholders ... { The Southern Division ... / The Province of Sindh ... } —1

Bombay—Indian Commerce { Bombay Mill Owner's Association / Ahmedabad Mill Owner's Association } —1

Bengal—Indian Commerce ... { Bengal National Chamber of Commerce ... ... / Marwari Association ... ... / Bengal Mahajan Sabha ... } —1

63D.—"(1) There shall be a president of the Legislative Assembly,[1] who shall, until the expiration of four years from the first meeting thereof, be a

President of Legislative Assembly. [1919, s. 20.]

person appointed by the Governor-General, and shall thereafter be a member of the Assembly elected by the Assembly and approved by the Governor-General:

"Provided that, if at the expiration of such period of four years the Assembly is in session, the president then in office shall continue in office until the end of the current session, and the first election of a president shall take place at the commencement of the ensuing session.

"(2) There shall be a deputy-president of the Legislative Assembly[2] who shall preside at meetings of the Assembly in the absence of the president, and who shall be a member of the Assembly elected by the Assembly and approved by the Governor-General.

"(3) The appointed president shall hold office until the date of the election of a president under this section, but he may resign his office by writing under his hand addressed to the Governor-General, or may be removed from office by order of the Governor-General, and any vacancy occurring before the expiration of his term of office shall be filled by a similar appointment for the remainder of such term.

"(4) An elected president and a deputy-president[3] shall cease to hold office if they cease to be members of the Assembly. They may resign office by writing under their hands addressed to the Governor-General, and may be removed from office by a vote of the Assembly with the concurrence of the Governor-General.

"(5) A president and deputy-president shall receive such salaries as may be determined, in the case of an appointed president by the Governor-General, and in the case of an elected president and a deputy-president by Act of the Indian legislature."

§ 1. "A President of the Legislative Assembly"

The Joint Select Committee think that "the President of the Legislative Assembly should for four years be a person appointed by the Governor-General. He should be qualified by experience in the House of Commons and a knowledge of Parliamentary procedure, precedents, and conventions. He should be the guide and adviser of the Presidents of the provincial councils, and he should be chosen with a view to the influence which it is hoped he would have on the whole history of parliamentary procedure in India. He should be paid an adequate salary."—*J. S. C. R.*

The Governor-General has already appointed a distinguished member of the House of Commons to be the first President of the Indian Legislative Assembly.

At the expiration of four years after the first meeting of the Assembly it will proceed to elect, from among its members, a president who will have to be approved by the Governor-General. The President is to be elected from among the *members* of the Legislative Assembly; an official member of the Governor-General's Executive Council, or a nominated official or non-official or an elected non-official *may* thus be the President of the Assembly, if he is elected by it; but, as there will be a non-official elected majority, it is *likely* that the elected President will be one of the elected non-official members.

2. "A Deputy President of the Legislative Assembly."

The Deputy President will be elected by the Assembly at the very beginning of its first session.

3. "An elected president and a deputy-president"

Both the elected president and the elected deputy-president may be removed from office by a vote of the Assembly with the concurrence of

the Governor-General; their salaries are to be determined by an Act of the Indian Legislature.

Duration and sessions of Legislative Assembly and Council of State. [1919, s. 21.]

63D.—"(1) Every Council of State shall continue for five years,[1] and every Legislative Assembly for three years[2], from its first meeting:

"Provided that—

(*a*) either chamber of the legislature may be sooner dissolved[3] by the Governor-General; and

(*b*) any such period may be extended[4] by the Governor-General if in special circumstances he so thinks fit; and

(*c*) after the dissolution of either chamber the Governor-General shall appoint a date not more than six months,[5] or, with the sanction of the Secretary of State, not more than nine months, after the date of dissolution for the next session[6] of that chamber.

"(2) The Governor-General may appoint such times[7] and places for holding the sessions of either chamber of the Indian legislature as he thinks fit, and may also from time to time, by notification or otherwise, prorogue[8] such sessions.

"(3) Any meeting of either chamber of the Indian legislature may be adjourned[9] by the person presiding.

"(4) All questions in either chamber shall be determined by a majority of votes[10] of members present

other than the presiding member, who shall, however, have and exercise a casting vote[11] in the case of an equality of votes.

"(5) The powers of either chamber of the Indian legislature may be exercised notwithstanding any vacancy[12] in the chamber."

§ 1 "Every Council of State to continue for five years"

In Canada the Senators, appointed by the Governor-General, hold their seats for life. In the Australian Commonwealth the Senators are chosen for a term of six years. The Indian Senators—the members of the Council of State—are chosen for a term of five years. The length of the legal term of a member of the Council of State is thus greater than the potential term of a member of the Legislative Assembly.

§ 2. "Every Legislative Assembly to continue for three years."

Every Canadian House of Commons continues for five years from the day of the return of the Writs for choosing the House (subject to be sooner dissolved by the Governor-General) and no longer. In the Australian Commonwealth every House of Representatives continues for three years from the first meeting of the House, and no longer, but may be sooner dissolved by the Governor-General. The Indian Legislative Assembly, like its Australian prototype, also continues for three years from the first meeting, but may be sooner dissolved or may be continued for a further period (in special circumstances) by the Governor-General.

§ 3. "May be sooner dissolved"

"A dissolution is the civil death of the Parliament, and is effected in two ways:—(1) By the Sovereign's will, expressed either in person or by representation. (2) By length of time, *i.e.*, seven (now five) years. By the 30 & 31 Vict. c. 102 s. 51 it is provided that Parliament shall not be determined or dissolved by the demise of the Crown".—*Wharton.*

The Council of State and the Legislative Assembly may continue in existence for five and three years respectively but either of them may be "sooner dissolved" by the Governor-General.

Regarding this power to dissolve either chamber of the Indian Legislature, the Government of India make the following remarks in their *First Reforms Despatch*—"The proposal that the Governor-General should have power to dissolve either the Assembly or the Council of State has been less universally approved. The weight of opinion is in favour of the proposal, but there is considerable feeling that the power is one which should be sparingly used, and several influential bodies have urged that it should be accompanied by some provision for the summoning of a new legislature within a specified period. We have no fear that the power will be abused, but as in the case of the provincial councils if the object in view cannot be secured by making the election writs returnable by a specified date, we recommend that a dissolution should be accompanied by a provision requiring that a new chamber or chambers shall be summoned within a specified period."

As the executive government of India is not responsible to either House of the Indian Legislature in the sense in which the popular part of the Provincial Executive (the Ministers) is responsible to the provincial legislatures, it is difficult to conjecture the circumstances under which a dissolution of either House will take place.

§ 4 "Period may be extended."

Sub-section (1) of sec. 63D fixes the life of the Council of State at five years, and of the Indian Legislative Assembly at three years, but provides that the Governor-General may dissolve either Chamber at any time, and that he may in special circumstances also extend the life of either Chamber. This latter provision has been added in order to give the Governor-General a reserve power, which would only be used in exceptional circumstances, to defer the holding of a General Election.

§ 5. "A date not more than six months"

See Notes on "Dissolution" above.

§ 6 "Session."

"Session" means the sittings of the House, which are continued, day by day, by adjournment, until the House is prorogued or dissolved.

§ 7. "May appoint such times."

It will be noticed that the section states that the Governor-General may perform these acts and there is no reference to his so acting by the

advice of the Executive Council. *For the other powers which the Governor-General may exercise alone see notes under sec. 34 ante.*

§ 8. "Prorogue."

Prorogation is the continuance of the Legislature from one session to another, as an adjournment is a continuance of the session from day to day. Prorogation puts an end to the session, and according to Parliamentary practice, quashes any Bills which are begun and not perfected. According to the practice of the British Parliament, such Bills must be resumed *de novo* (if at all) in a subsequent session, as if they had not previously been introduced (*May, Parl. Prac. 10th ed. p. 43*). The Houses may however, by standing orders, provide for the resumption of such Bills, upon motion, at the stage at which they were interrupted. A prorogation may be effected by commission, but the usual course is by proclamation.

