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THE
LAW AND CUSTOM
OF THE
SOUTH AFRICAN
CONSTITUTION

A TREATISE ON THE
CONSTITUTIONAL AND ADMINISTRATIVE
LAW OF THE UNION OF SOUTH AFRICA,
THE MANDATED TERRITORY OF SOUTH-
WEST AFRICA, AND THE SOUTH AFRICAN
CROWN TERRITORIES

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To
GENERAL THE HONOURABLE
J B M HERTZOG, LL D
PRIME MINISTER OF
THE UNION OF SOUTH AFRICA
AND
MINISTER FOR EXTERNAL AFFAIRS
by kind permission

PREFACE

THE South Africa Act, which gave to the Union of South Africa its existence and the framework of a constitution, was passed in 1909 and came into force in 1910. Before it came into force there appeared a delightful sketch of the new constitution by the Hon. R. H. Brand entitled *The Union of South Africa*. Ten years later Dr. Manfred Nathan, K.C., published *The South African Commonwealth*. Dr. Nathan's valuable work, to which we are greatly indebted, deliberately avoids details in order not to distract attention from the main points under consideration. Except for a volume written in Afrikaans by Dr. van Pittius on *The Provincial Council System in South Africa*, no other book on South African constitutional law has been published. Since the publication of Dr. Nathan's book in 1919, fifteen years fruitful in constitutional development in South Africa have elapsed. Numerous constitutional cases have come before the courts, over sixty amendments of the South Africa Act have been passed by Parliament, more than one hundred and fifty statutory amplifications and interpretations of the Act have been made, the constitutional controversies of 1934 have been transplanted from the realm of politics into actual law, and there have been other constitutional changes effected by statutes and by the almost imperceptible growth of constitutional practice, which call for elucidation and discussion in a formal treatise. No apology, therefore, is needed for the publication of a work on South African constitutional law.

This book aims to describe the law and custom of the South African constitution, not only for South Africans but also for those outside South Africa who may be interested in constitutional law. Bearing in mind the enormous value of form and precedent, we have tried to combine in one volume, in all those parts of the book where they would be most practical and helpful, the methods of comment and analysis, illustration by documents, and elucidation by quotation from decided cases. At the same time we have endeavoured, by means of footnotes, to give the practical lawyer whatever assistance lay in our power. An historical approach to a study of the South African constitution, to which considerable space has been devoted, is extremely

helpful to the student who wishes to understand some of the present-day constitutional and political problems of South Africa. There are incidents in the history of Cape Colony which illustrate in an excellent manner constitutional evolution in the British Empire, e.g. the change from representative to responsible government. In addition, the constitutional struggle in the South African Republic between the judiciary and the executive from 1884 to 1897 is full of information on the differences between rigid and flexible constitutions, the various meanings of 'fundamental laws', and the doctrine of the separation of the executive from the judicial power.

Certain divisions of the subject have been treated shortly, others with the greatest detail. The former are topics which can readily be found in text-books on English constitutional law, the latter are particularly South African. We have been anxious to elucidate what is particularly South African, leaving other topics to those works on English constitutional law with which students of the South African constitution must necessarily be familiar.

The South African provincial system has taken up a considerable amount of space, for it was an experiment in British systems of government. An endeavour has been made to examine its working and to suggest reforms which may remedy its defects. The method of governing the native races of South Africa—a unique system of benevolent despotism in what may be termed a democratic autocracy—has been explained. Topics which some may consider to be outside the strict compass of constitutional law, e.g. the nature of native law and the principles of Roman-Dutch law, both of which exist side by side in South Africa, have been dealt with. The object of the brief survey of these and allied subjects will have been attained if those outside South Africa are thereby enabled to understand not only its system of government but also the administration of the branches of that government in the various aspects to which it presents itself to the European and coloured races of the Union.

We are conscious of numerous omissions, and of incomplete treatment, of a scattered arrangement of many topics and of repetitions which have been unavoidable. Perhaps these defects may be condoned in the light of a sympathetic consideration

of the difficulties of obtaining material. There are no text-books which deal with the government of the natives from a constitutional point of view, nothing has been written in South Africa on administrative law or on the present position of the Governor-General, on details of executive administration or on the constitutional relations of the Union with other states. There is no book which might have guided us either in matters of practice or in methods of presentation. On the practical working of the constitution, and on many other topics, reliance has had to be placed on information obtained from officials and politicians, from the close observation on the spot of the working of political and legal institutions, and from a detailed study of scattered cases, intricate departmental rules and regulations and of government blue-books. Great care has been taken, for the sake of accuracy, in cross-checking and confirming the information received. If some day, some one, using a little of these labours and researches as a basis, will write the great work on the law and practice of the South African constitution for which students, lawyers, and politicians in South Africa (and we venture to think, elsewhere) have for so long been waiting, these labours will not have been in vain.

Without attempting to record on every occasion our obligation to authors and authorities, we have made every effort in the footnotes and the text to acknowledge our sources. We wish to thank most sincerely for their kind assistance and help all those others who have generously helped us. Needless to say they bear no responsibility for either facts or interpretation in the volume. To those members of the public service of the Union, whose names 'for reasons of public policy' were withheld from us, we wish to express our deep sense of obligation for their unfailing courtesy and their generous consideration whenever we wrote to various departments of state for information. To others whose names we mention without their permission we owe an immense debt. Without their assistance on matters of practice, the title and scope of this book would have been different. To the Hon. Jan H. Hofmeyr, M.P., the Minister of the Interior, who read the manuscript of Chapters XV and XVI on the provincial councils, and suggested certain corrections on matters of fact and questions of practice, without making any comment on any of the views set forth, we express our sincere appreciation.

Mr Hofmeyr was a brilliant administrator of the Transvaal, and he is probably the greatest living authority both in theory and practice on the provincial councils. South Africa will watch with interest his handling of the problem of their reform. Mr Walter Pollak, advocate and lecturer in constitutional law at the Witwatersrand University, has given us his valuable assistance freely and generously. Dr H D J Bodenstein, Secretary for External Affairs, has gone to much trouble in giving us most valuable information on the official position of the Governor-General and regarding questions of the Union's external relations. On these topics, this book owes more to Dr Bodenstein than any expression of our gratitude could convey. Senator Hartog has given us the benefit of his experience of the senate and has always been extremely kind. We acknowledge gladly our obligation to him. We wish to thank Mr J F J van Rensburg, Secretary of Justice, Mr A H Louw, Chief Electoral Officer, Mr G H C Hannan, Clerk of the Transvaal Provincial Council, the Secretary for the Interior, and the Imperial Secretary attached to the office of the High Commissioner for South Africa for information supplied regarding their respective offices and departments. We wish to make it clear that never has the slightest hint been given in any information afforded to us which might have been even remotely confidential, and never has any one of those who have assisted us given us his views on controversial topics. Where views and opinions are concerned, nothing more has been done than to draw our attention to facts or decided cases which might affect those views. To no person can any responsibility be attributed for the facts and comments in this book except to the authors, who will appreciate any communication drawing their attention to errors and omissions.

We acknowledge with thanks the permission granted us by the Government Printer to copy portions of statutes and of the Official Year Book of the Union and of other government publications to Professors E H Brookes and R W Lee for permission to quote from their works. We acknowledge our indebtedness to the books of the Hon R H Brand, Professor Arthur Berriedale Keith, Mr R P Kilpin, Dr Manfred Nathan, K C, Dr Gey van Pittius, Professor E A Walker, and Sir John Wessels.

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Finally, our special thanks are due to the Oxford University Press for the provision of expert advice, criticism, and revision, without which this treatise would have been infinitely the poorer

W P M KENNEDY
H J SCHLOSBERG

January,
1935

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A C	Appeal Cases, House of Lords and Judicial Committee of the Privy Council
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Buch A C	Buchanan's Reports of the Cape Appeal Court, 1880-1910
Ch	Chancery or Chancery Division (England)
C L J	<i>Cape Law Journal Reports</i>
C L R	Commonwealth Law Reports (Australia)
C P D	Cape Provincial Division of the Supreme Court of South Africa, 1910 onwards
Cranch	Cranch's United States Supreme Court Reports
C T R.	<i>Cape Times Reports</i> , 1891-1910
Dallas	Dallas's United States Supreme Court Reports
D L R	Dominion Law Reports (Canada)
E D C	Eastern Districts Court of the Cape, 1880-1909
E D L	Eastern Districts Local Division of the Supreme Court of South Africa 1910 onwards
E R	English Reports
Foord	Foord's Reports of the Cape Supreme Court, 1880
H C G	Reports of the High Court of Griqualand West, 1882-1910
How	Howard's United States Supreme Court Reports
I R	Irish Reports
K	Kotze's Reports of the High Court of the Transvaal, 1877-81
K B	King's Bench Division (England)
L J P C	Law Journal, Privy Council
L T	<i>Law Times Reports</i> (England)
Mac	Macassey's New Zealand Reports
Menz.	Menzies's Reports of the Cape of Good Hope Supreme Court, 1820-50
Moo P C C	Moore's Privy Council Cases, 1836-63
Moo P C N S	Moore's Privy Council Cases, New Series, 1863-73
N A C	Native Appeal Cases
N L R	Natal Law Reports, Supreme Court, 1879-1910
N P D	Natal Provincial Division of the Supreme Court of South Africa, 1910 onwards
N Y	New York Reports
N Z L R	New Zealand Law Reports
Off Rep	Official Reports of the High Court of the South African Republic, 1894-9

O.F.S	Orange Free State High Court, 1879-83
O.P.D	Orange Free State Provisional Division of the Supreme Court of South Africa, 1910 onwards
O.R.C	High Court of Orange River Colony, 1903-10
P.H	Prontice-Hall Weekly Reports (South Africa)
Q.B	Queen's Bench Division (England)
S.A.R	Supreme Court of the South African Republic, 1881-92
S.C	Supreme Court of the Cape of Good Hope, 1880-1910
Searle	Searle's Reports of the Cape Supreme Court, 1850-67
S.R	High Court of Southern Rhodesia
St Tr	State Trials (England)
S.W.A	High Court of South West Africa
T.H	High Court of the Witwatersrand, 1902-10
T.L.R	<i>Times</i> Law Reports (England)
T.P.D	Transvaal Provincial Division of the Supreme Court of South Africa, 1910 onwards
T.S	Transvaal Supreme Court, 1902-10
U.S	United States Supreme Court Reports
Wis	Wisconsin Reports
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PART I
HISTORICAL AND INTRODUCTORY

I

CONSTITUTIONAL DEVELOPMENT IN THE SOUTH AFRICAN COLONIES

'At the sea-end of the principal street in Cape Town is a statue of van Riebeeck, and at the other end are the Houses of Parliament. Between these two monuments of bronze and brick there lies an invisible chain of two centuries. Everyone who treads that sunlit thoroughfare is familiar with both the statue and the glaring red-brick buildings, but the chain of events that binds them inseparably together is covered with the dust of an unromantic age. The story itself lies scattered in the records that are stored in the vaults of the Houses of Parliament. It is the story of how the 'Council of Policy' over which van Riebeeck presided gave rise to all the highest courts of South Africa, and of how the movement for representative government began while the Council was yet in existence and led in the natural course of events first to the establishment of the Cape Parliament and afterwards to the Parliament of the Union of South Africa.'

This opening paragraph of an excellent little work¹ describes picturesquely the continuity of constitutional history and brings us with one sweep of the pen from the first constitutional body in the dawn of South African history to the existence of a parliament under a modern constitution.

Before the establishment of the Union there were in South Africa four colonies enjoying responsible government, to-day their places are taken by four political provinces entirely subordinate in legislative power to the parliament of the Union. Unlike the characteristic in the formation of certain federations, when the constituent provinces or states surrender some of their powers to the newly created federal state and retain their own constitutions in a modified form, the constitutions of the four South African colonies were on the establishment of the Union completely and irrevocably swept away, nothing now remains

¹ R. P. Kilpin, *The Romance of a Colonial Parliament* (London, 1930), p. 3. The best and most scholarly account of the early history is to be found in E. A. Walker, *A History of South Africa* (London, 1928).

of them in the constitutions of their geographical counterparts in the Union. Yet these four colonies contributed certain features to the constitution of the Union and brought much from their own constitutional development to the construction and formation of the Union into which they were eventually so completely merged.

In this chapter we shall trace in each colony in turn its individual constitutional development, discussing the political and governmental, rather than the judicial and legal aspects (for the latter are best dealt with in subsequent chapters).¹ As we proceed, we shall emphasize any special features which might be recognized later in the South African constitution. In the next chapter we shall take note of the forces and tendencies that drove these four colonies inevitably towards the formation of a Union. In this manner we shall come to a fair knowledge of the nature of the law and custom of the present constitution, before discussing it in detail, and we shall have provided a necessary outline of the development of political institutions in South Africa.

1. The Cape of Good Hope

The constitutional history of the Cape falls into four distinct periods: (i) Dutch East India Company control, (ii) British crown colony government, (iii) Representative government and (iv) Responsible government.

(i) *Dutch East India Company Control* The beginnings of a 'council of policy' are to be found in a meeting which took place on board van Riebeeck's ship on December 30, 1651. Van Riebeeck had sailed from Holland earlier that year as the first commander of the Dutch East India Company at the Cape. He had under his charge three ships, and directly subordinate to him were three master-mariners, who were first assembled in mid-ocean during the stress of a rising storm to decide upon an immediate 'policy'. It is not clear whether van Riebeeck was instructed to act only with the advice of a council or whether a council was ever officially nominated by the company. It seems more likely that this procedure was a custom always followed by officials of the company. 'If there was one custom which the Company placed above all others, it was that wher-

¹ See *infra*, Chapters XVII and XVIII.

ever its flag flew its representatives should frequently take counsel together. No expedition, no fleet, no ship, no settlement, was without its council of responsible officials, and no official ever questioned this salutary practice.¹

This council of policy existed in various forms until the British occupation of the Cape. At first it sat in the fort erected on the foreshore of Table Bay, and for a long time it retained all the characteristics of the ship's council which it had originally been. It legislated by means of proclamation. The council passed resolutions which were signed by the members, when of sufficient importance, they were read in the form of proclamations from the balcony outside the fort's council chamber, and then *placarded*² in prominent places. These proclamations with their quaintly phrased preambles throw revealing sidelights on the problems of those days and from them we can see clearly the principles underlying the early administration of the Cape. Van Riebeeck had explicit instructions precluding any idea of colonization. The duty enjoined upon him was simply to build a fort and plant a garden which would serve as a refreshment station.³ The administration was essentially that of a trading company concerned with the physical and moral welfare of its servants. Nevertheless, the early beginnings of a native policy are seen in one of the proclamations: 'should any one ill-treat, beat, or push a native—whether he be right or wrong—he shall in the presence of the latter receive fifty lashes.'⁴ Soon, however (in 1657), nine servants of the company received their discharge as free colonists with permission to settle on the farms which had been allotted to them. This step immediately distinguished the Cape from the other dependencies of the company.

The first separation of judicial from executive and legislative functions had occurred a year earlier (1656), and when the company's servants were granted their freedom, first one and later several of their number bearing the title of bughder councillors,

¹ Kilpm, *The Romance of a Colonial Parliament*, p. 6. The first meeting and all subsequent meetings opened with the prayer still known as 'van Riebeeck's prayer', which, 'shorn of its allusions to the "wild and brutal people of the Cape", and its almost pathetic appeal for assistance in the promotion of "the greatest interests of the Dutch East India Company"', is still read every day of the session in the Union Senate' (ibid., p. 4), and in the provincial councils. For the text of the modern form of this prayer, see *infra*, p. 326, note 3.

² i.e. plastered, placarded or posted up.

³ Ibid., p. 5.

⁴ Ibid., p. 10.

were required to sit with the council, augmented as it was by the addition of the constable of the fortress and two corporals, to hear cases affecting the people at the Cape¹ This court of justice gradually evolved into the supreme court of the Cape of Good Hope In 1674 the old fort was demolished and the council sat in the castle Two years previously in 1672, the commander of the Cape had been raised to the rank of governor²

It is necessary to refer to the company's system of administration The sovereign power of the Dutch East India Company was vested in a 'council of seventeen' directors presided over by each director in turn This council of seventeen sat in Holland, directed the processes of commerce and controlled the appointment and dismissal of officials In Batavia there sat a council of eleven, better known as the 'council of India', which administered the affairs of the company's seven dependencies in the East, including the Cape The procedure and internal arrangements of this council of India were copied by the governor's council of policy at the Cape The Cape had no formal constitution, and its procedure and its composition depended entirely upon unwritten usage or convention, on disconnected instructions from Holland or Batavia, and on memoranda left by one governor for another, not unlike the memoranda sometimes left by one British governor for his successor³

The states-general of the Netherlands legislated but seldom for the colonies, for it delegated its functions to the chartered companies of East and West The governor-general of Batavia with the advice of the council of India, issued statutes for the Cape, which, if locally promulgated, had binding force until superseded or abrogated by disuse The law of the Cape consisted, therefore, of the common law of Holland, or Roman-Dutch law, brought to the Cape by van Riebeeck, the statutes of Batavia promulgated at the Cape, and the enactments of the local governor sitting with the council of policy, as well as

¹ Kilpin, *The Romance of a Colonial Parliament*, p 14 It was only after this separation of duties that the ordinary council, which dealt with the legislative and executive side, can be called the 'council of policy' See W Burge, *Colonial and Foreign Law* (London, 1907), vol 1, p 108

² G M Theal, *History of South Africa before 1795* (London, 1908), vol 11, p 363

³ A Todd, *Parliamentary Government in the British Colonies* (London, 1894), p 680

the earlier resolutions of the commander-in-council.¹ To-day, the common law of South Africa is still the common law of van Riebeeck (now superseded in its mother country) though it has been substantially modified by conditions and the passage of time, while a few only of the external statutes above referred to are occasionally relied on in the courts.²

As the population of the Cape grew by emigration from Holland and France, its requirements became greater than the council of policy could by itself direct. The settlers had spread beyond Capetown and the colony was divided into four districts. These districts were under the supervision of district boards presided over by landdrosts, the forerunners of present-day magistrates.³ Many of the multifarious administrative duties of the magistrates to-day, as well as the fact that they are the representatives of the Union government in certain respects, may be traced to the initial step of making these landdrosts the district administrative representatives of the government in the early days of the Cape. The landdrost had on his board six men called 'heemraden',⁴ appointed by the council of policy from lists of burghers drawn up by the board on the expiry of its term of office every two years. The boards performed fiscal and municipal duties in their respective districts, and had a certain amount of taxing power. They also acted as courts of justice in civil cases of limited jurisdiction, their decisions being subject to appeal. They had no criminal jurisdiction, but acted as a kind of grand jury and sent their landdrosts as public prosecutors before the court of justice at Capetown in cases that came from their respective districts.

¹ See R. W. Lee, *Introduction to Roman-Dutch Law* (Oxford, 1931), pp. 9, 27-8, Burgers *Colonial and Foreign Law*, vol. 1 p. 115, J. L. W. Stok, 'The New Statutes of India at the Cape' (*South African Law Journal*, vol. xxxii, p. 328) *Silberbauer v. van Breda* (1806) 5 Scule 231, (1809) 6 Moo. P.C.N.S. 319, 16 E.R. 7th (1870) L.J.N.S. 39 p. 8. Statutes passed in Holland in 1580, 1594, and 1661 still define a portion of the law of intestate succession for the Union of South Africa. For the formation and acceptance of Roman-Dutch law into South Africa, see the standard works of J. W. Wessels, *History of the Roman-Dutch Law* (Grahamstown 1908), Lee, *Introduction to Roman-Dutch Law*, and *infra* Chapter XVIII. 1. Volume 1 of the *Statutes of the Cape of Good Hope* contains a collection of 'Pleasants and other legal enactments, from the establishment of the Colony in 1652 to its surrender by General Janssens to Sir David Baird in 1806, which still have, wholly or in part, the force of Law'.

² See *infra*, Chapter XVIII. 1.

³ See *infra*, Chapter XVII. 13.

⁴ See note 3 on p. 33 *infra*.

Up to the year 1786 the supreme court of justice consisted entirely of the officials and members of the council of policy sitting with burghers in most cases. In 1786 this court was reorganized so as to consist of twelve judges, half of whom were selected from officials and the remainder from the burghers. The whole court sat in the trial of every kind of case. No special salary was attached to the office of judge, because the burgher judges did not wish to be dependent on the government in any way. This court tried all civil cases that were above the jurisdiction of the landdrosts' courts, and criminal cases that arose throughout the colony. It also acted as a court of appeal from the lower courts, its own decisions being subject to appeal to the high court of Batavia.¹ There were other legal institutions such as a debts registry, a board of orphanmasters, and an advisory burgher council sitting in Capetown. This burgher council developed into the Capetown municipal council, and was the first of all municipal institutions in South Africa.²

The British occupied the Cape in 1795, but the colony was handed over to the Batavian Republic in 1803. The authorities in Holland then sent out Jacob de Mist, an accomplished and brilliant scholar and statesman, to set the government of the Cape on a proper footing. He at once proceeded to make the council of policy a national representative institution no longer dependent on the company, and answerable only to the government of the Republic.³ But when the Cape was on the point of obtaining representative government, it fell once more under the British. The council of policy now passed away, but it appeared under another name a generation later.

Much doubt still remains as to the exact powers of the Dutch governors. They acted on almost every occasion 'by and with the consent of the council' (to adopt a peculiarly British phrase), but on one occasion at least instructions were received from Holland permitting the governor to set aside the decision of the council if he deemed such a step necessary.⁴

¹ G. W. Eybers, *Select Constitutional Documents Illustrating South African History, 1795-1910* (London, 1918), p. xxiii.

² Kilpin, *The Romance of a Colonial Parliament*, p. 28.

³ G. M. Theal, *Progress of South Africa in the Century* (London, 1901), p. 85, see the *Memorandum of J. A. de Mist* (van Riebeeck Society, Capetown, 1920).

⁴ Eybers, *Select Constitutional Documents*, p. xix.

The fundamental feature of the Dutch administration of the Cape was 'to pay more attention to what was due to or belonged to the Company than what was due to or belonged to others',¹ yet from this period of history are survivals by no means unimportant in the present administration of South Africa.

(11) *British Crown Colony Government* This stage of government was characterized by the absolute and sole responsibility of the governor for all acts of government. He was subject only to the government of the United Kingdom. All the powers of government, civil as well as military, were vested in him by Instructions issued in 1796. He abolished the powers of the district boards and acted without the assistance of any advisory council. Yet his rule gave no cause for complaint—a curious contrast to a later state of affairs. In 1820 a large body of British settlers known as the 1820 Settlers arrived. They soon took a leading part in the demand for representative government. In the year 1825 the British governor at the Cape was suddenly provided with an advisory council. The exact reason for its establishment is still a mystery, and it is still impossible to know who first recommended it, or to decide how 'it arose on the ashes of the Council of Policy'.

'What is of greater consequence in tracing the continuity of parliamentary institutions in the Cape' writes Mr. Kilpin, 'is an interesting letter to the Colonial Office in Downing Street from an old Dutch official named Andries Muller, which was reprinted in *Theal's Records* and then lost sight of. Muller, a South African by birth, had not only held office under the Dutch East India Company, but had once been a member of the Council at Batavia. Subsequently he had taken office under the British Government at the Cape, and while on a holiday in Geneva in 1822—before either the Cape or New South Wales had been granted an advisory council—he had occasion to express an opinion on Cape affairs. "To trust the Governor-Commander-in-Chief with the full power of governing is quite the best way," he tactfully remarked in the letter, "but every British colony, if I am not mistaken, even Gibraltar, has the benefit of a charter. My opinion is that the Governor of the Cape should have a council given to assist him and discuss everything that may concern the colony, but in case the majority were to advise contrary to the Governor's mind or proposition he should not be bound to submit and act against what he thinks fit, but the different opinions and protocol of the council must be set before the eyes of His Majesty's Ministers at home who may judge." In other words, Muller suggested that a council should

¹ Kilpin, *The Romance of a Colonial Parliament*, p. 25.

be established at the Cape, similar to the old council of policy which he knew the Dutch East India Company had found necessary, to enlighten or curb a headstrong Governor"¹

This letter is of the utmost importance. On May 2, 1825, the first council was appointed 'to advise and assist in the administration of the government' of the Cape. This council consisted of the chief justice, Sir John Truter, one-time secretary to the council of policy under the Batavian government, the secretary to the government, the second-in-command of the forces, the deputy quartermaster-general, the auditor-general, and the colonial treasurer. The council was presided over by the governor and met behind closed doors. It was neither a representative nor a popular assembly. It had in reality no power at all, not even by a majority vote, but if the governor acted against a majority vote of the council, he might be required to give satisfactory reasons to the secretary for the colonies. This practice was similar to that under Dutch occupation.

Theal and most other historians assert that this advisory council was appointed as a result of a commission of inquiry which was sent out from England in 1823. This commission sat at the Cape for more than three years and made important suggestions regarding finance and justice, resulting in the creation of resident magistrates in place of landdrosts,² the introduction of the jury system,³ the reorganization of the supreme court,⁴ and the adoption of English rules of procedure and evidence.⁵ But historians do not explain how the commission of inquiry, which sat in 1823 came to suggest an advisory council in 1825, when it only completed its report long after the first council was appointed. 'It seems to be more than a coincidence that the constitution of the council very closely followed the lines of the old Council of Policy so quaintly suggested by Andries Muller,'⁶ though it must not be forgotten that advisory councils in the

¹ Kilpin, *The Romance of a Colonial Parliament*, p. 35

² Ordinance 33 of 1827

³ Ordinance 41 of 1828

⁴ The Royal Charter of Justice, 1832, superseding the Charter of 1827. The development of the judicial system in the four colonies is dealt with *infra*, in Chapter XVII 1, as its discussion in this chapter would detract from the continuity of institutional development which is here attempted.

⁵ English rules of evidence were introduced by Ordinance 72 of 1830, procedure in civil cases was dealt with in the Charter of Justice, 1832.