"Both Houses are necessarily prorogued at the same time, it not being a prorogation of the House of Lords or Commons, but of Parliament. The session is never understood to be at an end until a prorogation ; though, unless some Act be passed, or some judgment given in Parliament, it is in truth no session at all." (*Tomlins*).

"The Crown may bring the session to an end by prorogation, which has the effect of quashing all proceedings except impeachments and appeals before the House of Lords. Parliament is prorogued by the sovereign in person in the House of Lords, or by commission ; it may also be prorogued by proclamation from the day for which it was summoned or to which it had been previously prorogued." (*Encyclopædia, Laws of England, IX., p. 401.*)

The practice of the Mother of Parliaments will no doubt largely influence the practice of the Indian Legislature.

§ 9. "Adjourned."

Adjournment means "a putting off to another time or place, a continuation of a meeting from one day to another."—(*Wharton*).

§ 10. "A majority of votes of members present."

All questions in either chamber are to be decided by an *ordinary* majority of votes of *members present* : that is to say, the minimum votes necessary for the affirmative decision of any question must be more than half the quorum fixed by Rules made under this Act. An *absolute*

majority *i.e.*, a majority of votes of the *total legal number of members*—is not necessary for such decision.

§ 11. "Casting vote".

See notes under sec. 41.

§ 12. "Notwithstanding any vacancy".

Vacancies may occur by reason of absence of members from India, inability to attend to duty, death, acceptance of office, or resignation duly accepted, or otherwise. The powers of either Chamber of the Indian Legislature may be exercised so long as the number of its members does not fall below the quorum fixed by rules made under sec. 67 (1).

Membership of both chambers. [1919, s. 22.]

63E. "(1) An official[1] shall not be qualified for election as a member of either chamber of the Indian Legislature, and, if any non-official[1] member of either chamber accepts office[2] in the service of the Crown in India, his seat in that chamber shall become vacant.

"(2) If an elected member[3] of either chamber of the Indian Legislature becomes a member of the other chamber, his seat in such first-mentioned chamber shall thereupon become vacant.

"(3) If any person is elected a member of both chambers[4] of the Indian Legislature, he shall, before he takes his seat in either chamber, signify in writing the chamber of which he desires to be a member, and thereupon his seat in the other chamber shall become vacant.

"(4) Every member of the Governor-General's Executive Council[5] shall be nominated as a member of one chamber of the Indian Legislature, and shall

have the right of attending in and addressing the other chamber, but shall not be a member of both chambers."

§ 1. "An official"—"Any non-official".

Sec. 134 of this Act thus defines the expressions "official" and "non-official"—

"The expressions 'official' and 'non-official', where used in relation to any person, mean respectively a person who is or is not in the civil or military service of the Crown in India."

"Provided that rules under this Act may provide for the holders of such offices as may be specified in the rules, not being treated for the purposes of this Act, or any of them, as officials."

The proviso enabling exceptions to be made in respect to the holders of certain offices is intended to meet a difficuly with regard to certain appointments, such as that of Government Pleader, which, while carrying no position which can reasonably be held to constitute a disqualification for election as a member of a Legislative Council, may, unless specially excepted, be regarded as bringing their holders within the definition of "officials".

In exercise of the powers conferred by the above section and sec. 129A, the Governor-General in Council, with the sanction of the Secretary of State in Council, has made the following rules—

1 (*a*) These rules may be called the Non-official (Definition) Rules.

(*b*) They shall come into force on a date to be appointed by the Governor-General in Council with the approval of the Secretary of State in Council and different dates may be appointed for different parts of India.

2. The holder of any office in the civil or military service of the Crown, if the office is one which does not involve both of the following incidents, namely, that the incumbent.

(*a*) is a whole-time servant of Government, and

(*b*) is remunerated either by salary or fees,

shall not be treated as an official for any of the purposes of the Government of India Act.

3. If any question arises, whether any officer is or is not a whole-time servant of Government for the purposes of Rule 2, the decision of the Governor-General in Council shall be final.

Vide Government of India Notification No. 614 G. dated Simla, the

9th September, 1920, published in the Gazette of India of the 11th September, 1920.

Under rule (2) above all holders of honorary offices under the Government and of offices which do not involve whole-time employment will be treated as non-official for all purposes of the Act and will therefore be eligible for election to any Legislative body. Whether a particular office does or does not involve whole-time employment is a question of fact to be decided in case of doubt by the Governor-General in Council.

§ 2. "If any non-official member accepts office".

If any member of the House of Commons accepts office, his seat becomes vacant ; similarly under this section, if any non-official member—elected or nominated, of either Chamber of the Indian Legislature accepts office – civil or military—in the service of the Crown in India, his seat in that Chamber becomes vacant, and a fresh selection will have to be made by his constituency. If, however, the office that is accepted by him is an honorary one or does not involve whole-time employment, he may continue to be a member (*See Notes on "official" and "non-official" above*). The wording of the section, however, is not clear to show whether *re-election* is necessary under such circumstances.

§ 3 "If an elected member etc."

Sub-sections (2) and (3) provide for two different sets of circumstances. Sub-section (2) apparently means that if a person, after he has been elected a member of either chamber of the Indian Legislature and has taken his seat in it, is *subsequently elected* or nominated (the word "*becomes*" implying either election or nomination) a member of the other chamber, his seat in such first-mentioned chamber thereupon becomes vacant.

§ 4 "If any person is elected etc".

This sub-section implies that if a person is *simultaneously* elected a member of both chambers he must, *before he takes his seat in either chamber*, signify in writing the chamber of which he desires to be a member and thereupon his seat in the other chamber becomes vacant.

§ 5. "Every member of the Governor-General's Executive Council etc"

In some countries the ministers—although not members of both chambers of the Legislature—have the right of attending in and

addressing them. A similar privilege is given by this sub-section to members of the Governor-General's Executive Council : They will be members of only one of the two chambers, but they will have the right of being present in and addressing the other chamber and of explaining their policy and action in regard to matters under discussion.

Supplementary provisions as to composition of Legislative Assembly and Council of State. [1919, s. 23.]

64. (1) Subject to the provisions of this Act, provision may be made by rules under this Act as to—

(*a*) the term of office of nominated members of the Council of State and the Legislative Assembly[1], and the manner of filling casual vacancies[2] occurring by reason of absence of members from India, inability to attend to duty, death, acceptance of office, or resignation duly accepted, or otherwise ; and

(*b*) the conditions under which and the manner in which persons may be nominated as members of the Council of State or the Legislative Assembly ; and

(*c*) the qualification of electors[3], the constitution of constituencies[4], and the method of election for the Council of State and the Legislative Assembly (including the number of members to be elected by communal and other electorates[5]) and any matters incidental or ancillary thereto ; and

(*d*) the qualifications for being or for being nominated or elected as members of the Council of State or the Legislative Assembly[6]; and

(*e*) the final decision of doubts or disputes as to the validity of an election[7]; and

(*f*) the manner in which the rules are to be carried into effect.

(2) Subject to any such rules, any person who is a ruler or subject of any State in India may be nominated as a member of the Council of State or the Legislative Assembly.[8]

§ 1. "Term of office of members.....Legislative Assembly.

Nominated non-official members hold office for the duration of the Council of State or the Legislative Assembly to which they are nominated.

Nominated official members hold office for the duration of the Council of State or the Legislative Assembly to which they are nominated, or for such shorter period as the Governor-General may, at the time of nomination, determine.

§ 2. "Manner of filling casual vacancies"

1. If any person, having been elected or nominated, subsequently becomes subject to any of the disabilities, or fails to make the oath or affirmation prescribed by the rules, within such time as the Governor-General considers reasonable, the Governor-General shall, by notification in the Gazette, declare his seat to be vacant.

2. When a vacancy occurs in the case of an elected member by reason of his election being declared void or his seat being declared vacant, or by reason of absence from India, inability to attend to duty, death, acceptance of office, or resignation duly accepted, the Governor-General shall, by notification in the Gazette, call upon the constituency concerned to elect a person for the purpose of filling the vacancy within such time as may be prescribed by such notification.