⁶ Kilpin, *The Romance of a Colonial Parliament*, p. 37. The report was dated September 6, 1826.

colonies were by this time well-established institutions¹ The ordinances of the Cape, as they were now called, were drafted by officials and submitted to the chief justice for his legal opinion If passed by the council the ordinances came into operation if and when they were sanctioned by the governor Legislation took the form of AN ORDINANCE of His Excellency the Governor in Council

This form of government was, however, entirely unsatisfactory to the colonists, and certain occurrences intensified their dislike of the system In 1827 the governor submitted two ordinances to the council stating that the colonial office required them to be passed before a fixed date In 1828, on account of the governor's differences with the chief justice, the governor was instructed to dispense with the services of the chief justice as a councillor of the Cape government In the same year the services in a similar capacity of the chief justice in New South Wales were also dispensed with² In that year also Fairbairn, editor of the first South African newspaper *The Commercial Advertiser*, started a series of attacks denouncing the council as a mere screen to cover the actions of the governor, and encouraging the colonists to lay claim to representative government A petition of 1 600 signatures was sent to the house of commons³ The next two vacancies in the council were filled by two colonists, Sir John Truter the retired chief justice and the interesting Captain Andries Stockenström No sooner had the latter taken his seat when he declared that the Council, as a step towards reform, was the greatest insult that could have been inflicted upon the common sense of any country⁴ In 1833 he was forced to resign The news of the freedom proposed to be granted to the slaves, with what was considered insufficient compensation, angered the colonists still more and united them in meetings of protest and in demands for representative government When

¹ See, e.g., Instructions to General James Murray, governor of Quebec, December 7, 1763, section 2 'You are in the next place to nominate and establish a Council to assist you in the Administration of Government' W P M Kennedy, *Statutes, Treaties and Documents of the Canadian Constitution* (Oxford, 1930), p. 43

² E Sweetman, *Australian Constitutional Development* (Melbourne, 1925), pp. 55-6

³ This petition was the subject of a debate in the British house of commons on May 24, 1830 (See Eybers, *Select Constitutional Documents*, p. 30)

⁴ Kilpin, *The Romance of a Colonial Parliament*, p. 49

Sir Benjamin D'Urban arrived in 1834, he brought with him a reformed constitution¹ This marked the beginning of parliamentary government in South Africa and the first real separation of legislative from executive powers

Under the new constitution there was to be an executive council of five officials, and a legislative assembly consisting of these five officials and five or more nominated colonists Legislation now took the form of 'AN ORDINANCE, Enacted by the Governor of the Cape of Good Hope, with the advice and consent of the Legislative Council thereof' The popular appointments were for life

The public was very critical of the new assembly Its debates were held behind closed doors but the people clamoured for admission and this concession was eventually won Soon the popular dissatisfaction with the form of government again grew to alarming dimensions In 1849 (such was the state of popular hostility towards the legislative council) mob law prevailed in Capetown and the governor could not assemble the council All but one of the unofficial members had resigned, and the governor had no quorum In 1850 the secretary for the colonies proposed to give the Cape representative government on the general lines drawn up by the attorney-general of the Cape, William Porter, leaving the legislative council itself to draw up the details of the new constitution After a struggle concerning procedure and policy, the task was accomplished and the council held its last sitting on October 14, 1853

(iii) *Representative Government* When representative government for the Cape was being discussed in the turbulent days of 1849, it soon became apparent that neither the English nor the Dutch colonists would be satisfied with nominated legislators The new constitution contained two houses, both of which were elected The upper house, the legislative council, was the first upper house in the British Empire to be entirely elected²

¹ Kilpin (*The Romance of a Colonial Parliament*, p. 51) has an interesting description of the governor's first public appearance 'Troops lined the streets, and by the time His Excellency arrived at Government House the Advisory Council and a large number of expectant inhabitants had assembled to hear the Instructions read After being sworn in by the Chief Justice, His Excellency was introduced to the members of the Council and several others His Commission was then read aloud, and long before it had been finished all who were present realized that with its reading the Advisory Council had come to an end'

² The suggestion that the upper house should be elected was first made by

The procedure adopted for the granting of the constitution is interesting in view of subsequent events. The crown issued letters patent authorizing the governor with the consent and advice of the Legislative Council to pass an ordinance defining the constitution of the colony subject to certain limitations. This ordinance was passed on April 3, 1852, to take effect on a date to be fixed by the Queen-in-Council. It was amended and confirmed by an order in council dated March 11, 1853, to take effect on July 1, 1853. The first meeting of the first parliament held on African soil took place at Capetown on June 30, 1854.

Both houses were elected on the same franchise. The difference in their composition lay in the qualification for election. The franchise was low. A male adult of any colour who was a British subject and occupied property to the value of £25 or drew a salary of £50 per annum or of £25 per annum with free board and lodging, could be registered as a voter.¹ This low qualification allowed a small portion of the native and coloured population to secure the vote, a right which became of the greatest possible importance in the subsequent making of the South African constitution, which was nearly a stumbling-block to union, and which was eventually entrenched in the South Africa Act.² It became also the subject of one of the very few appeals to the privy council since Union.³

Members of the house of assembly were to possess only the qualifications of ordinary electors, but members of the upper house, the legislative council, were to be not less than thirty years of age and were to possess a high property qualification. 'No person shall be qualified to be elected a member of the said Council who shall not be the owner for his own use and benefit of immovable property of the value of £2,000 of sterling money, over and above all special conventional mortgages affecting the same.' This particular provision has its counterpart in the South Africa Act.⁴

The house of assembly had forty-six members, and the legisla-

Sir John Wylde, C J., in a memorandum dated June 10, 1848, see *ibid*, p. 85.

¹ Section 5 of Ordinance 29 of 1852 as amended by order in council dated March 11, 1853 (The Cape of Good Hope Constitution Ordinance).

² See sections 35, 36, 47, and 162 of 9 Ed. vii, c. 9 (The South Africa Act, 1909).

³ *Re v Ndobe*, [1930] A.D. 484.

⁴ Section 26 (e) of the South Africa Act, 1909.

tive council fifteen members. The former was elected in two-member constituencies, Capetown alone being a four-member constituency. The council was elected in two constituencies, to form which the Cape was divided into a western district and an eastern district. Nearly eighty years later discussion began as to whether it would not be advisable to divide the Cape into two similar divisions for purposes of provincial government.

The executive government remained in the hands of a body of high officials, the chief of whom could sit and take part in debates in either house, but without the right to vote.

The new constitution contained unique features. The upper house was the only colonial second chamber ever given the right to increase as well as to decrease expenditure and taxation,¹ and it was the only colonial second chamber to share with the lower house the advantage of permitting members of the executive to sit and speak in it without being elected.²

The power of the legislative council is referred to by Mr Kilpin

¹ The Cape of Good Hope Constitution Ordinance, 1853, provided

80 It shall not be lawful for the House of Assembly or the Legislative Council to pass, or for the Governor to assent to, any bill appropriating to the public service any sum of money from or out of Her Majesty's revenue within the said Colony, unless the said Governor, on Her Majesty's behalf shall first have recommended to the House of Assembly to make provision for the specific public service towards which such money is appropriated, and no part of Her Majesty's revenue within the said Colony shall be issued except under the authority given by the Governor of the said Colony directed to the public treasurer thereof.

88 In regard to all bills relative to the granting of supplies to Her Majesty, or the imposition of any impost, rate, or pecuniary burden upon the inhabitants, and which bills shall be of such a nature that if bills similar to them should be proposed to the Imperial Parliament of Great Britain and Ireland such bills would, by the law and custom of Parliament, be required to originate in the House of Commons, all such bills shall originate in, or be by the Governor of the Cape of Good Hope introduced into the House of Assembly of the said Colony. Provided that the Legislative Council of the said Colony, and the Governor thereof, shall respectively have full power and authority to make in all such bills such amendments as the said Council and the said Governor shall respectively regard as needful or expedient, and the said Council and the said Governor may respectively return such bills, so amended, to the House of Assembly or the Legislative Council.

² Section 47 of the constitution provided that no person holding an office of profit under the crown shall be eligible for election to the legislative assembly. This had been a source of great dissatisfaction with the colonists.

'It is not surprising', he writes,¹ 'to find the Upper House constantly asserting its authority'. In the first session it threw down the gauntlet on its right to amend money bills by making provision in the Appropriation Bill for certain expenditure which the Governor had not asked for and did not want. The House of Assembly, afraid of admitting the principle, rejected the amendment and when the Council, bent on establishing its position, finally returned the Bill with a message to say that the Bill had "dropped" the Speaker refuted by throwing it on the floor of the House. When Parliament was prorogued a few days later the Governor admitted that the Council was quite within its right in increasing or decreasing the amount of money bills, but pointed out that it was not competent for either House to propose expenditure without the sanction of the Governor himself. Years later² Sir J. H. de Villiers, when President of the Council, held that, although in accordance with the strict letter, it was not in accordance with the spirit of the constitution for the Upper House to increase the amount of a money bill.³ But the Council was never dissuaded from exercising its potent right of reducing sums of money voted by the Lower House for public services, and on several occasions (1855, 1899, 1907) it asserted its authority by cutting down partial appropriation bills by at least half of the amount required. On other occasions, more numerous than generally supposed (1879, 1883, 1885, and 1888), it created alarm by reducing items in the annual estimates of expenditure, while on another and still more celebrated occasion (1907) it withheld supplies entirely and brought about the fall of the Jameson Government. As a house of review it was, in the beginning, even more prone to assert its right, and so assiduously performed its constitutional duties as a "check and a counterpoise" to the House of Assembly that during the first ten years of its existence it amended or rejected nearly half the bills sent to it from that body.⁴

It was not the assertion of powers by the council that made representative government a failure at the Cape. During the first session of the new parliament the system itself pointed to failure. A year later the legislative council asked for responsible government. A motion was passed which declared 'that in the opinion of this Council the principal officers of government should be appointed by the governor from among the members

¹ Kilpin, *The Romance of a Colonial Parliament*, p. 85.

² 1881. Any alteration to a money bill was considered by the assembly a breach of its privileges. (See *Cape Assembly Votes*, September, 1879.) The Cape obtained responsible government in 1872 but the constitution of 1872 did not affect the provisions of sections 80 and 88 (referred to *supra*, p. 14 note 1) of the constitution of 1873.

³ Section 80 of the South Africa Act, 1909, takes this power of increase and even amendment away from the upper house.

⁴ Compare the strong position of this upper house with the position of the senate in the Union of South Africa and see *infra*, Chapters IX and XI.

of both Houses, and that they should hold office only so long as they possess the confidence and can ensure the co-operation of the Legislature' ¹ The reason for the failure of representative government is to be found in the fact that as long as the executive was not responsible to the legislature there were bound to be deadlocks between those two organs of government By 1867 it was abundantly clear in the Cape that the activities of these two bodies were culminating in a paralysing deadlock, for the treasury had been consistently spending more money than the legislature had authorized

It is remarkable that the first important step towards responsible government was taken by the government of the United Kingdom which urged upon the colony the adoption of that form of self-government A bill was introduced in 1871 but it was rejected by the council, in 1872 it was again introduced and passed the council by a majority of one vote The hostility of the council was due to the cross-currents of the disputes regarding the wider question of a South African federation, disputes with the Orange Free State regarding the newly discovered diamond fields at Kimberley, the question of the annexation of Basutoland, and the demand by the Eastern Province of the Cape for separation ²

(iv) *Responsible Government* No great change in the form, effect, and power of government has ever been made with so little legislative solemnity as the change from representative to responsible government in the British colonies In the case of the Cape, even the parliament of the United Kingdom took no hand in the transformation Todd, discussing the same point, writes 'The introduction of responsible government into the British Colonies was an event which it required no legislative process [of the parliament of the United Kingdom] to effect or ratify It scarcely necessitated any alteration in the governor's commission and instructions The only definite change in the royal instructions was to provide that henceforth the members of the executive council should be appointed with the understanding that, upon their ceasing to retain the confidence of the popular branch of the legislature, they should resign office' ³

¹ Minutes of the Cape of Good Hope Legislative Council (No. xl), p. 7

² E. A. Walker, *Lord de Villiers and His Times* (London, 1925), pp. 30 ff

³ Todd, *Parliamentary Government in the British Colonies*, pp. 28 ff

The statute which gave the Cape responsible government is the following

ACT NO 1 OF 1872

I reserve this Bill for the Signification of Her Majesty's pleasure

HENRY BARKLY, Governor
Government House,
Cape Town, 18 June 1872
(Assented to—28 Nov 1872)

ACT—To amend the Ordinance enacted on the 3rd of April 1852, by the Governor of the Colony of the Cape of Good Hope, with the advice and consent of the Legislative Council thereof, intitled 'An Ordinance for Constituting a Parliament for the said Colony'

WHEREAS it is expedient, in order to the introduction of the system of *executive administration commonly called Responsible Government*,¹ to amend in certain respects the Ordinance enacted on the third day of April, in the year 1852, by the Governor of the Cape of Good Hope, with the advice and consent of the Legislative Council thereof, intitled 'An Ordinance for Constituting a Parliament for the said Colony' ² *Be it enacted by the Governor of the Cape of Good Hope, with the advice and consent of the Legislative Council and House of Assembly thereof, as follows*

I From and after the taking effect of this Act, there shall be in this Colony a certain office to be called the office of 'Commissioner of Crown Lands and Public Works', and a certain other office to be called the office of 'Secretary for Native Affairs' ³

II The persons to hold the said offices respectively shall be *appointed by Her Majesty the Queen*, and shall hold office *during her Majesty's pleasure*, and shall be charged with such duties as Her Majesty shall from time to time assign to them

III The following persons holding offices of profit under Her Majesty the Queen shall be eligible, if otherwise duly qualified under the provisions of the Ordinance aforesaid, to be elected as members of the Legislative Council, or the House of Assembly that is to

¹ Certain important phrases in this statute have been italicized

² Under representative government the formula was the same as that under responsible government. During 1858 there was a departure from the usual formula, for a reason unknown, in the form of enactments. The formula used in 1858 was 'Be it enacted by the Parliament of the Cape of Good Hope in Parliament assembled, as follows'

³ These offices were new offices presided over by ministers of the crown. The full list of five offices is mentioned in section III, and these were filled by the first cabinet ministers appointed in Africa, namely J. C. Molteno, prime minister and colonial secretary, H. White, treasurer, J. H. (afterwards Lord) and the first chief justice of the Union) de Villiers, attorney-general, C. Abororombio Smith, commissioner of public works, C. Brownlee, secretary for native affairs. A ministry of agriculture was added in 1893 (Act No. 14). The Act of 1893 uses for the first time in the history of the British Empire the words 'prime minister'

say, the Colonial Secretary, the Treasurer of the Colony, the Attorney-General, the Commissioner of Crown Lands and Public Works, and the Secretary for Native Affairs. Provided always that it shall be lawful to appoint to any such office as aforesaid any person being already at the time of such appointment a member of the said Council or the said Assembly.

IV It shall be lawful for any person holding any of the offices in the third section of this Act mentioned, and being likewise a member of either [House] to sit and take part in any debate or discussion which may arise in the House whereof he does not happen to be a member but it shall not be lawful for any such officer to vote on any proceeding in such House whereof he shall not be a member.¹

V VI VII VIII [Incidental matters, salaries, &c.]

IX This Act shall commence and take effect when and so soon as the Governor shall by proclamation declare that Her Majesty has ~~been pleased to allow and confirm the same~~

X This Act may be cited for all purposes as the Constitution Ordinance Amendment Act, 1872

It may be seen from this statute that the transformation from representative to responsible government was effected by the words 'during Her Majesty's pleasure.' The pleasure of the crown was to be exercised according to the view of the conduct of ministers taken by the assembly. This act which may be termed a 'fundamental law'² is an amending one only, and it was enacted by the colonial parliament itself. Thus a far-reaching constitutional revolution was effected quietly, by a change of phrase, by the fiction of a formula.

'The result of this great constitutional reform', writes Todd 'is briefly this: that, while the governor of a colony under the parliamentary system remains, as formerly, personally responsible to the Crown, through the Secretary of State, the members of his executive council, who are his constitutional advisers, now share—and, so far as the colony is concerned, entirely assume—the responsibility, which previously devolved upon the governor exclusively, of framing the policy of the local government, of embodying the same in measures for the sanction of the legislature, and of superintending and controlling all public affairs through the appropriate departments of state in the colony.'³

The form of constitution outlined above continued until the establishment of the Union of South Africa in 1910.

¹ Cf. a similar section (52) of the South Africa Act, 1909.

² See *infra*, Chapter III. 1.

³ *Parliamentary Government in the British Colonies*, p. 40. For a careful summary of events leading to responsible government in the South African colonies, see A. B. Keith, *Responsible Government in the Dominions* (2 vols., Oxford, 1928), pp. 27–37.

2. Natal

The Cape was the first South African colony to obtain representative institutions, and it is only natural that the representative institutions granted to the other colonies should follow the Cape model both in the manner of their establishment and in their development. And this indeed was the case. Natal was connected with the Cape more closely than the other colonies, and its development was along similar lines. The battles were fought in the Cape and their results were achieved in Natal without much trouble.

The early history of Natal does not throw much light on the constitution of the Union. The latter stages are a little more instructive, but excepting for the provisions of the law relating to the powers of the lieutenant-governor as supreme chief of the natives, the constitutional history of Natal has very little of importance to students of the South African constitution. There are six well-marked periods: (i) a committee of management, (ii) a 'Volksraad', (iii) a district of the Cape, (iv) a crown colony, (v) representative government, (vi) responsible government.

(i) *The Committee of Management*. Quite unconnected with the government either at the Cape or in the United Kingdom, a small number of British settlers congregated round Port Natal in 1835 for hunting and trading purposes. They appointed a committee to manage their affairs, to levy a few small taxes, and to perform such public duties as were entailed in granting and distributing among themselves the land they found lying waste and unoccupied. In 1838 this embryonic government was destroyed by the massacre of nearly every settler by Dingaan, the Zulu king, in retaliation for an attack on him by the colonists.

(ii) *The 'Volksraad'*. For reasons that need not be given at length here, there left Cape Colony during the years following 1836, in what was known as the 'great trek', a large body of Dutch farmers. They had been dissatisfied with the absolutism of the governor's rule, with the lack of protection against native attacks, with the inadequate compensation for the slaves that had been released, and for other reasons which may be found in any colonial history.¹ Towards the end of 1838 a Volksraad or 'people's council' had been established at Pietermaritzburg.

¹ Eybers, *Select Constitutional Documents*, documents 92, 100, 106, and 107.

The Volksraad consisted of twenty-four elected members, one of whom was the president. It acted also as a court of appeal for the more serious criminal offences tried by a landdrost and the six heemraden with whom we are already familiar. Capital cases were tried before a jury of twelve. Draft laws were submitted informally to the small population for approval.

(iii) *A District of the Cape* The parliament of the United Kingdom did not recognize the republic, and legislated for it.¹ In 1843, after a proclamation by the governor of the Cape, Sir George Napier, annexing the territory to the Cape, troops took possession of it. Till 1847 the governor and council of the Cape legislated for Natal as a district of the Cape, passing special laws and setting up municipal and judicial institutions on the Cape model. Roman-Dutch law was introduced in 1845.²

(iv) *A Crown Colony* In 1847, by letters patent, an advisory council of three nominated officials was established to act with a lieutenant-governor. This system lasted for the short space of nine years. Natal's distance and isolation from Cape Colony made it inevitable that its local affairs should be separately administered, and in 1856 it was formally granted the status of a separate colony.

(v) *Representative Government* The Charter of Natal³ gave the colony a legislative council in 1856, consisting of sixteen members, of whom twelve were elected and four nominated. The elected members were chosen by eight electoral counties or boroughs returning one or two members each. Natal was the only colony in South Africa to adopt peculiarly British appellations in its local government, but few of them remain at the present day. The franchise qualification was substantially the same as that in the Cape. The governor and council were empowered to alter the constitution granted by this charter and could pass legislation 'for the peace, order and good government of the said colony, provided that the same be not repugnant to the laws of England'.⁴

Natal, however, had to consolidate her borders. On the south-west she obtained in 1866 a cession of territory from the Pondo

¹ 8 & 7 Will IV, c. 57

² Legislation by the Cape was authorized under letters patent dated May 31, 1844 and April 30, 1845

³ Granted under letters patent dated July 18, 1856

⁴ See *infra*, Chapter III § (iii)

chief In Zululand, on the north-eastern border, the experiences of the Cape Colony with the native tribes were repeated. The Zulu war broke out in 1879 and ended by the removal of the chief Cetewayo to the Cape Colony. A British resident was appointed, but the actual government of the territory was left in the hands of several independent chiefs until 1882, when it was restored in part to Cetewayo. On his death, in 1884, a party of burghers from the Transvaal helped Dinuzulu, his son, to conquer his rival, and received in recognition of their services a gift of the territories of Utrecht and Vryheid, where they proceeded to set up a separate government under the name of the New Republic. In 1887 the British government recognized the New Republic (which was afterwards incorporated in the Transvaal), but annexed the remainder of Zululand. This was followed in 1895 by the further annexation of Amatongaland, which lies north of Zululand between Swaziland, Portuguese territory, and the sea. Up to 1897 these territories were administered by the British government on lines similar to those followed in Basutoland. In that year, however, this policy was abandoned, and Zululand was added to Natal just as the Transkeian territories had been added to the Cape Colony.

In 1902, after the second Boer war, the districts of Utrecht and Vryheid were detached from the Transvaal and included in Natal. The existence of Natal as a separate and self-governing colony is thus seen to be one of the direct consequences of the great trek. The presence of a white community there was itself the result of the natural expansion of settlement, and Great Britain only asserted sovereignty over it, because she could not allow a port on the road to India to come under the influence of a continental power. So far as possible she restricted the growth of the new territory. In the vast wall of the Drakensberg on the west, she found and adopted the one natural frontier in South Africa, and on the north-east she took the Tugela and Buffalo rivers as being the best boundaries available. But just as in the Cape Colony, she found herself drawn farther and farther along the eastern coast, without possibility of stopping, until, finally, her borders met the southern frontier of Portuguese East Africa.

Repeated attempts had been made to obtain responsible government, but there were difficult problems of colour and defence to overcome. If the British troops were withdrawn,

Natal's 30,000 whites would be at the mercy of 400,000 Zulus. If the natives were given a franchise, the whites would be swamped politically. If they were not given a franchise, their rights might be disregarded. There were in Natal 25,000 Indians, brought to the colony for labour purposes, who were demanding an education test for electors. In course of time the Europeans might find themselves without any political control in a territory in which they had hoped to establish a white civilization, and one that was predominantly British, for most of the Dutch colonists had left for the Transvaal. It was this colour question that brought into the constitution of Natal its first really important features as far as modern South African constitutional law is concerned.

An ordinance of 1849 preserved the power of native chiefs to try cases between members of their tribes according to native custom.¹ The early traders and hunters in Natal had gathered round themselves a number of native retainers, and had acquired in the eyes of the natives a status of petty chieftainship. Later the lieutenant-governor assumed the title of supreme chief of the native tribes, a position and title now held legally by the governor-general of the Union.² As supreme chief he had an absolute authority. He did not in those early stages rely on his council for advice in native affairs. The whole position is clearly set out in the Native Administration Law of 1875 and its amendment of 1887. Under these enactments the governor could appoint European administrators of native law as well as native chiefs or other native officers to preside and exercise authority over and administer justice among natives living under native customs within certain defined districts. These persons had

¹ Ordinance 3 of 1849, repealed by Ordinance 26 of 1875. See *infra*, Chapters XVII 9 and XVIII 3.

² See section 147 of the South Africa Act, 1909, and section 1 of the Native Administration Act (No. 38 of 1927), which, as amended by section 2 of Act No. 9 of 1929, reads as follows: 'The Governor-General shall be the supreme chief of all Natives in the Provinces of Natal, Transvaal and Orange Free State, and shall in any part of the said Provinces be vested with all such rights, immunities, powers and authorities in respect of all Natives as are vested in him in respect of Natives in the Province of Natal.' The preamble to Ordinance 3 of 1849 (referred to in the text) mentions 'the Lieutenant-Governor, whom the several native chiefs and tribes have hitherto regarded as their Supreme Chief, and to whom they have voluntarily yielded the same respect and obedience which they have been accustomed to yield to Supreme Chiefs of their own race' (See *infra*, Chapter XXV 1).

power to decide civil disputes between native and native, their decisions being subject to appeal to the native high court. All matters and disputes in the nature of civil cases between natives living under native law shall be tried according to native laws, customs, and usages for the time being prevailing, so far as the same shall not be of a nature to work some manifest injustice, or be repugnant to the settled principles and policy of natural equity.¹ Criminal matters were tried before the ordinary courts of law in the colony, but there were certain political and other offences of a public nature, such as faction fights, which might be tried in the native high court.²

The native high court consisted of a judge, sitting, if necessary, with assessors chosen from chiefs, administrators, or other native officers.³ From this court there was a further appeal to a court of appeal consisting of a supreme court judge, the secretary for native affairs, and the afore-mentioned judge of the native high court. The members of this court of appeal were in 1887 appointed to a board with two magistrates or justices of the peace, having power to alter native law after having obtained the consent of the governor and the legislative council. In form the alteration was made by proclamation under the governor's signature. The board drew up a remarkable code of native law which obtained the sanction of the legislative council in 1891.⁴ The sections referring to the powers of the lieutenant-governor in his capacity of supreme chief have been extended to the greater portion of the Union by an enactment of the Union parliament.⁵

¹ Section 5 of the Native Administration Ordinance, No. 26 of 1875. Cf. section 11 of Native Administration Act, No. 38 of 1927 (*infra*, Chapter XVIII, 3). The latter act repealed Ordinance 26 of 1875.

² The Native Administration Ordinance (No. 44 of 1887) has the curious provision that if there is reason to believe that there is a combination among any tribe or community of natives to suppress evidence of a homicide, assault, or other injury to person or property by natives, or to conceal the perpetrator, or by passive resistance to encourage a repetition, the governor may enforce a fine upon such tribe or community (section 6). The reason for this provision in the law was the difficulty which the police had in bringing home to any specific person almost any offence. The natives often lived or took refuge in some remote mountain fastness, involving danger of ambush or other treachery to police officers charged with the duty of making an arrest or seeking evidence.

³ See *infra*, Chapter XVII, 9.

⁴ Ordinance 19 of 1891. The relevant provisions of the Code appear in Chapter XXV, 1, *infra*.

⁵ These wide powers in their entirety were vested in the governor-general of

The code vested all political power and authority over all natives in Natal in the supreme chief. All native chiefs held their appointments under him, and he could subdivide tribes and appoint subordinate chiefs over them. He could dismiss chiefs, punish them, remove them from one part of the colony to another, demand from them armed assistance for the suppression of disorder and labour for public works. He might, acting in conjunction with the Natal Native Trust,¹ remove a whole tribe from one part of the colony to another. In fact, there was nothing which was legally beyond the power of the supreme chief. He could be the most despotic ruler in the world, if such a course were necessary for the good government of the natives. He could imprison or fine any person for disobedience to his orders or disregard of his authority, and no court of law in the colony could question the authority of 'any order, proclamation or of any other act or matter whatsoever, committed, ordered, permitted, or done either personally or in Council'. Yet the history of his office in Natal has no untoward incident to its discredit.