If a vacancy occurs in the case of a nominated member the Governor-General shall nominate to the vacancy a person having the necessary qualifications.

§ 3 "Qualification of Electors."

1. Every person shall be entitled to have his name registered on the electoral roll of a constituency who has the qualifications prescribed for an elector of that constituency and who is not subject to any of the disqualifications hereinafter set out, namely :—

(*a*) is not a British subject ; or

(*b*) is a female ; or

(*c*) has been adjudged by a competent court to be of unsound mind ; or

(*d*) is under 21 years of age :

Provided that, if the Ruler of a State in India or any subject of such a State is not disqualified for registration on the electoral roll of a constituency of the Legislative Council of a province, such Ruler or subject shall not by reason of not being a British subject be disqualified for registration on the electoral roll of any constituency of the Council of State or of the Legislative Assembly in that province.

Provided further that, if a resolution is passed by the Council of State or the Legislative Assembly after not less than one month's notice has been given of an intention to move such a resolution, recommending that the sex disqualification for registration should be removed either in respect of women generally or any class of women, the Governor-General in Council shall make regulations providing that woman or a class of women, as the case may be, shall not be disqualified for registration by reason only of their sex, if they are not so disqualified for registration as electors for the Legislative Council of their province :

Provided further that no person shall be entitled to have his name registered on the electoral roll of more than one general constituency.

(2) If any person is convicted of an offence under Chapter IX—A of the Indian Penal Code punishable with imprisonment for a term exceeding six months or is, after an inquiry by Commissioners appointed under any rules for the time being in force regarding elections to a legislative body constituted under the Act, reported as guilty of a corrupt practice as specified in Part I, or in the Paragraphs 1, 2 or 3 of Part II of Schedule IV, his name, if on the electoral roll, shall be removed therefrom and

shall not be registered thereon for a period of five years from the date of the conviction or the report, as the case may be, or if not on the electoral roll, shall not be so registered for a like period ; and if any person is reported by any such Commissioners as guilty of any other corrupt practice, his name, if on the electoral roll, shall be removed therefrom and shall not be registered thereon for a period of three years from the date of the report or, if not on the electoral roll, shall not be so registered for a like period :

Provided that the Governor General in Council may direct that the name of any person to whom this sub-rule applies shall be registered on the electoral roll.

The qualifications of an elector for a general constituency shall be such qualifications based on——

(i) residence, or residence and community, and

(ii) (*a*) the holding of land, or

(*b*) assessment to or payment of income-tax, or

(*c*) past or present membership of a legislative body, or

(*d*) past or present tenure of office on a local authority, or

(*e*) past or present university distinction, or

(*f*) the tenure of office in a co-operative banking society, or

(*g*) the holding of a title conferred for literary merit, as are specified in Schedule II in the case of that constituency.

The qualifications of an elector for a special constituency shall be the qualifications specified in Schedule II in the case of that constituency. *See the Gazette of India Extraordinary July 29, 1920.*

§ 4. "Constitution of Constituencies."

See Notes under sec. 63 ante.

See also Gazette of India Extraordinary, July 29, 1920.

§ 5 "Communal and other electorates."

See paras 15—23 of the Franchise Committee's Report, pp. 198—206 of Pt. II of this book.

§ 6. "Qualification for being nominated or elected as a member .....Legislative Assembly."

(1) A person shall not be eligible for election or nomination as a member of the Council of State or of the Legislative Assembly if such person—

(*a*) is not a British subject ; or

(*b*) is a female ; or

(*c*) is already a member of any legislative body constituted under the Act ; or

(*d*) having been a legal practitioner has been dismissed or is under suspension from practising as such by order of any competent court ; or

(*e*) has been adjudged by a competent court to be of unsound mind ; or

(*f*) is under 25 years of age ; or

(*g*) is an undischarged insolvent ; or

(*h*) being a discharged insolvent has not obtained from the court a certificate that his insolvency was caused by misfortune without any misconduct on his part :

Provided that, if the Ruler of a State in India or any subject of such a State is not $\frac{\text{ineligible for election}}{\text{disqualified for nomination}}$ to the Legislative Council of Province, such Ruler or subject shall not by reason of not being a British subject be $\frac{\text{ineligible for election}}{\text{disqualified for nomination}}$ to the Council of State or the Legislative Assembly by any constituency in that Province. Provided further that the disqualification mentioned in clause (*d*) may be removed by an order of the Governor-General in Council in this behalf.

(2) A person against whom a conviction by a criminal court involving a sentence of transportation or imprisonment for a period of more than six months is subsisting, shall, unless the offence of which he was convicted has been pardoned, not be eligible for $\frac{\text{election}}{\text{nomination}}$ for five years from the date of the expiration of the sentence.

(3) If any person is convicted of an offence under Chapter IX-A of the Indian Penal Code punishable with imprisonment for a term exceeding six months or is, after an inquiry by Commissioners appointed under any rules for the time being in force regarding elections to a legislative body constituted under the Act, reported as guilty of a corrupt practice as specified in Part I, or in paragraphs 1, 2 or 3 of Part II, of Schedule IV, such person shall not be eligible for $\frac{\text{election}}{\text{nomination}}$ for five years from the date of such conviction or of the finding of the Commissioners, as the case may be ; and a person reported by any such Commissioners to be guilty

of any other corrupt practice shall be similarly disqualified for three years from such date.

(4) If any person has been a candidate or an election agent at an election to any legislative body constituted under the Act and has failed to lodge any prescribed return of election expenses or has lodged a return which is found, either by Commissioners holding an inquiry into the election or by a Magistrate in a judicial proceeding, to be false in any material particular, such person shall not be eligible for $\frac{\text{election}}{\text{nomination}}$ for five years from the date of such election : Provided that any disqualification mentioned in sub-rule (3) or sub-rule (4) of this rule may be removed by an order of the Governor-General in Council in that behalf.

No person shall be eligible for election as a member of the Council of State to represent—

(*a*) a general constituency situated in the United Provinces or in the province of Assam, unless his name is entered on the electoral roll of a general constituency situated within the same province.

(*b*) a general constituency situated in the province of Madras, Bombay, Bengal, the Punjab or Bihar and Orissa unless his name is entered on the electoral roll of the constituency or of another constituency situated in the same province and of the same communal description as that by which he desires to be elected ;

(*c*) a general constituency situated in the Central Provinces or in the province of Burma unless his name is entered on the electoral roll of the constituency.

No person shall be eligible for election as a member of the Council of State to represent special constituency unless his name is entered on the electoral roll of the constituency.

For the purposes of these rules—

(1) "special constituency" means a European commerce constituency ;

(2) "general constituency" means any constituency specified in Schedule I other than a European Commerce constituency.

§ 7. "The final decision of doubts and disputes as to the validity of an Election."

1. In this Part * and in Schedule IV, unless there is anything repugnant in the subject or context,—

(*a*) "agent" includes an election agent and any person who is held by Commissioners to have acted as an agent in connection with an election with the knowledge or consent of the candidate ;

(*b*) "candidate" means a person who has been nominated as a candidate at any election or who claims that he has been so nominated or that his nomination has been improperly refused, and includes a person who, when an election is in contemplation, holds himself out as a prospective candidate at such election, provided that he is subsequently nominated as a candidate at such election ; and

(*c*) "returned candidate" means a candidate whose name has been published under these rules as duly elected.

2. No election shall be called in question except by an election petition presented in accordance with the provisions of this Part.

3. An election petition may be presented to the Governor-General by any candidate or elector against any returned candidate within fourteen days from the date on which the result of the election has been published.

4. The petition shall contain a statement in concise form of the material facts on which the petitioner relies and the particulars of any corrupt practice which he alleges and shall, where necessary, be divided into paragraphs numbered consecutively. It shall be signed by the petitioner and verified in the manner prescribed for the verification of pleadings in the Code of Civil Procedure, 1908.

5. The petitioner may, if he so desires, in addition to calling in question the election of the returned candidate, claim a declaration that he himself or any other candidate has been duly elected ; in which case he shall join as respondents to his petition all other candidates who were nominated at the election.