The significance of the Natal native code lies in the fact that it has been adopted in its entirety by section 1 of the Native Administration Act, 1927.

'The Governor-General [of the Union] shall be the Supreme Chief of all the natives in the provinces of Natal, Transvaal, and Orange Free State, and shall in any part of the said provinces be vested with all such rights, immunities, powers and authorities in respect of all natives as are, or may be from time to time, vested in him in respect of natives in the province of Natal.'²

This section makes applicable to the provinces of the Union, except the Cape, the enormous powers previously held by the governor of Natal. The Cape fell under an entirely different system, which will be discussed in the chapters which deal with the government of the natives.³ The natives in the Cape, however, also come within the scope of most of the provisions of the Native Administration Act, 1927.

the Union by section 147 of the South Africa Act, 1909, and section 1 of the Native Administration Act (No. 38 of 1927). See *supra*, p. 22 note 2, and Chapter XXV. 1

¹ A body consisting in practice of the governor and executive council, to whom was entrusted the care of native rights as regards the land occupied by them.

² Printed here as amended by section 2 of Act 9 of 1929. See also section 147 of the South Africa Act, 1909. See also *infra*, Chapter XXV. 1

³ See *infra*, Chapters XXIV and XXV.

It is to be noted that the authority of the governor of Natal as supreme chief was an absolute authority as far as the colony itself was concerned. Except in a few particulars provided for in the code of native law, when the governor had to act with the concurrence of his council, he was as supreme, and could be as autocratic as any tsar or sultan. This supreme authority the government of the United Kingdom refused to surrender when the time came for granting the colony responsible government. The native danger was too real, too proximate, too overwhelming, to be overridden by any other consideration.

The governor of Natal was also special commissioner for Zulu affairs. The terms of the commission of 1882 under which he was so appointed are instructive:

'We do hereby authorize and empower you in Our name and on Our behalf to take all such measures, and to do all such things in relation to the Native Tribes of Zululand as are lawful and appear to you advisable for maintaining Our Colony of Natal in peace and safety, and for promoting the peace, order, and good government of the tribes aforesaid, and for preserving friendly relations with them.'

It must be borne in mind that the natives in Natal and those in Zululand were of the same nation, and the political division of the two territories was largely an artificial one. Zululand was annexed to Natal in 1897 after responsible government had been granted to the colony.

A further point that delayed the grant of responsible government was the fear of complications with the adjacent republics of the Orange Free State and the Transvaal. Responsible government, however, could not be long delayed, and was eventually granted in 1893.

(vi) *Responsible Government* Responsible government was granted by the Constitution Act of 1893. This act was passed 'by the Governor of Natal, with the advice and consent of the Legislative Council thereof. In place of the legislative council until then subsisting, a legislative council and a legislative assembly were constituted. The Charter of Justice, however, was not repealed, and remained in force in so far as it did not conflict with the Constitution Act. The provisions regarding ministers may be cited.

- 8 Within three months after the commencement of this Act, and thereafter from time to time as may be necessary, the Governor

may designate such offices as he thinks fit, not being more than six in number, to be political offices for the purposes of this Act. Appointments to such offices shall be made by the Governor, in the name of Her Majesty, and such offices shall be held during Her Majesty's pleasure, and be liable to be vacated on political grounds.

The holders of such offices are in this Act styled Ministers, and a Minister shall not vacate his seat in the Legislative Council or Legislative Assembly by reason of his appointment to or retention of any such office.

- 9 Every Minister shall be, or shall within four months from the date of his appointment become, a member of the Legislative Council or of the Legislative Assembly, but not more than two Ministers may be members of the Legislative Council ¹

The council consisted of eleven members over the age of thirty, nominated for ten years, each being 'the registered proprietor of immovable property within the colony of the value of five hundred pounds in nett value after the deduction of the amount of all registered mortgages' ² Five members of the first council, to be decided on by lot, were to retire after five years. A peculiar provision in regard to these nominated members was that they were to be chosen from certain defined areas within the colony. The legislative assembly had thirty-seven members chosen in four-, three-, or two-member constituencies, made up of the various counties of Natal. It sat for four years unless dissolved earlier. Responsible government was, in the case of Natal also, indicated by the use of the words, during Her Majesty's pleasure.

The Constitution Act did not deal with the franchise, which consequently remained the same as before. All natives, except those 'exempted' from the operation of native custom, and possessing an 'exemption certificate', ³ were excluded from the franchise by the Native Franchise Act of 1865. Very few natives indeed managed to qualify as electors. Under the act of 1897 the annexed territory of Zululand became known as the Province of Zululand and was subject to the parliament of Natal. The powers of the supreme chief remained unaltered.

¹ Cf. section 14 of the South Africa Act, 1909, in which the period is three months.

² Section 15 of the Constitution Act, 1893. Cf. section 26 of the South Africa Act, 1909 which in this respect is almost identical.

³ See *infra*, Chapter XXV. 2 (u)

3. The Orange Free State and the Transvaal

The Free State as it is popularly termed, has two periods in its development (i) as an independent republic, and (ii) under the British crown after the Boer war. The Transvaal also has two stages, (i) as the South African Republic, and (ii) as a British colony. The constitutional development of the twin republics was not very dissimilar. In the second stage of their development, their constitutions were identical. We shall deal with them together for reasons of convenience and for purposes of comparison, dividing this section into four parts: (i) The Orange Free State, (ii) The South African Republic, (iii) Crown Colony government in the Orange River Colony and the Transvaal, (iv) Responsible government in the Orange River Colony and the Transvaal.

(i) *The Orange Free State*. The population of the Free State consisted of the emigrants or voortrekkers from the Cape or their descendants, and some of those from Natal. At first there was a British resident at the spot that later became the town of Bloemfontein. In 1848 British sovereignty was peacefully established by proclamation of the Cape governor, with the object of protecting the rights of the native chiefs. In 1849 a small council was appointed to assist the resident, and it seemed as though the Free State were to follow the ordinary development of a British crown colony. On January 30, 1854, a royal proclamation was issued renouncing all dominion over the territory, because of the costliness of maintaining its defence against the Basuto tribes, and on February 23, in the same year, an agreement was entered into with certain Dutch inhabitants transferring the territory to their administration. This agreement is known as the Bloemfontein Convention. The British government, in entering into a Convention for finally transferring the Government of the Orange River Territory to the representatives delegated by the inhabitants to receive it, guarantees 'the future independence of that country and its Government'. Except for observing the treaties already entered into with certain native chiefs, Her Majesty's Government has no wish or intention to enter hereafter into any treaties which may be injurious or prejudicial to the interests of the Orange River Government. Thereafter, within two months, on April 10,

1854, and three weeks after the convention was ratified by the British authorities, the Orange Free State constitution or *grondwet* (which in Dutch means basic law) was adopted. Slight alterations were made in 1866 and 1868, but generally the constitution remained remarkably stable and smooth in its working.

Eybers, writing of the Free State in the introduction to his *Select Documents Illustrating South African History*, declares

‘Its idealism remained unimpaired, and it will be strange if it does not turn out to be the bearer of ideas to the other communities in the present century. The smoothness of its career was reflected in the stability of its constitution. Its laws were as terse and finished as could be expected, nearly as complete and polished as could be desired. The tiny annual publications show that as regards its constitution it pursued the even tenor of its way till the end and hardly found any modifications necessary.’

The first inhabitants of the Free State had expressed an ambition in 1837 ‘to establish our settlement on the same principles of liberty as those adopted by the United States of America, carrying into effect as far as possible, our burgher laws’¹. One legislative chamber called the Volksraad was constituted, a president was elected, and an executive, partly appointed and partly elected, and dependent upon the Volksraad, was established. Local government and the higher courts of justice followed the Cape models very closely.

The franchise was a wide one. Every male white person born in the Free State, or any white person who had resided there a year and possessed immovable property to the value of £150, or any male white person who had resided in the Free State for three years, was entitled to vote for a Volksraad member and for the state president.

The Free State constitution may be termed a ‘fundamental (or basic) law’, because it could be changed only by a three-fourths majority in two successive annual sessions of the Volksraad. The executive, legislative, and judicial functions were well separated. The constitution did not expressly state that the high court had power to declare whether a law was against the constitution or not, but the court undoubtedly did have this power without the enabling statute of 1885, e.g. if the Volksraad amended the constitution without a three-fourths

¹ G. M. Theal, *History of South Africa (1795-1872)* (London, 1908), vol. II, p. 316.

majority in successive sessions, as required by the constitution, a court could declare that the amendment was invalid

The Free State constitution of 1868 is a document remarkable for the simplicity of the form of government for which it provided.¹ The republic had a single chamber Volksraad consisting of members chosen by a majority of votes in single member constituencies. Members had to be over the age of twenty-five and had to possess unencumbered fixed property to the value of at least five hundred pounds. Members were chosen for four successive years, half the members vacating their seats in rotation, so that parliament was in theory perpetual. The Volksraad had the power to try the president of the republic and public officers for treason, bribery, and other high misdemeanours. The constitution contained provisions, as most of the rigid constitutions do, guaranteeing the liberty of the subject, and of the press, and the right of property. It further contained the provision that the Volksraad shall make no laws to prohibit the inhabitants from assembling in a peaceful manner, or from petitioning the government to be relieved from difficulties or to obtain a change in any law.

The president was chosen by popular vote for a period of five years. He was the head of the executive authority and supervised public departments and the public service. He was responsible to the Volksraad for all the appointments he made, and that body could refuse to ratify any of his actions. With an executive council consisting of two permanent officials and three members elected by the Volksraad, he exercised the prerogative of mercy, and, subject to ratification by the Volksraad, declared war and made peace and treaties.

The constitution of the Free State concerned itself only with the fundamental matters of state which it treated broadly, and in simple sweeping language. The details of the administration of justice were left to a separate code, which made the judiciary independent of the executive, but not of the legislature. There were a number of laws explanatory of the *grondwet*, e.g. regulating the election of the state president, the prerogative of mercy, the declaration of war and the making of peace, the proceedings of the executive council, and so on. The *grondwet* of the Free

¹ This constitution should be studied when reading Chapters XV and XVI *infra*

State did not contain a jumble of matters relating to the discipline of domestic servants, the duties of poundmasters, and the qualifications of auctioneers, as did the *grondwet* of the South African Republic

A feature of the Free State constitution was the supremacy of the legislature acting under the constitution. The president, the executive, and even the judges, were responsible, in so far as integrity and the efficient performance of their public duties were concerned, to the Volksraad. Another feature of the constitution was the democratic manner of appointing important officials like field-cornets and the elected members of the executive. The former were elected by all the electors in the districts in which they were to function, the latter were elected by the Volksraad.¹ A third feature was the centralization of every administrative action in the state president. Even where he did not appoint, he gave instructions. He was the supreme figure in the state, he visited the offices of all the officials, either in person or through his subordinates, he could suspend, he could appoint, sometimes permanently, mostly temporarily, he could negotiate with the enemy, he, either alone or with his executive council, controlled the administration of the state, but the Volksraad controlled the president. He was responsible to the Volksraad for his every action, it ratified every appointment, every treaty, every suspension, it could suspend the president himself, it could dismiss him for ever from the service of the state. It was supreme—but it was itself under the constitution, and the constitution was made by the people. The fourth and last important feature of the constitution was the rule of law. Though the president or official could be dismissed by the Volksraad, its sentence could not go farther than that, it could not fine or imprison, it could only dismiss. Punishment was within the power of the courts of law 'which are established by law' 'Every inhabitant owes obedience to the law' 'The judge shall exercise all laws with impartiality and without respect of persons' 'The law is for all alike'

There were many similarities in this constitution to the United States constitution, but there were fundamental differences. First, it was not a federation. Secondly, it had no institution like the federal court. Thirdly, it had only one chamber

¹ See suggestions in regard to provincial councils *infra*, Chapter XVI

Fourthly, the process of amendment was entirely different. These differences sprang from the difference between a federal state and a unitary state.

There were, however, differences which arose from intentional departure in two respects. Because the Free State had only one chamber, a property and age qualification for membership was imposed, so that responsibility and discretion in the members of the legislature would counteract the possible effects of the almost universal male adult suffrage. Secondly there was a vast difference in the powers which the president had in the two countries, the Free State president being so much more under the control of his legislature, and being unable even to choose his own cabinet, as can the president of the United States.

It has been said that the constitution of the Free State shows that that state was nothing but a petty affair, a miniature model of government. But this is certainly not the case. The constitution was one of the most admirable that ever existed. It did not have the weakness of an upper chamber, nor the constant appeal to the electorate when the house differed from the executive. It could have adapted itself to an enormous population. Many of its features could be adopted with advantage by other states. The simplicity and conciseness of the phraseology of all its legislative enactments might well replace the ponderous complexities of modern legislation. It certainly is a model for the reform of the provincial constitutions of the Union.