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* Extract from the Rules published in the Gazette of India Extraordinary, July 29, 1920.

6. At the time of presentation of the petition, the petitioner shall deposit with it the sum of one thousand rupees in cash or in Government Promissory Notes of equal value at the market rate of the day as security for the costs of the same.

7. (1) If the provisions of rule 6 are not complied with, the Governor-General shall dismiss the petition.

(2) Upon compliance with the provisions of rule 6—

(*a*) the Governor-General shall appoint as Commissioners for the trial of the petition three persons who are or have been, or are eligible to be appointed, Judges of a High Court within the meaning of section 101 (3) of the Act, and shall appoint one of them to be the President, and thereafter all applications and proceedings in connection therewith shall be dealt with and held by such Commissioners ;

(*b*) the President of the Commission so constituted shall, as soon as may be, cause a copy of the petition to be served on each respondent and to be published in the Gazette, and may call on the petitioner to execute a bond in such amount and with such sureties as he may require for the payment of any further costs. At any time within fourteen days after such publication, any other candidate shall be entitled to be joined as a respondent on giving security in a like amount and procuring the execution of a like bond.

(3) When in respect of an election in a constituency more petitions than one are presented, the Governor-General shall refer all such petitions to the same Commissioners, who may at their discretion inquire into the petitions either in one or in more proceedings as they shall think fit.

8. Every election petition shall be inquired into by the Commissioners, as nearly as may be, in accordance with the procedure applicable under the Code of Civil Procedure, 1908. to the trial of suits : provided that it shall only be necessary for the Commissioners to make a memorandum of the substance of the evidence of any witness examined by them.

9. The inquiry shall be held at such place as the Governor-General may appoint : provided that the Commissioners may in their discretion sit for any part of the enquiry at any other place in province in which the constituency in question is situated, and may depute any one of their number to take evidence at any place in that province.

10. (1) No election petition shall be withdrawn without the leave of the Commissioners.

(2) If there are more petitioners than one no application to withdraw a petition shall be made except with the consent of all the petitioners.

(3) When an application for withdrawal is made, notice thereof fixing a date for the hearing of the application shall be given to all other parties to the petition and shall be published in the Gazette.

(4) No application for withdrawal shall be granted if the Commissioners are of opinion that such application has been induced by any bargain or consideration which the Commissioners consider ought not to be allowed.

(5) If the application is granted——

(a) the petitioner shall be ordered to pay the costs of the respondent theretofore incurred or such portion thereof as the Commissioners may think fit ;

(b) such withdrawal shall be reported to the Governor-General, who shall publish notice thereof in the Gazette ; and

(c) any person who might himself have been a petitioner may, within seven days of such publication, apply to be substituted as petitioner in place of the party withdrawing, and, upon compliance with the conditions of rule 6 as to security, shall be entitled to be so substituted and to continue the proceedings upon such terms as the Commissioners may think fit.

11. (1) An election petition shall abate only on the death of a sole petitioner or of the survivor of several petitioners.

(2) Such abatement shall be reported to the Governor-General, who shall publish notice thereof in the Gazette.

(3) Any person who might himself have been a petitioner may, within seven days of such publication, apply to be substituted as petitioner, and, upon compliance with the conditions of rule 6 as to security, shall be entitled to be so substituted and to continue the proceedings upon such terms as the Commissioners may think fit.

12. If before the conclusion of the trial of an election petition the respondent dies or gives notice that he does not intend to oppose the petition, the Commissioners shall cause notice of such event to be published in the Gazette, and thereupon any person who might have been a petitioner may, within seven days of such publication, apply to be substituted for such respondent to oppose the petition, and shall be

entitled to continue the proceedings upon such terms as the Commissioners may think fit.

13. Where at an inquiry into an election petition any candidate, other than the returned candidate, claims the seat for himself, the returned candidate or any other party may give evidence to prove that the election of such candidate would have been void if he had been the returned candidate and a petition had been presented complaining of his election.

14. When at an inquiry into an election petition the Commissioners so order, the Advocate General or some person acting under his instructions shall attend and take such part therein as they may direct.

Explanation.—The expression "Advocate General" includes also a Government Advocate, or, where there is no Advocate General or Government Advocate, such other officer as the local Government may appoint in this behalf.

15. (1) Save as hereinafter provided in this rule, if in the opinion of the Commissioners—

(*a*) the election of a returned candidate has been procured or induced, or the result of the election has been materially affected, by a corrupt practice, or

(*b*) any corrupt practice specified in Part I of Schedule IV has been committed, or

(*c*) the result of the election has been materially affected by any irregularity in respect of a nomination paper, or by the improper reception or refusal of a vote, or by any non-compliance with the provisions of the Act or the rules or regulations made thereunder, or by any mistake in the use of any form annexed thereto,

the election of the returned candidate shall be void.

(2) If the Commissioners report that a returned candidate has been guilty by an agent (other than his election agent) of any corrupt practice specified in Part I of Schedule IV which does not amount to any form of bribery other than treating as hereinafter explained or to the procuring or abetment of personation, and if the Commissioners further report that the candidate has satisfied them that—

(*a*) no corrupt practice was committed at such election by the candidate or his election agent, and the corrupt practices mentioned in the report were committed contrary to the

orders and without the sanction or connivance of such candidate or his election agent, and

(*b*) such candidate and his election agent took all reasonable means for preventing the commission of corrupt practices at such election, and

(*c*) the corrupt practices mentioned in the said report were of a trivial, unimportant and limited character, and

(*d*) in all other respects the election was free from any corrupt practice on the part of such candidate or any of his agents,

then the Commissioners may find that the election of such candidate is not void.

Explanation.—For the purposes of this sub-rule "treating" means the incurring in whole or in part by any person of the expense of giving or providing any food, drink, entertainment or provision to any person with the object, directly or indirectly, of inducing him or any other person to vote or refrain from voting or as a reward for having voted or refrained from voting.

16. (1) At the conclusion of the inquiry, the Commissioners shall report whether the returned candidate, or any other party to the petition who has under the provisions of these rules claimed the seat, has been duly elected, and in so reporting shall have regard to the provisions of rule 42.

(2) The report shall be in writing and shall be signed by all the Commissioners. The Commissioners shall forthwith forward their report to the Governor-General who on receipt thereof, shall issue orders in accordance with the report and publish the report in the Gazette, and the orders of the Governor-General shall be final.

17. If either in their report or upon any other matter there is a difference of opinion among the Commissioners, the opinion of the majority shall prevail, and their report shall be expressed in the terms of the views of the majority.

18. Where any charge is made in an election petition of any corrupt practice, the Commissioners shall record in their report—

(*a*) a finding whether a corrupt practice has or has not been proved to have been committed by any candidate or his agent, or with the connivance of any candidate or his agent, and the nature of such corrupt practice, and

(*b*) the names of all persons (if any) who have been proved at the inquiry to have been guilty of any corrupt practice and the nature of such corrupt practice with any such recommendations as they may desire to make for the exemption of any such persons from any disqualifications they may have incurred in this connection under these rules.

§ 8. "Any person who is a ruler.....Legislative Assembly".

Provided that, if the Ruler of a State in India or any subject of such a State is not disqualified / ineligible for nomination or election to the Legislative Council of a province, such Ruler or subject shall not by reason of not being a British subject, be disqualified for nomination or election to the Legislative Assembly or Council of State to represent that province, and no subject of such a State shall for that reason be disqualified / ineligible for nomination / election to represent the province.

Legislative powers. [1861, c. 67, s. 22; 1919, 2nd Sch., Pt. II.]

65. (1) The "Indian Legislature" has power to make laws—

(*a*) for all persons, for all courts, and for all places and things, within British India[1]; and

(*b*) for all subjects of His Majesty and servants of the Crown within other parts of India[2]; and [1861, c. 67, s. 22; 1865, c. 17, ss. 1, 2.]

(*c*) for all native Indian subjects of His Majesty, without and beyond as well as within British India;[3] and [1869, c. 98, s. 1.]

(*d*) for the government of officers, soldiers, "airmen" and followers in His Majesty's Indian forces, wherever they are serving, in so far as they are not subject to the Army Act, "or the Air Force Act"; and [1813, s. 96; 1833, s. 73; 1861, c. 67 s. 22, 5th proviso; 1881, c. 58, s. 180 (2) (a) (b); 44 and 45 Vict., c. 58. 1919, 2nd Sch. Pt. III.]

(*e*) for all persons employed or serving in or belonging to the Royal Indian Marine Service; and [1884, s. 2.]

(*f*) for repealing or altering any laws[4] which for the time being are in force in any part of British India or apply to persons for whom the "Indian Legislature" has power to make laws. [1861, c. 67, s. 22; 1892, s. 3.]

(2) Provided that the "Indian Legislature" has not, unless expressly so authorised by Act of Parliament, power to make any law repealing or affecting— [1861, c. 67, s. 22, 1st proviso.]

(*i*) any Act of Parliament passed after the year one thousand eight hundred and sixty and extending to British India (including the Army Act, "the Air Force Act" and any Act amending the same); or [1861, c. 67, s. 22, 1st, 5th and 6th provisos. 44 and 45 Vict., c. 58; 1919, 2nd Sch., Pt. III.]

(*ii*) any Act of Parliament enabling the Secretary of State in Council to raise money in the United Kingdom for the Government of India; [1861, c. 67, s. 22, 4th proviso.]

and has not power to make any law affecting the authority of Parliament, or any part of the unwritten laws or constitution of the United Kingdom of Great Britain and Ireland whereon may depend in any degree the allegiance of any person to the Crown of the United [1861, c. 67, s. 22, 7th proviso.]

Kingdom[6], or affecting the sovereignty or dominion of the Crown over any part of British India.

(3) The "Indian Legislature" has not power,[5] without the previous approval of the Secretary of State in Council, to make any law empowering any court, other than a high court, to sentence to the punishment of death any of His Majesty's subjects born in Europe, or the children of such subjects, or abolishing any high court[7].

[1833, s. 46; 1861, c. 104, ss. 11, 16; 1884, s. 5; 1914, s. 3]

§ 1. "For all persons, for all Courts etc."

The wording of this clause seems to give to the Indian Legislature concurrent power to legislate not only for the whole of India, but for the Provinces as well. Sub-section 2 (i) of sec. 67 is more explicit on this point: with the previous sanction of the Governor-General any measure for repealing or amending any Act of a Local Legislature may be introduced into the Indian Legislature. No precise line of demarcation has been drawn between the legislative spheres of the Local and Indian Legislatures. Although there is no formal limitation of the general powers of legislation conferred by this section, it is, however, contemplated, that under the new reformed constitution of India, the Indian Legislature will abstain from legislating on Provincial subjects, except where those subjects are declared by the Rules of Classification under sec. 45A of this Act to be subject to Indian Legislation. (*Functions Committee's Report, para 33, p. 246 of Pt. II of this book*).

§ 2. "Within other parts of India."

This section empowers the Indian Legislature to enact laws not only for all persons in "British India", but in other parts of "India" as well *i.e.* the jurisdiction of the Indian Legislature—so far as His Majesty's subjects and servants are concerned—extends beyond British India, into the Indian States. Apart from the authority given to the Indian Legislature by this section, there is a wider power to legislate for persons and things outside British India under the Foreign Jurisdiction Act.

§ 3. "Without and beyond as well as within British India."

The jurisdiction of the Indian Legislature extends to native Indian subjects of His Majesty, in whatever part of the world they may be at any time.

§ 4 "Repealing or altering any laws etc."

This clause empowers the Indian Legislature to repeal or alter any Act of any Local Legislature in British India. *See notes under sec. 67 (2) ii.*

Although this section does not impose any formal limitation of the general powers of legislation of the Indian Legislature, it is contemplated that the Indian Legislature will abstain from legislating on provincial subjects, except where those subjects are declared by the Rules of Classification made under sec. 45A to be subject to Indian Legislation. (*Functions Report, para 33.*)

§ 5. "The Indian Legislature has not power etc"

The Non-Sovereign Character of the Indian Legislature -The Indian Legislatures are, according to constitutional theory, strictly non-sovereign law-making bodies. The general characteristics of such bodies are, according to Professor Dicey,—first, the existence of laws affecting their constitution which such bodies must obey and cannot change; hence, secondly, the formation of a marked distinction between ordinary laws and fundamental laws; and lastly, the existence of a person or persons, judicial or otherwise, having authority to pronounce upon the validity or constitutionality of laws passed by such law-making bodies. Each of these three characteristics is noticeable with reference to the Indian Legislatures, Imperial and Provincial. Although the Indian Legislature can pass laws as important as any Act passed by the British Parliament, the authority of the Legislature as regards law-making is completely subordinate to, and dependent upon, the Acts of Parliament which constitute the Legislatures. The legislative powers of the Indian Legislatures arise from definite Parliamentary enactments (such as the statutes of 1853, 1861, 1892, 1909 and 1919) which have all now been consolidated into one statute *viz.*, the Government of India Act. This new Act might be termed the Constituent and Fundamental Law of the Government of India. In the next place, the Indian Legislatures are also non-sovereign in that they are bound by a large number of Regula-

tions and Rules which the Executive Government of India is empowered to frame under the constituent law mentioned above, which cannot be changed by the Indian legislative bodies themselves, but which can be changed only by the Executive Government or by the superior power of the Imperial Parliament. Again the powers of the Legislatures as to law-making are also specifically restricted by rules as well as by statutes. Thus the Indian Legislature "has not power to make any law affecting the authority of Parliament or any part of the unwritten laws or constitution of the United Kingdom of Great Britain and Ireland whereon may depend in any degree the allegiance of any person to the Crown of the United Kingdom or affecting the sovereignty or dominion of the Crown over any part of British India."

Lastly, the Courts in British India are constitutionally vested with the power of pronouncing upon the validity or constitutionality of laws passed by the Indian Legislatures. The Courts treat Acts passed by the Indian Legislature precisely in the same way in which the King's Bench Division treats the bye-laws of a railway company. No Judge in India or elsewhere ever issues a decree which declares invalid, annuls, or makes void a law or regulation made by the Indian Legislature. But when any particular case comes before the Courts, whether Civil or Criminal, in which the rights or liabilities of any party are affected by the legislation of the Indian Legislature, the Courts may have to consider and determine with a view to the particular case whether such legislation was or was not within the legal powers of the Legislature, which is of course the same thing as adjudicating as regards the particular case in hand upon the validity or constitutionality of the legislation in question.

Thus in the case *Queen vs. Burah* (*3 I. L. R. Calcutta Series, p. 63*) "the High Court held a particular legislative enactment of the Governor-General in Council to be in excess of the authority given to him by the Imperial Parliament and therefore invalid, and on this ground entertained an appeal from two prisoners which, if the enactment had been valid, the Court would admittedly have been incompetent to entertain. The Privy Council, it is true, held on appeal that the particular enactment was within the legal powers of the Council and therefore valid, but the duty of the High Court of Calcutta to consider whether the legislation of the Governor-General was or was not constitutional, was not questioned by the Privy Council. To look at the same thing from another point of view, the Courts in India treat the legislation of the Governor-General in Council

in a way utterly different from that in which any English Court can treat the Acts of the Imperial Parliament. An Indian tribunal may be called upon to say that an Act passed by the Governor-General need not be obeyed because it is unconstitutional or void. No British Court can give judgment, or ever does give judgment, that an Act of Parliament need not be obeyed because it is unconstitutional. Here, in short, we have the essential difference between subordinate and sovereign legislative power". (*Anson*).

The net effect of the powers and restrictions relating to the Indian Legislature cannot be better described than in the words of Lord Selbourne in the case of *Queen* v. *Burah*, referred to above. He says—"The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond these limits which circumscribe these powers. But when acting within these limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation, as large and of the same nature, as those of Parliament itself. The established courts of justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question : and the only way in which they can properly do so is by looking to the terms of the instrument, by which affirmatively the legislative powers were created, and by which negatively they are restricted. If what has been done is legislation within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited (in which would of course be included any Act of the Imperial Parliament at variance with it), it is not for any court of justice to enquire further or to enlarge constructively those conditions and restrictions."