Two ordinances of 1866 and 1867 regulated the government of the natives. A commandant invested with the authority of a *landdrost*, was placed over each of the native districts. The natives retained their own laws and customs, administered by their own chiefs under the guidance of the commandant. But the criminal laws of the Free State were made applicable to all natives—a wise measure, as the native laws were primitive and barbaric in matters of punishment. Disputes of a civil nature could be brought before the chief and his council. There was a right of re-trial, on 'complaint' brought, before the commandant. The natives could be required to provide troops for the government. The only tax was one of ten shillings on the owner of every hut, payable in January of each year—in order to defray Government expenses. No white persons could settle

in native territory, nor trade there without special permission, but Dutch Reformed Church missionaries were allowed to go among the natives. The supply of liquor was prohibited. The Free State president, with the advice of the executive council, had 'the right to make, from time to time, such regulations for the commandant as may be found necessary according to circumstances'. The natives were thus removed from the control of the Volksraad by the desire of that body itself, a provision not entirely unlike the Natal provision granting powers to the supreme chief, but in no way so autocratic and severe. In the Free State legislation can be seen the first principles of a segregation policy.¹

(ii) *The South African Republic* The small republics which originally existed in the Transvaal were merged under a common *grondwet* in 1858. This constitution was changed in 1889, 1890, and 1896. It was originally drawn up with the experiences of the burghers in the Cape vividly before the framers of this remarkable document. 'What they had disliked in the Cape Colony they discarded, what they thought had suited their needs they retained—whether it was something quite old or something quite novel to their experience did not matter. The whole document becomes one of the most interesting instruments ever published in South Africa if it be read with this obvious fact in mind.'²

The Volksraad consisted of twenty-eight members, who had to be between the ages of thirty and sixty years. The franchise was open to every male European burgher of the republic over the age of twenty-one years. The president of the republic was chosen for a period of five years by a majority of votes of the burghers. He had to be a member of the protestant church and over the age of thirty. All laws had to be proposed or recommended by the president. The executive council consisted of two officials and two elected members. The president and the executive committee could sit and speak but could not vote in the Volksraad. The power of pardon was vested in the president and the executive council acting together, but it could be exercised only on the recommendation of the court which pronounced the sentence. In confirming death sentences or making

¹ See *infra*, Chapter XXVI. 1

² Eybers, *Select Constitutional Documents*, introduction, p. lxxviii.

a declaration of war, the unanimous vote of the executive council was necessary before a decision could be taken ¹

The judicial power² was exercised by a high court of justice, circuit courts, landdrosts' courts, heemraden³ and juiors, and field-cornets. The *grondwet* dealt with the military power and the council of war, and a great number of other matters of minor importance, from the regulation of trade to the minutest instructions to public officials.

In 1859 it was enacted that the common law of the republic was to be sought first in the text-book of van der Landen, then in the 'law-book of Simon van Leeuwen and the Introduction of Hugo de Groot' (*Grotius*).

There were three leading characteristics in the republican constitution. The first was the constant reiteration that the people were the source of all authority. In one form or another this doctrine appeared in almost every section of the *grondwet*. 'The people delegate the function of legislation to a Volksraad, the highest authority in the country, consisting of representatives or plenipotentiaries of the people, elected by burghers possessing the franchise, but it is provided that a period of three months be given to the people to enable them to convey to the Volksraad their views on any proposed law, except in the case of laws which can brook no delay.' 'The people desire to permit no equality between the coloured races and the white inhabitants.' 'The people entrust the maintenance of order to the military power.' 'The people vest the judicial power in judges.' 'The people shall annually receive from the Volksraad an estimate of general expenses for the state.' 'The people desire to put up with no slavery in this republic.' The second characteristic was the extreme flexibility of the constitution. It could be

¹ The constitution of the executive council was amended by the *Grondwet* of 1880 to consist of the commandant-general, two burghers possessing the franchise, a secretary and a minute-keeper, 'whose votes shall all be of equal value'. The superintendent of native affairs and the minute keeper were *ex-officio* members of the executive council.

² This provision was amended by section 115 of the *Grondwet* of 1880. Law 14 of 1870 regulated the appointment and powers of justices of the peace.

³ Wessels, in his *History of Roman-Dutch Law*, p. 152, states 'The word *heemraad* has an interest for us, for our early South African courts were courts of Landdrost and Heemraden. The word *heem*, from which this word is derived, means a homestead, and is connected with a German word meaning a hedge, *raad* means councillor. When the early Dutch settlers came to the Cape they called the president of their court landdrost, and the members *heemraden*.'

amended by the Volksraad either by means of a 'law' (or statute, as it would be termed to-day) or by means of a *besluit* (a resolution of the Volksraad). In order to effect a change in the constitution by a law, three months' prior notice was required, but this drawback was overcome by the simple device of passing a resolution approving of a whole 'bill' introduced by the president and declaring that the bill was henceforth the law of the land.

The third characteristic was the supremacy of the Volksraad, a consequence of the device of making laws by resolution. 'Every court shall observe all resolutions of the Volksraad as law, shall be entitled to make no remark and pass no judgment about them, and what has been decided or approved of by the Volksraad may not again be subjected to the cognizance of any court of law.'¹ This provision was followed for thirty-six years, when an attempt was made suddenly by the high court to ignore the resolutions of the Volksraad. The incident gave rise to the great constitutional struggle on the 'testing right' claimed by the courts.

The Transvaal bench consisted of five judges, with the distinguished Kotze as chief justice. Kotze had delivered two important judgments in 1884 and 1887, recognizing the fact that a resolution had the force of law and that the *grondwet* held no more privileged position than any other law, the high court had no power of testing the validity of a resolution as being repugnant to the *grondwet*.² The latter judgment was dissented from by Jorissen, who sat in the case with Kotze and Esselen, and Kotze had himself declared that the *grondwet* should permit the high court to test in the same manner as the *United States constitution* provided. Gradually Kotze came to the conclusion that his judgments in those two cases were mistaken. 'A written constitution', he wrote to de Villiers, chief justice of the Cape, in 1897, 'is the sheet anchor of a state, and especially is this so in the case of a republic. The minority in the state, especially at a time when political feeling runs high, is to be protected against the majority, and this can alone be done by the safe-

¹ Article 2 of the second addendum to the *grondwet*, 1859, which recites that 'uncertainty exists' as to the interpretation of the *grondwet*.

² *McCorkindale's Ex v Bok*, N O, (1884) 1 S A R 202, *Dom's Trustee v Bok*, N O, (1887) 2 S A R 189.

guard of the constitution ¹ In 1895, in the *Hess* case, he declared that the essential requirements for the validity of a statute under the *grondwet* were that it should not conflict with the *grondwet*, that it should have been passed in form provided by the *grondwet* and that it should have been duly promulgated ² In 1897 the validity of a Volksraad resolution was again disputed before the court, and Kotze and Ameshoff held that 'the High Court had power to test the validity of any law of the Volksraad and to declare the same illegal and void in so far as it conflicted with the provisions of the *Grondwet*', and that 'a resolution of the Volksraad has not all the effects of a law. A law, properly passed in accordance with the *Grondwet* of 1858, cannot be repealed, altered or interpreted by a mere resolution of the Volksraad, not introduced, considered, adopted and duly promulgated in the form of a law' ³ The Volksraad, as a result of these judgments, passed Law No 1 of 1897, which, ironically enough, was passed as a resolution of the Volksraad, but it threatened the judges with dismissal if they in future ignored the resolutions. Lord de Villiers came to the Transvaal to mediate between the president and Kotze, for he held the view that the latter was wrong ⁴ Kotze affirmed that the Volksraad was not a supreme legislature but a legislature subordinate to a constitution which had been created by a sovereign people, who endowed it with certain powers which were to be exercised strictly according to the powers so granted. The constitution, Kotze thought, was as rigid as the constitution of the United States ⁵ In the end, however, Kotze surrendered, but he had

¹ F. A. Walker, *Lord de Villiers and His Times* (London, 1925), p. 288.

² *Hess v. The State*, (1895) 2 Off. Rep. 112. The first two rules in this judgment would apply to the United States or Australian constitutions, or to the 'entrenched' or 'fundamental' clauses of the South Africa Act, 1909 (See, e.g., section 152). The judgment in its entirety would apply to ordinances of the provincial councils. (See sections 66 and 61 of the South Africa Act, 1909.)

³ *Brown v. Leyds*, N.O., (1897) 4 Off. Rep. 17, 14 *Cape Law Journal*, 71, 94.

⁴ Walker, *Lord de Villiers and His Times*, pp. 291 and 294.

⁵ This view was held in regard to the Constitution of the Free State by Melhus De Villiers, chief justice of the Free State, see *Nineteenth Century*, March, 1897, Walker *Lord de Villiers and His Times*, pp. 293 ff., where it is stated that Kotze had discussed the question with Lord Bryce, author of *The American Commonwealth*, who had visited Pretoria in 1895. Bryce printed in the *Forum*, April 1896, an essay on the constitutions of the Orange Free State and the South African Republic in which he acknowledged his indebtedness to de Villiers and Kotze. The essay is reprinted in Bryce, *Studies in History*

first obtained an undertaking by the president that the constitution would be amended to include provisions safeguarding it from ordinary legislation and guaranteeing the independence of the high court

In 1890 a great change was made in the constitution. Hitherto the Volksraad had been a single chamber, but by Law 4 of 1890 it was made a two-chamber body. The First Volksraad, as the original body was now called, retained its supremacy, and could pass legislation without requiring the concurrence of the Second Volksraad. The latter consisted of the same number of members who were elected in the same constituencies as the First Volksraad, but the electors included immigrants who had been resident in the republic for two years. The Second Volksraad could be overridden by the legislation of the First Volksraad, and its powers of legislation were strictly limited to certain subjects. On those subjects, however, as long as it was not overridden by the First Volksraad, it could pass legislation without requiring the assent of the First Volksraad. This amended constitution of the republic, which was introduced on account of the friction with the large outlander population regarding franchise rights, remained in force until it was swept away by the Boer War of 1899. In 1877 there had been an interruption in the life of the republic by its annexation to the British Empire. The form of government during that period was that of a military despotism, but in 1881 independence was restored, though Britain retained suzerainty over the territory until the London convention of 1884. The events, however, which led up to these troubles and to the war of 1899 are beyond the scope of this work and must be sought in books which treat of political history.

(iii) *Crown Colony Government in the Orange River Colony and the Transvaal*. On August 2, 1901, and September 23, 1902, letters patent were issued under the great seal of the United Kingdom providing for the government of the Orange River Colony and the Transvaal respectively. Both instruments are almost identical. Before these instruments came into operation the two territories were governed by an administrator, and the administrators of the provinces under Union probably take their

and *Jurisprudence* (Oxford, 1901), vol. 1, pp. 359-90. On the issues between Kotze and Kruger see (Sir) J. G. Kotze, *Documents and Correspondence relating to the Judicial Crisis in the South African Republic*.

title from the name given to the crown colony officials who then administered the territories for about two years.

The letters patent established a governor and commander-in-chief over both colonies, and a lieutenant-governor for each colony, acting with an executive council and a nominated legislative council which, subject to certain defined limitations, had full power to make laws for the peace, order, and good government of the respective colonies. The same person, Lord Milner, was appointed governor for both colonies, and also high commissioner for South Africa. The crown reserved to itself not only its 'undoubted right to disallow ordinances but also 'undoubted right to legislate by order in council. Ordinances were to be 'enacted by the Lieutenant-Governor of the (Colony), with the advice and consent of the legislative council thereof' 'The lieutenant-governor is to the utmost of his power, to promote religion and education among the native inhabitants of the colony, and he is especially to take care to protect such native inhabitants in their persons and in the free enjoyment of their possessions, and by all lawful means to prevent and restrain all violence and injustice which may in any manner be practised or attempted against them' ¹ The constitutions generally were the same as the constitutions under crown colony government elsewhere.

(iv) *Responsible Government in the Orange River Colony and the Transvaal* The Orange River Colony had a legislative council of eleven members and the Transvaal one of fifteen members, all nominated, but power was given to amend the constitution in this respect so that the council might be elected. The legislative assembly consisted of thirty-nine and seventy elected members respectively. There were five ministers in the smaller colony and six in the Transvaal. The legislatures had the usual wide powers of legislating, except that proposed laws affecting divorce, currency, foreign relations, the imperial forces and navy, merchant shipping, and differential duties, had to be reserved. The lieutenant-governor, also, was the paramount chief over all the natives, and he had power to summon assemblies of chiefs. As under crown colony government, one person, Lord Selborne, was appointed governor over the two territories, and high commissioner for South Africa.

¹ Section 29 of the Instructions

The redistribution of electoral divisions was to take place automatically every two years, and was to be effected by a delimitation commission. This provision finds a counterpart in the South Africa Act, 1909.¹ Another important innovation, as far as South African constitutions were concerned, was a provision that if the two houses failed to agree, the governor might convene a joint sitting, or might dissolve the assembly, or both the council and the assembly, if the council was an elected body. If, after dissolution, the houses still disagreed, the governor might convene a joint sitting. At any joint sitting the members were to deliberate and vote together, and decide by an absolute majority of the total number of members. This provision also finds an echo in the South Africa Act.² It is not necessary to mention the franchise to any greater extent than to say that the natives were expressly and entirely excluded from the universal male suffrage.³

Responsible government was granted to the Orange River Colony by letters patent dated June 5, 1907, and to the Transvaal by letters patent dated December 6, 1906 (when letters patent dated March 31, 1905, which had remained ineffective owing to a change of ministry in the United Kingdom, were revoked). In both colonies responsible government was indicated by the use of the words 'during His Majesty's pleasure', which means that the pleasure of the crown was to be exercised not according to the conduct of the ministers, but according to the view of their conduct taken by the popular house of parliament.

4. The High Commissioner for South Africa, and the Inter-Colonial Council

There are two topics which may be dealt with in this chapter, as they concern in some measure the constitutional development of the South African colonies, and throw some light on constitutional problems both before and after Union.