If we examine closely we shall find that the powers of the Indian Legislature are actually more extensive than those of the Federal Parliament of Canada or any Dominion Parliament. As Professor Keith points out—"They cover not only the power to make laws for all persons, courts, places, and things within British India, which are the powers of a Dominion Parliament in a Unitary Dominion and which are, of course, much in excess of the powers of any Federal Parliament, but they include authority with regard to all British subjects and servants of the Crown in other parts of India, and all native Indian subjects of His Majesty within and beyond British India, the regulation of His Majesty's Indian forces,

wherever serving, in so far as they are not subject to the Army Act—a power conferred by the Imperial Army Act also on colonial legislatures—the government of persons in the Royal Indian Marine Service within the limits of Indian waters, defined in Sec. 66 as the high seas between the Cape of Good Hope on the west and the Straits of Magellan on the east—a power only conceded in 1911 to Dominion Parliament as regards Dominion naval forces—and, most remarkable of all, a power to repeal any Act of the Imperial Parliament passed prior to 1861, except any Act enabling the Secretary of State in Council to raise money in the United Kingdom. To Acts of Parliament after 1860 the doctrine of repeal does not apply and the Council may not pass a law affecting the authority of Parliament, any part of the unwritten law or constitution of the United Kingdom dealing with allegiance or the Sovereignty or dominion of the Crown over any part of British India. All these restrictions, however, apply equally to any Dominion Parliament, and the only specific restraint on the Council peculiar to itself is that it may not, without the previous approval of the Secretary of State in Council, empower any but High Court to sentence to death a European British subject, or the child of such a subject or abolish a High Court.

"Through the curious and somewhat inadvertment grant of the power to alter any Act of Parliament prior to 1861 the Indian Legislative Council has some odd powers; it could repeal the provisions requiring obedience to the orders of the Secretary of State, the limitations on the power of the Governor-General in Council or local Governments to make war or treaties, the provisions regarding the jurisdiction, powers and authorities of the High Courts etc."

§ 6. "Whereon may depend.....United Kingdom"

These words are somewhat indefinite, and a wide meaning was attributed to them by Mr. Justice Norman in the case of *In the matter of Ameer Khan*, 6 Bengol Law Reports, 392, 456, 459. In this case, which turned on the validity of an arrest under Regulation III of 1818, the powers of the Indian Legislature under successive charters and enactments were fully discussed.—*Ilbert.*

Allegiance means "the natural, lawful and faithful obedience which every subject owes to the Supreme Magistrate" (*Wharton.*)

§ 7. "Abolishing any High Court."

It appears from this section that, although the Indian Legislature may not create a High Court, yet it can abolish any High Court with the previous approval of the Secretary of State in Council.

66. (1) A law made under this Act for the Royal Indian Marine Service shall not apply to any offence unless the vessel to which the offender belongs is at the time of the commission of the offence within the limits of Indian waters, that is to say, the high seas between the Cape of Good Hope on the West and the Straits of Magellan on the East, and any territorial waters between those limits.

Laws for the Royal Indian Marine Service. [1884, ss. 2, proviso, (a) 3.]

(2) The punishments imposed by any such law for offences shall be similar in character to, and not in excess of, the punishments which may, at the time of making the law, be imposed for similar offences under the Acts relating to His Majesty's Navy, except that, in the case of persons other than Europeans or Americans, imprisonment for any term not exceeding fourteen years, or transportation for life or any less term, may be substituted for penal servitude.

[1884, s. 2, prov. (b).]

67. (*1*) Provision may be made by rules under this Act for regulating the course of business and the preservation of order in the chambers of Indian legislature and as to the persons to preside at the meetings of the Legislative Assembly in the absence of the president and the

Business at meetings. [1919, s. 24 (2).]

deputy-president; and the rules may provide for the number of members required to constitute a quorum, and for prohibiting or regulating the asking of questions[1] on, and the discussion of, any subject specified in the rules.

[1861, c. 67, s. 19, prov.]

(2) It shall not be lawful without the previous sanction of the Governor-General, to introduce at any meeting of "either Chamber of the Indian legislature" any measure affecting—

(*a*) the public debt or public revenues[2] of India, or imposing any charge on the revenues of India; or

(*b*) the religion or religious rites[3] and usages of any class of British subjects in India; or

(*c*) the discipline or maintenance of any part of His Majesty's military, naval "or air" forces, or

[1919, sch. II. Pt. III.]

(*d*) the relations of the Government with foreign princes or states[4].

" or any measure—

(i) regulating any provincial subject[5] or any part of a provincial subject, which has not been declared by rules under this Act to be subject to legislation by the Indian legislature; or

[1919, s. 27.]

(ii) repealing or amending any Act of a local legislature[6]; or

(iii) repealing or amending any Act or ordinance made by the Governor-General.

"(2A) Where in either chamber of the Indian legislature any Bill has been introduced, or is proposed to be introduced, or any amendment to a Bill is moved, or proposed to be moved, the Governor-General may certify[7] that the Bill, or any clause of it, or the amendment, affects the safety or tranquillity of British India, or any part thereof, and may direct that no proceedings, or that no further proceedings, shall be taken by the chamber in relation to the Bill, clause, or amendment; and effect shall be given to such direction."

"(3) If any Bill which has been passed by one chamber is not, within six months after the passage of the Bill by that chamber, passed by the other chamber either without amendments or with such amendments as may be agreed to by the two chambers, the Governor-General may in his discretion refer the matter for decision to a joint sitting of both chambers[8]: Provided that standing orders made under this section may provide for meetings of members of both chambers appointed for the purpose, in order to discuss any difference of opinion which has arisen between the two chambers.

[1919, Sec. 24 (3)—(7).]

"(4) Without prejudice to the powers of the Governor-General under section sixty-eight of this Act, the Governor-General may, where a Bill has been passed by both chambers of the Indian legisla-

ture, return the Bill for reconsideration[9] by either chamber.

"(5) Rules made for the purpose of this section may contain such general and supplemental provisions as appear necessary for the purpose of giving full effect to this section.

"(6) Standing orders may be made providing for the conduct of business and the procedure to be followed in either chamber of the Indian legislature in so far as these matters are not provided for by rules made under this Act. The first standing orders shall be made by the Governor-General in Council, but may, with the consent of the Governor-General, be altered by the chamber to which they relate.

"Any standing order made as aforesaid which is repugnant to the provisions of any rules made under this Act shall, to the extent of that repugnancy but not otherwise, be void.

"(7) Subject to the rules and standing orders affecting the chamber, there shall be freedom of speech in both chambers[10] of the Indian legislature. No person shall be liable to any proceedings in any court by reason of his speech or vote in either chamber, or by reason of anything contained in any official report of the proceedings of either chamber."

§ 1. "Rules regulating the asking of questions etc."

Rules under this section have not yet been published: but the general principles on which the Rules will be framed can be gathered from para. 286 of the M. C. Report (*Documents I, p. 558.*) and para. 148 of

the Government of India's First Reforms Despatch (printed in Part II of this book pp. 135-136.)

§ 2 "Public debt," "Public revenues."

See notes under sec. 20 ante.

§ 3. "The religion or religious rites etc."

We should recall, in this connection, the famous words of the Royal Proclamation of 1858—

"Firmly relying Ourselves on the truth of Christianity, and acknowledging with gratitude the solace of Religion, We disclaim alike the Right and the desire to impose our Convictions on any of Our Subjects. We declare it to be Our Royal Will and Pleasure that none be in anywise favoured, none molested or disquieted by reason of their Religious Faith or Observances; but that all shall alike enjoy the equal and impartial protection of the Law: and We do strictly charge and enjoin all those who may be in authority under Us, that they abstain from all interference with the Religious Belief or Worship of any of Our Subjects, on pain of Our highest Displeasure."

§ 4. "The relations of the Government with foreign princes or States."

See notes under sec. 44 pp. 184-188.

§ 5 "Any measure regulating any provincial subject."

Among provincial subjects there are some which are subject to legislation by the Indian Legislature (*see pp. 258-268, Part II of this book*): there are others which are not so subject. If any measure affecting the latter class of provincial subjects is to be introduced at any meeting of either chamber of the Indian Legislature, the previous sanction of the Governor-General must have to be obtained.

§ 6. "Repealing or amending any act of a local legislature"

The essential feature of the system of legislation in British India is that save for certain powers entrusted to the Indian Legislature by this section, "the Indian Legislature as regards British India, and each of the

provincial legislatures as regards its own province, have in theory concurrent jurisdiction over the whole legislative field." Thus, according to this section, the Indian Legislature, with the previous consent of the Governor-General, is competent to repeal or amend any Act of a local legislature : similarly according to sec. 80A (3) (i) the local legislature may with the previous sanction of the Governor-General, pass a law altering or repealing any provision of an Act of the Indian Legislature made after the commencement of the Government of India Act, 1919.

§ 7 "The Governor-General may certify etc."

This sub-section is supplementary to section 67B : it empowers the Governor-General to use his power of certificate in preventing the passage of a law affecting the safety or tranquillity of British India or any part thereof. Sec. 67B, on the other hand, enables the Governor-General to secure the passage of any law which he deems "essential for the safety, tranquillity or interests of British India or any part thereof." The original proposal was to empower the Governor-General to certify that the passage of a Bill was essential for the safety, tranquillity or interests of British India, or that a state of emergency had arisen ; and on such certificate being given, the Council of State was to be empowered, without obtaining the concurrence of the Legislative Assembly, to pass laws which were meant to have effect as if passed by both Chambers.

For reasons which prompted their rejection of the process of certification by a Governor to a grand committee in a province, the Joint Select Committee "are opposed to the proposals in the Bill which would have enabled the Governor-General to refer to the Council of State, and to obtain by virtue of his official majority in that body, any legislation which the lower chamber refuses to accept, but which he regards as essential to the discharge of his duties. The Committee have no hesitation in accepting the view that the Governor-General in Council should in all circumstances be fully empowered to secure legislation which is required for the discharge of his responsibilities ; but they think it is unworthy that such responsibility should be concealed through the action of a Council of State specially devised in its composition to secure the necessary powers. They believe that in such a case it would add strength to the Government of India to act before the world on its own responsibility. In order, however, that Parliament may be fully apprised of the

position and of the considerations which led to this exceptional procedure, they advise that all Acts passed in this manner should be laid before Parliament, who would naturally consider the opinion of the standing committee already referred to."—*J. C. S. R.*

§ 8 "Joint sitting of both Chambers."

This sub-section provides for the settlement of deadlocks between the two chambers of the Indian Legislature. If one chamber passes a Bill, and the other chamber refuses to pass it within six months without any amendments, or with such amendments as may be agreed to by both chambers, the Governor-General is empowered to refer the Bill to a joint sitting of both chambers.

The joint sitting is an old contrivance in Parliamentary Government. It is founded on the practice of conflicting legislative chambers at times appointing representatives to meet in conference anthorized to discuss questions in dispute, and to suggest possible modes of settlement. In that practice, recognized both in Great Britain and her colonies, as well as in the United States, may be found the germ of which the joint sitting elaborated in this Constitution is the development.

In the Australian Commonwealth the question upon which the members present at the joint sitting "may deliberate and shall vote together" are——(1) the bill as last proposed by the House of Representatives ; and (2) any amendments which have been made by one House and not agreed to by the other. Any such amendments which are affirmed by an absolute majority of the total number of the members of both Houses will be taken to be carried ; and the Bill itself, with any amendments so carried, must be voted upon, and if affirmed by a similar "absolute majority" of members it will be presented for the Royal assent, as if it had been passed by both Houses separately.

Sec. 57 of the "Commonwealth of Australia Constitution Act" (63-64 Vict. c. 12) runs as follows——

"The members present at the joint sitting may deliberate and shall vote together upon the proposed law as last proposed by the House of Representatives, and upon amendments, if any, which have been made therein by one House and not agreed to by the other, and any such amendments which are affirmed by an absolute majority of the total number of the members of the Senate and House of Representatives shall

be taken to have been carried, and if the proposed law with the amendments, if any, so carried is affirmed by an absolute majority of the total number of the members of the Senate and House of Representatives, it shall be taken to have been duly passed by both Houses of the Parliament, and shall be presented to the Governor-General for the Queen's assent." [It should be noted that this scheme for the settlement of deadlocks does not extend to Bills originating in the Senate ; it is only applicable to Bills which have been initiated in and passed by the House of Representatives.]

The standing orders of the Indian Legislature will have to provide for such an "absolute majority" for passing measures referred to a joint sitting of both Houses, otherwise there will be the risk of the Legislative Assembly swamping the more select and small body—the Council of State.

§ 9. "The Governor-General may return the Bill for reconsideration."

This sub-section is apparently based on the following part of sec. 58 of the "Commonwealth of Australia Constitution Act"—

"The Governor-General may return to the House in which it originated any proposed law so presented to him, and may transmit therewith any amendments which he may recommend, and the Houses may deal with the recommendations."

Although the sub-section merely speaks of "returning" a Bill "for reconsideration," its implication is that he will transmit, along with the Bill, any changes or additions which he may recommend. It may so happen that the Governor-General finds himself in general agreement with the principles of a Bill passed by both Houses of the Legislature, but he is unable to give his assent to it, unless it is modified in certain directions : under such circumstances he may return it for reconsideration by either Chamber. This power of returning Bills with suggested amendments is of special value, towards the end of a session, when Bills have been passed through all their stages in both Houses of the Indian Legislature, and when it has been found that inaccuracies or discrepancies have crept into some of them.

§ 10. "There shall be freedom of speech in both chambers."

The English, French, German and American constitutions agree in providing "that the legislative members shall have perfect liberty of

speech and debate in the chambers and committee rooms of the legislative bodies ; *i. e.*, that they shall not be held responsible for their words in these places when discharging their legislative duties, except by the house to which they belong. The fullest and most complete ventilation of every plan, object and purpose is necessary to wise and beneficial legislation. This could never be secured if the members should be held under the restraints imposed by the law of slander and libel upon private character. There is no doubt that this privilege may be grossly abused, since every word used in debate, and frequently something more, is now reported to the public ; but the danger to the general welfare from its curtailment is far greater than to individuals from its exercise."—*Burgess, Political Science and Constitutional Law, II, 122.*

In the United States of America the members of Congress have the freedom of speech and debate in their respective houses. The exact wording of the constitution is that for any speech or debate in either house they shall not be questioned in any other place. This means that only the house itself can call a member to account for what he says in the house. It means that he is not subject to any prosecution for libel or slander before the Courts for what he says in the house to which he belongs or in its committees, or for the official publication of what he says.

In Great Britain the members of both Houses of Parliament have perfect freedom of speech and debate in their respective houses. They cannot be legally dealt with for anything said in the House by any Court or body outside the House. If, however, they cause their words or speeches to be published, they are subject to prosecution for libel, like private persons (*Anson, Law and Custom of the constitution, pp. 139, 146 ; May, Parliamentary Practice, 112, 122, 142, 143*) : this was the decision in the famous case of *Stockdale* v. *Hansard*, making the members of the House of Commons liable to prosecution for libel in case their words are defamatory of private character and in case they cause the publication of these words (Prof. Burgess doubts whether the decision in *Stockdale vs. Hansard* is held to apply to the members of the House of Lords).

It is likely that the principle laid down in *Stockdale vs. Hansard* will be applicable to members of both Houses of the Indian Legislature, if the words used by them are defamatory of private character, and *if they cause the publication of these words* : it seems however, that they will

not be liable to prosecution if their words are *only published* in the *official* report of the proceedings.