(1) *The Office of High Commissioner*. The office of the high commissioner in and for South Africa was created by letters patent in 1878. In 1879 a second high commissioner was

¹ Sections 38-43.

² Section 63. The instruments providing for the government of the Orange River Colony and the Transvaal are in House of Commons Papers (1905), 130, pp. 27-47.

³ The whole subject of franchise is dealt with *infra*, Chapter X. 2

appointed, to whom was assigned South-Eastern Africa including Zululand. This arrangement ceased in 1881 when a special Commissioner for Zulu affairs was appointed who was also governor of Natal. But the origin of the office really goes back to 1846, when the governor of the Cape was appointed 'Her majesty's high commissioner at the Cape of Good Hope for certain purposes.

The duties of the Cape high commissioner were to control the relations of the colony with the adjoining native tribes subject to the direction of the government in London, to prevent attacks upon the colony by those natives and to endeavour to place them under some settled form of government. In time the high commissioner came to hold a multiplicity of offices, becoming the supreme head of Basutoland, Bechuanaland, Griqualand West, and Rhodesia and representing the crown in its relations with the Orange Free State and the South African Republic.

On the conclusion of the Boer war the office of the high commissioner began to assume an even more complex character. On October 6, 1900, Sir Alfred Milner, and on March 15, 1905, the Earl of Selborne were appointed to the office of high commissioner under identical commissions. The commission authorized the high commissioner to transact in Our name and on Our behalf all business which may lawfully be transacted by you with the representative of any Foreign Power in South Africa and to do all such things as appear to you to be advisable for maintaining Our Possessions in peace and safety, and for promoting the peace, order and good government of the [native] Tribes aforesaid, and for preserving friendly relations with them.

Many of the duties of the high commissioner are of the utmost importance. He is still the governor of Basutoland, and supervises the affairs of the Bechuanaland Protectorate and of Swaziland.¹ During the years 1910 to 1930 the office was vested by separate commission in the successive governors-general of the Union of South Africa. This arrangement ceased upon the

¹ Swaziland was transferred to the control of the high commissioner by order-in-council December 1, 1906. For the legal status of the territory see *Sobhuza II v. Miller and the Swaziland Corporation, Ltd* [1926] A.C. 518. Southern Rhodesia passed from the control of the high commissioner on the grant of responsible government to that territory, October 1, 1923.

termination of the period of office of the Earl of Athlone. The decisions of the Imperial Conferences of 1926-30 that the Governor-General was the representative solely of the King, and not an agent of the Government of the United Kingdom, made it inevitable that he could no longer logically exercise the absolute administrative functions of high commissioner for South Africa. Sir Herbert Stanley was accordingly then appointed by His Majesty to be high commissioner for South Africa, and he holds that office concurrently with the newly created office of high commissioner in the Union of South Africa for His Majesty's government in the United Kingdom. So that, to-day, the office consists of the office of governor for the various native territories in South Africa which do not fall within the jurisdiction of the Union government, and the office of the representative in the Union of the government of the United Kingdom.¹

(u) *The Inter-Colonial Council*. The commission to Sir Alfred Milner and to the Earl of Selborne contained the following provision

VI And whereas it is desirable that the administrations of our various Colonies and Protectorates in South Africa should act in harmony in regard to subjects of common interest, such as the treatment of natives, the control of armed forces, the traffic in arms and ammunition, and the working of railways, posts and telegraphs, We do direct you from time to time as may seem to you expedient to invite the Officers administering the Governments of Our said Colonies and Protectorates to send representatives to confer with you as such Our High Commissioner and with each other on the measures to be taken in regard to any or all of such subjects of common interest

As a result of this provision the inter-colonial council was established by various orders in council of 1902-5.² The object of this body was to avoid a division of the railway system which extended over the Transvaal and Orange River Colony, and its functions also included the control of expenditure connected with the South African constabulary. The council ceased to exist on June 2, 1908, after the introduction of responsible government. The great importance of this council is that it brought to the forefront of practical politics the necessity for a central

¹ See *infra*, Chapter XXXII

² Sept 15, 1902, May 20, 1903, Apr 21, 1904, Jan 12, 1905, May 10, 1905

control of the many services and problems of the four South African colonies. Representatives of the two northern colonies, some appointed and some elected from the legislative councils, sat together and tried to solve the problems which had become so difficult and pressing because of the divided approach to them and of the divided control of services of state which could be more easily and effectively managed by a central government. The high commissioner presided over this combined body, but its decisions required legislative sanction by the two councils of the colonies. This was always obtained, and the inter-colonial council was a decided success and contributed largely to the movement towards closer union.

Conclusion

When Union was proclaimed on December 2, 1909, to take effect from May 31, 1910, the four colonies in South Africa enjoyed an equal status, that of responsible government colonies. Their constitutions were similar, their judicial and legal systems were almost identical. Nearly all the more important common features in their constitutions were transplanted to the constitution of the Union. The South Africa Act did not give South Africa something entirely new as far as the form of a constitution was concerned. The constitution of the Union is a replica on a large scale of the pre-existing constitutions of the four colonies. In the first place the whole system of responsible government was the same. It is true that the powers of the Union legislature are wider than were those of the legislatures of the Transvaal and Orange River Colony, but this is only a matter of detail affecting a small number of topics and in no way affecting the wide powers of legislation generally possessed under a form of responsible government. The real change effected was the substitution of one responsible government system in place of four responsible government systems, and the consequent centralization of powers in that one government, at the same time granting the control of more or less minor or local matters to the four local and entirely subordinate provincial legislatures.

The Cape was the first South African colony to obtain and develop representative institutions, and it was only natural that

the representative institutions granted to the other colonies should follow the Cape model both in the manner of their establishment and in their development. And this indeed was the case. The Cape is the mother colony of South Africa, its parliament South Africa's mother parliament. The Cape system, however, itself closely follows that of the United Kingdom. Thus we have it that the Union constitution, through the choice of a unitary instead of a federal form, and reproducing as much as possible of the constitutions of the Cape and the colonies modelled on the Cape, is so much like the constitution of the United Kingdom.

There is inherent evidence in the South Africa Act, 1909, of the continuity of constitutional development. As little as possible is disturbed. 'All laws in force in the several colonies at the establishment of the Union shall continue in force until repealed or amended.'¹ 'All persons who have been naturalized in any of the colonies shall be deemed to be naturalized throughout the Union.'² 'All officers of the public service of the colonies shall at the establishment of Union become officers of the Union.'³ 'All powers, authorities, and functions lawfully exercised at the establishment of the Union by divisional or municipal councils, or any other duly constituted local authority, shall be and remain in force until varied or withdrawn by parliament or by a provincial council having power in that behalf.'⁴ 'The several supreme courts shall become provincial divisions of the supreme court of South Africa within their respective provinces.'⁵ 'All judges of the supreme courts of the colonies shall become judges of the supreme court of South Africa.'⁶ The Union further takes over all the assets as well as the liabilities of the former colonies, and, as far as internal or external obligations are concerned, it steps into the place of the former colonies.⁷ Whatever had been useful, whatever worked well in the constitutions of the former colonies, and of other countries also, was moulded into the new Union constitution. The fathers of the constitution went to the constitutions of Switzerland and the old South African republics for the provincial council executive committee system. They went to Canada for the wording of many sections of the South Africa Act. They took from Natal and the Cape

¹ Section 135² Section 138³ Section 140⁴ Section 93⁵ Section 98⁶ Section 99⁷ Sections 119, 121-5, 148.

the 'unencumbered property' qualifications of senators. They saw that the power of the upper house to amend money bills did not work well in the Cape, so they were careful to avoid the same error in the Union constitution. Though the supreme courts had an inherent jurisdiction to decide the validity of any South African enactment, yet the South Africa Act especially provided that the supreme court could decide the validity of provincial council ordinances, a quite unnecessary precaution, but one perhaps deemed advisable by those who remembered the famous Kotze controversy. In addition there was no autocratic power which had hitherto worked so well as the autocratic power of the supreme or paramount chief. Into the South Africa Act, therefore, that very autocratic power went. In some of the colonies there were nominated members of the upper house, in others there were elected members. Whether the one method was better than the other, few could say with conviction. Both methods, then, were adopted, there was a compromise. And so it happened that wherever there was difficulty, there most clearly we find compromise. The battle for federation left its scars on the Union constitution, and the constitution of the senate as well as representation in the assembly shows how bitter was the struggle. Therefore the Union constitution, though decidedly a unitary one, has distinct traces in it of federalism, but because they are only traces, and not outstanding characteristics, mere incidental digressions and not fundamental features, we can realize how decisive was the victory of unification over federation.

We thus see that except for the provincial council system, and those provisions in the act which were necessary to harmonize into a working unit the single central government which replaced the four colonial governments, the South Africa Act did not effect a great constitutional change. It is true that the former constitutions were swept away, but in the new constitution of the Union nearly every one of the former colonial characteristics reappeared. The changes that were wrought were not changes in constitutional form, they were changes in outlook, in vision, changes which come about when men are lifted out of the slough of narrow parochialism on to the high pedestal of national and international statesmanship. But the forms, the surroundings, the men, even the problems were the same. The new constitution

did not formulate a policy or bring about a solution of difficulties. It provided a machinery of government in exactly the same way as the former colonial constitutions provided a machinery of government. But the field of government was a larger one—the brains and resources of the four colonies were pooled for the benefit of a united nation.

II

THE MAKING OF THE CONSTITUTION

IN the preceding chapter we traced the development of the four colonial constitutions in South Africa up to the time of the establishment of the Union and we came to the conclusion, as far as it was possible at that early stage of this work, that the continuity of constitutional development persisted not only up to the time of union but even after the establishment of the Union. The establishment of the Union, though a distinct political advance, was not a great constitutional advance. The South Africa Act, 1909, added very little that was new to constitutional jurisprudence. There were one or two innovations, such as, for example, the provincial council system and the method of electing senators, but these innovations were not such as to upset constitutional theories already well established in South Africa and in other parts of the British commonwealth. The provincial council system was not a very great departure from the Canadian provincial system, nor is there anything in the whole of the South Africa Act (except for the above-mentioned innovations) that cannot be found in the constitutions of the other self-governing Dominions. It is necessary, nevertheless, to know why the few innovations did come about, and more particularly to know why one form of constitution was chosen in preference to another. It is the object of this chapter to endeavour to make these points clear.

1. Effects of Disunion

(1) *Artificiality of Disunion* In 1907, when Lord Selborne was High Commissioner for South Africa, he was asked by representative statesmen in South Africa to prepare a statement reviewing the position of the colonies in their state of disunion. 'In view of the conference on railway matters to be held between the various governments of South Africa within the next twelve months,' the minute of November 28, 1906, forwarded by the governor of the Cape to Lord Selborne declared, 'ministers have the honour to inform His Excellency the Governor that in their opinion any serious attempt on the part of the several British

colonies to accomplish a settlement on this question brings them to the border line of the larger question of political unification or federation' It was pointed out that the absence of an authority competent to dispose of questions in which two or more colonies were involved, and the time which the several governments wasted in attempting to negotiate settlements retarded the free development of the country generally The state of friction which at times existed impaired the good relations of the various South African communities and excited a feeling of mutual distrust between them

'Ministers doubt', stated the minute, 'whether any solution of the railway problem which may be suggested at the forthcoming conference¹ can be final or effective unless it is based on a re-consideration of the system of administration now existing in South Africa [They] recommend therefore that the Governor be pleased to submit these representations to Lord Selborne, with an expression of their desire and hope that in his capacity as High Commissioner for South Africa he will undertake to review the situation in such a manner that the public may be informed as to the general position of affairs throughout the country, their object in urging this course being that they consider it due to the people of South Africa that they should have a timely opportunity of expressing a voice upon the desirability, and, if acknowledged, the best means of bringing about a central national Government embracing all the Colonies and Protectorates under British South African administration'

In response to this request, and after communicating with the governments of Natal, Transvaal, Orange River Colony, and Southern Rhodesia, Lord Selborne drew up his famous *Review of the Present Mutual Relations of the British South African Colonies*,² which is considered the equivalent in South Africa of Durham's *Report on the Affairs of British North America* In the despatch to the governor of the Cape accompanying his *Review*, Lord Selborne stated

'To review the present situation in South Africa in such a manner that the public may be informed as to the general position of affairs throughout the country is a task which I should never have undertaken had I not been requested to do so by those who have a right to demand my services—the Ministers of the responsible governing Colonies of Cape Colony and Natal It is my dearest conviction that no healthy move-

¹ The railway conference was unsuccessful, but it passed the resolutions set out in section 2 of this chapter

² See A P Newton, *Select Documents relating to the Unification of South Africa* (London, 1924) and Basil Williams, *The Selborne Memorandum* (Oxford, 1921) The preliminary dispatches are in Newton and Williams

ment towards federation can emanate from any authority other than the people of South Africa themselves, but, when I am called upon by those occupying the most representative and responsible positions in the country to furnish such material as is in my possession, for the information of the people of South Africa, it is clearly my duty to comply with the request.

'In the nature of things, constant divergences of opinion and of interest arise between the Governments of the Cape Colony, of Natal, of the Orange River Colony, and of the Transvaal. How can those divergences of opinion and of interest be settled? At present they are settled through the High Commissioner, not, of course, by the High Commissioner. He simply represents the central organization in which the divergences of opinion or of interest are focused and he acts as the servant of the different Colonies in endeavouring to facilitate arrangements and accommodations among themselves. The High Commissioner, however, is not an independent authority. His action is subject to the control of the Secretary of State for the Colonies in Westminster, who, in his turn, is a member of a Government subject to the control of the Imperial Parliament. As things therefore are at present, in extreme cases of divergence of opinion or interest between the British South African Colonies, even in respect of affairs which are strictly the internal affairs of South Africa, the ultimate authority is the Imperial Parliament at Westminster. It is as a remedy to this system that the minds of men in South Africa are turning to some form of union between the British South African Colonies.'