67A.—"(1) The estimated annual expenditure and revenue of the Governor-General in Council shall be laid in the form of a statement before both chambers of the Indian legislature in each year.

Indian budget [1919, s. 25].

"(2) No proposal for the appropriation[1] of any revenue or moneys for any purpose shall be made except on the recommendation of the Governor-General.[2]

"(3) The proposals of the Governor-General in Council for the appropriation of revenue or moneys relating to the following heads of expenditure shall not be submitted to the vote of the legislative assembly, nor shall they be open to discussion by either chamber at the time when the annual statement is under consideration, unless the Governor-General otherwise directs—

(*i*) interest and sinking fund charges[3] on loans; and

(*ii*) expenditure of which the amount is prescribed by or under any law; and

(*iii*) salaries and pensions of persons appointed by or with the approval of His Majesty or by the Secretary of State in Council; and

(*iv*) salaries of chief commissioners and judicial commissioners; and

(*v*) expenditure classified by the order of the Governor-General in Council as—

(*a*) ecclesiastical;

(*b*) political;

(*c*) defence.

"(4) If any question arises whether any proposed appropriation of revenue or moneys does or does not relate to the above heads, the decision of the Governor-General on the question shall be final.

"(5) The proposals of the Governor-General in Council for the appropriation of revenue or moneys relating to heads of expenditure not specified in the above heads shall be submitted to the vote of the legislative assembly in the form of demands for grants.

"(6) The legislative assembly may assent or refuse its assent to any demand or may reduce the amount referred to in any demand by a reduction of the whole grant.

"(7) The demands as voted by the legislative assembly shall be submitted to the Governor-General in Council, who shall, if he declares that he is satisfied that any demand which has been refused by the legislative assembly is essential to the discharge of his responsibilities, act as if it had been assented to, notwithstanding the withholding of such assent or the reduction of the amount therein referred to, by the legislative assembly.

"(8) Notwithstanding anything in this section the Governor-General shall have power, in cases of emergency, to authorise such expenditure as may, in his opinion, be necessary for the safety or tranquillity of British India or any part thereof.

"This is a new provision for the submission of the Indian Budget to the vote of the Legislative Assembly, on the understanding that this body is constituted as a chamber reasonably representative in character and elected directly by suitable constituencies. The committee consider it necessary (as suggested to them by the consolidated fund charges in the Imperial Parliament) to exempt certain charges of a special or recurring nature, which have been set out in the Bill, *e.g.*, the cost of defence, the debt charges and certain fixed salaries, from the process of being voted. But otherwise they would leave the Assembly free to criticise and vote the estimates of expenditure of the Government of India. It is not, however, within the scheme of the Bill to introduce at the present stage any measure of responsible Government into the central administration, and a power must be reserved to the Governor-General in Council of treating as sanctioned any expenditure which the Assembly may have refused to vote if he considers the expenditure to be necessary for the fulfilment of his responsibilities for the good government of the country. It should be understood from the beginning that this power of the Governor-General in Council is real, and that it is meant to be used if and when necessary"—*J. S. C. R. Vide "Indian Legislative Rules," App. A.*

§ 1. "Appropriation of any revenue or moneys."

An appropriation of revenue or moneys is the setting apart, assigning or applying to a particular use or to a particular person a certain sum of money. It is an application of money already raised or an authority to spend money already available. Public revenue is generally paid into a consolidated fund. Into this fund flows every stream of the revenue, the proceeds of taxation, fees, penalties and other sums of money received by the treasury on behalf of His Majesty. From this fund proceed the supplies necessary for carrying on the various branches of the public service. (*May's Parliamentary Practice, 10th. Ed., 558*). In addition to the consolidated fund there may be large sums of money raised on loan.

Of this a separate account is kept as not coming under the heading of revenue. In this section, however, the words "revenue or moneys" are wide enough to cover loan money as well as revenue. The revenue or money can only be issued by virtue of a legal appropriation, that is, by an Act of the Legislature.

"Statutory provision must be made by Parliament during each financial year, to ensure that all the money therein raised for the service of the Crown be applied to a distinct use either wholly or partly, within the current financial year; as the proceeds of taxation should not be reserved for accumulation pending the decision of Parliament or otherwise left without specific appropriation." *(May's Parl. Prac. 10th Ed. p. 557)*

§ 2. "No proposal for appropriation.....except on the recommendation of the Governor-General."

Standing Order No. 66 of the British House of Commons provides *that it will not receive any petition, or proceed upon any motion, for a grant or charge upon the public revenue*, whether payable out of the Consolidated Fund or out of money to be provided by the Parliament, except upon the recommendation of the Crown. This rule adopted in 1706 was designed to prevent improvident expenditure on private initiative. It has proved not only an invaluable protection to the Treasury but a bulwark for the authority of the ministry. Its importance has been so well recognized that it has been embodied in the fundamental laws of the self-governing colonies* and in this sub-section of the Government of India Act.

"Although in terms the rule applies only to a motion for making a grant, *it has been construed to cover any amendment for increasing a grant beyond the amount recommended from the Crown*—an extension certainly needed to protect both the Treasury and the authority of the ministers. When, therefore, a minister moves that a sum of money be granted for a definite purpose no amendment is in order either to increase that sum or to alter its destination. But the rule does not forbid a reduction. It follows that if any member deems the sum named too small, his

* British North America Act § 54. Commonwealth of Australia Constitution Act, § 56—"A vote, resolution, or proposed law for the appropriation of revenue or moneys shall not be passed unless the purpose of the appropriation has in the same Session been recommended by message of the Governor-General to the House in which the proposal originated."

only course is to move to reduce it in order to draw attention to its insufficiency."

"A still greater extension of the rule is made in its application to taxes; but this does not depend upon the standing order, but upon a general constitutional principle which has gradually been evolved therefrom. The principle has, in fact, been expanded until it may be stated in the general form that *no motion can be made to raise or expend national revenue without a recommendation from the Crown, or to increase the sum asked for by the Crown.* The government has accordingly, the exclusive right to propose fresh national taxation, whether in the form of new taxes, or of higher rates for existing ones, and no private member can move to augment the taxes so proposed. He can, however, move to reduce them, and he is even free to bring in a bill to repeal or reduce taxes which the government has not proposed to touch."—*Lowell's Government of England, Vol. I, pp. 279-283.*

§ 3 "Sinking fund charges."

These consist of special sums of money ear-marked for the repayment of loans, or specified sums annually devoted to the discharge of debt and to the "terminable annuities." Under all sinking fund systems there is a determination of part of the revenue to the purpose of repayment which, if steadily persisted in, will extinguish the liabilities, unless the relief so obtained is used for fresh loans. For further details about the Sinking Fund System, *see Bastable, Public Finance, pp. 701—705.*

Provision for case of failure to pass legislation. [1919, s. 26.]

67B.—"(1) Where either chamber of the Indian legislature refuses leave to introduce, or fails to pass in a form recommended by the Governor-General, any Bill, the Governor-General may certify that the passage of the Bill is essential for the safety, tranquillity or interests of British India or any part thereof, and thereupon—

(*a*) if the Bill has already been passed by the other chamber, the Bill shall, on signature by the Governor-General, notwith-

standing that it has not been consented to by both chambers, forthwith become an Act of the Indian legislature in the form of the Bill as originally introduced or proposed to be introduced in the Indian legislature, or (as the case may be) in the form recommended by the Governor-General ; and

(*b*) if the Bill has not already been so passed, the Bill shall be laid before the other chamber, and, if consented to by that chamber in the form recommended by the Governor-General, shall become an Act as aforesaid on the signification of the Governor-General's assent, or, if not so consented to, shall, on signature by the Governor-General, become an Act as aforesaid.

"(2) Every such Act shall be expressed to be made by the Governor-General, and shall, as soon as practicable after being made, be laid before both Houses of Parliament, and shall not have effect until it has received His Majesty's assent, and shall not be presented for His Majesty's assent until copies thereof have been laid before each House of Parliament for not less than eight days on which that House has sat; and upon the signification of such assent by His Majesty in Council, and the notification thereof by the Governor-General, the Act shall