In his *Review* Lord Selborne immediately tackled the question of the artificiality of disunion. There was no justification either for past disunion or for its present continuance. After stating that there were no great physical barriers separating one part of the country from another, and that differences of race and language should not be stressed, the report declared

'Of the five principal partners¹ in the confederacy of the British Empire, South Africa has in this respect an advantage over the United Kingdom and Canada, though not over Australia and New Zealand. Where two nationalities both Teutonic in origin are so generally mixed together throughout the sub-continent as are the British and the Dutch, in spite of a tendency on the part of the one race to settle in towns and on the part of the other to cling to the country, the fusion between them is merely a matter of time, as it was with the Saxons and Normans, who were related to one another in a similar degree of kinship.'

The *Review* then proceeded to discuss in thorough detail (i) the historical causes of South African disunion, (ii) the results of

¹ Canada, Australia, New Zealand, South Africa, and the United Kingdom. The phraseology of this sentence is significant.

disunion on the railway development of South Africa, (iii) the results of disunion on the fiscal policy of South Africa, (iv) disunion as affecting the native and labour questions in South Africa, (v) disunion as affecting the economic position, and to it was appended a *Memorandum on South African Railway Unification*. Each document will repay the most careful examination, both from the point of view of history, economics, political science, and matters of railway rates and policy. In Lord Selborne's *Dispatch*, which accompanied the *Review*, there is an admirable summary of the longer documents, and we propose to follow the classification adopted in the summary by Lord Selborne himself.

(ii) *Railway Rates*. As long as the governments of the four British colonies in South Africa were independent of each other, their railway interests were necessarily incompatible. There was a competitive struggle between the ports of Cape Colony and of Natal to snatch from each other every ton of goods which could be carried. The Orange River Colony desired as many tons of goods as possible to be passed to the Transvaal through its territory, but it was to the interest of Cape Colony that no such tons of goods should pass into the Transvaal through the Orange River Colony. In the same way it was to the interest of Natal to pass the goods consigned to the Transvaal from Durban into the Transvaal at Volksrust, and not at Verconing through the Orange River Colony. Thus the interests of Cape Colony, of Natal, and of the Orange River Colony conflicted the one with the other. But when it came to considering the railway interests of the Transvaal, then it was found that the interests of the Transvaal were diametrically opposed to the interest of all the other colonies. The Transvaal lost revenue on every ton of goods which entered the Transvaal by any other route than that from Delagoa Bay, for on that line the Transvaal had the longest mileage to the coast.

'This divergence,' stated Lord Selborne, 'this conflict of railway interests, would vanish like a foul mist before the sun of South African Federation, but no other force can dissipate it. There would no longer be a conflict of interests between the railway systems of Natal, of Cape Colony, and of the Orange River Colony. Nor would it any longer be to the interest of the Transvaal to lean exclusively towards Delagoa Bay. The wealth of the Transvaal would be used, not in enriching a foreign port and a foreign country, but in building up a great white population

in the British ports of British South Africa with interests identical with her own'

(iii) *Fiscal Policy* 'Questions of customs dues', wrote the Hon R H Brand, 'had always led to bad feeling. In old days the Cape Colony and Natal, controlling all the means of ingress into the inland colonies, had used their power in a manner which can only be termed unscrupulous. Like the robber barons of the Rhine, they forced all who passed by to pay toll. For years their treasuries simply took all the produce of the duties paid on goods consigned to the Transvaal and Orange Free State. The extortions of the coast colonies led to a result which soon made them repent of their rapacity.'¹

The Transvaal turned to Delagoa Bay, and made a treaty with the Portuguese Government under which goods to the Transvaal were admitted through the Portuguese port on favourable terms.² The coast colonies came to terms, and an attempt was made to form a customs union, but the Transvaal could not be persuaded to join. After the Boer war, Lord Milner succeeded in getting all the colonies to join a customs union. But under the agreement no colony was satisfied. 'One had too much revenue from customs, another too little, one wished for higher protective duties for the purpose of stimulating South African production, another demanded lower duties in order to cheapen the cost of living.'³ The farmers of the Transvaal regarded the great market of Johannesburg as peculiarly their own preserve, and clamoured for protection against the competition from the other colonies. In all the colonies the customs union was maintained, not because the people wished to maintain it, but because statesmen shrank from the consequences which might have resulted from its disruption.

Lord Selborne's *Dispatch* was as forceful on this aspect of the South African problem as it was on others.

'What would be the danger of a customs war between the British South African Colonies? Imagine each of them with a separate tariff framed expressly with the object of fostering the trade of one Colony to the detriment of the trade of its neighbour! Imagine each Colony ringed round with a barrier of internal customs houses! The result would be the destruction of commercial stability, the stagnation of industrial enterprise, the creation of a permanent depression. The sun of progress would go back ten degrees on the dial of South Africa. She would revert, and revert deliberately, to the helpless impotence for

¹ R H Brand, *The Union of South Africa* (Oxford, 1909), p 15

² Treaty of May 1884

³ Brand, *The Union of South Africa*, p 17

national advance to which the thirteen States of America were condemned before the Union, and the Kingdoms, Duchies, and Principalities of Germany before the creation of the German Empire. What a prospect of mutual heartburning and bitterness does not the contemplation of such a catastrophe present! Yet the danger will be imminent unless the Colonies take another step forward towards union. Can they stand still on the compromise embodied in the present Customs Convention? That Convention does not represent a South African customs policy, it is a compromise between five¹ Colonial customs policies, almost universally disliked, tolerated only because men shrink aghast from the consequences of a disruption of the Convention. The only path of safety is a forward path to a South African tariff, based on the deliberate policy of the South African people, affording permanent free trade to all South Africans within South Africa, offering a stable basis of investment to industry and commerce.

(iv) *The Legal System of South Africa* There were in South Africa four different sets of statutes enacted by as many different legislatures. A South African company might be formed and regulated under the laws of any of the colonies, and it was open to promoters to register under whatever law allowed the freest scope to their purposes. To take another instance, the law of weights and measures varied in all parts of the country. A foot and a ton meant one thing in one place and another thing in another place. But it was not only statute law that varied in each of the colonies. The common law which was being developed by the judges by means of judicial interpretation in the courts also began to have some startling differences in the various colonies. Until South Africa had a common court of appeal, a different and inconsistent common law was certain to develop in each of the separate colonies. 'The best instrument of establishing such a uniformity of laws,' wrote Lord de Villiers as far back as 1889, 'would be a common court of appeal for the different colonies and states. As a matter of practical convenience such a court would be extremely useful. The delay and expense of an appeal from the colonies to the privy council are so great, and the judges of that court are so little conversant with South African law, that the colonies at all events would not object to the establishment of an intermediate court of appeal.'²

¹ Southern Rhodesia is included in this reference.

² De Villiers to A. G. MacGregor, December 27, 1889, see E. A. Walker *Lord de Villiers and His Times* (London, 1925), p. 111.

(v) *Agriculture and Mining* The two great industries of South Africa are agriculture and mining

'No race of farmers in the world', wrote Lord Selborne, 'have more natural difficulties to contend with than those of South Africa. Scab, rinderpest, East African coast fever, locusts, are each in their degree a constant menace to the farmer. The plagues of nature know no artificial boundaries between Colonies, and are impartial in their visitations. Imagine the despair of the farmer in the Transvaal, who has successfully destroyed each swarm of locusts that has hatched upon his farm, when he sees fresh swarms of locusts appearing from a neighbouring Colony where the same process of destruction has not been accomplished. If one South African authority, exercising undisputed powers from the Cape of Good Hope to the Zambesi, were to carry out one consistent policy in support of the farmers, it is probable that, within a few years, not only would dread pests like the East African coast fever have disappeared, but scab might become rare among South African sheep, and the scourge of locusts might have passed into the record of a bad dream.'

The mining industry always depended greatly on an adequate supply of native labour. The demand for labour might be situated in one colony, and the supply which might fulfil that demand in another. Any attempt to bring the supply and the demand together could only be made by private individuals who were hampered by the existence of different laws regulating labour questions in the colony of the demand and the colony of the supply. Had there been a union or federation these difficulties would not have existed.

(vi) *The Colour Question* No country in the world has such a problem to face as the South African native problem. The white people of South Africa are committed to a path that few nations have trod before, and none of them with success.

'Their task', wrote Lord Selborne, 'is to lead upwards in Christian civilisation the natives of South Africa, who are in many different stages of development. There is the educated native, whose aspirations must be regarded with wide sympathy, and there are tribes still in the stage of barbarism. A more difficult or complex problem was never presented to a people, and it is ever shadowed by the responsibility of keeping order in the land and of the defence of civilisation against any turbulent or unruly element in the uncivilised masses.'¹

Long before union was brought about men recognized that the colour question in all its aspects had to be dealt with, not piecemeal by separate governments, but as one complex whole.

¹ The native population was over five millions, the white population about one million.

Hitherto the opposite policy had been pursued. The Cape had one native policy, Natal another entirely different, the Transvaal a third, the Orange River Colony a fourth. Different remedies were being applied to the same disease. Soon the gulf might be too wide to be bridged. Apart from this there was always the danger of a native rising. The white population, if united under one government, would be strong enough to deal with any danger of that kind, but under four governments not one of them, especially Natal, was safe from danger. Asiatic questions and immigration were also difficult to be dealt with by four separate governments.

(vii) *General Administration* 'Disunion not only brought with it many dangers. It meant also that government was inefficient, cumbrous, and expensive. Four separate systems were needed for the control of one million white inhabitants. There were four parliaments handling identical problems by means of differing laws, there were four courts interpreting those laws in different manners, there were four governors with their accompaniment of government houses, retinues, and staffs, there were four governments, driven in every sphere of their activity to recognize the necessity of unity and promptitude of action and yet failing to achieve either, there were four treasuries, each borrowing money without regard to the needs of the others, there were confusing differences in many of the laws, especially in such matters as patents, marriage, inheritance, and naturalisation. A man might be a British subject in the Cape Colony but not in the Transvaal. Taken alone, all these elements of waste and confusion were a potent argument for Union.¹

Public opinion was strongly in favour of union. Not only was nationalist and patriotic feeling stirred, but the business community had become convinced of the advantage of union on purely financial and economic grounds. The great mining houses declared strongly for union. Societies were formed in many different parts of the country to organize the forces favourable to union. Religious bodies exhorted the people towards the desired goal. Throughout the country, in every town and village men were firmly convinced that every evil to which the colonies were subject, every evil which affected industry or commerce, agriculture or finance, work or sport, was due to the fact of disunion. When the National Convention met on October 12, 1908, the country was set upon the establishment of a Union. For exactly half a century the question had been before the people of South Africa.

¹ Brand, *The Union of South Africa*, p. 20

2. The Movement towards Union (1858-1908)

The first move towards union came from the Orange Free State in 1858. Sir George Grey, the governor of the Cape, a man to whose memory every South African, to whatever race or party he may belong, looks back with affection and reverence, received from some of the leading people in the Free State, a document which had been widely circulated in that state early in 1858.

'We, the undersigned inhabitants of the Orange Free State without distinction of descent,' ran the document, 'unanimously address ourselves to your Excellency, the man who solely understood how to grapple with and ultimately to overcome the great difficulties in Kaffraria. It is our earnest opinion, that unless this country called Orange Free State is allied in general union with our parent Colony, it never will enjoy the blessings of peace and prosperity. Such federal union, if Her Majesty would deign to grant it to us, would enable us to preserve our officers of government, our National Assembly called "Volksraad", all of which did their best, under trying circumstances, to govern this country to the best of their abilities, it would also afford us the means to continue transacting our business in the Dutch language and to nurse the Church to which this country is so greatly indebted. In fact, nothing would disturb our present internal arrangements, and all remnants of old dissent would gradually disappear. We would then claim as a right that part of the revenue arising from duties on goods consumed in the Orange Free State, and that also of sending members to the general Parliament, that our voice may be heard in the Congress of our common fatherland.

'Whilst thus allied for better or for worse to the mother Colony from which unjustly we have been severed, we would, joining our sister Colony of Natal to the east and the districts of Colesburg and Albert to the south, form a compact union, and the prestige of such national federation would alone be sufficient to prevent those lamentable strifes with the native races which of late we had to deplore.

'We have read that your Excellency has matured a similar federative tie between the different States of New Zealand and we therefore sincerely trust that your Excellency will take this our fervent prayer into earnest consideration.'¹

Sir George Grey sent this document to the secretary of state for the colonies. He said that he had so frequently stated it as his opinion 'that such a federation would be a very desirable event, both for Great Britain and this country, that I need not

¹ A. P. Newton, *Select Documents relating to the Unification of South Africa* (London, 1924), vol. 1, pp. 1-3. There had been some discussion on the subject of federation in the Cape elections of 1854, see H. E. S. Fremantle, *The New Nation* (Capetown, 1909), p. 54.

trouble you with any further remarks upon that point, but I beg that I may be instructed as to the general purport of the reply I should return to any such application' ¹

A great deal of correspondence followed with Sir E. Bulwer Lytton, secretary of state for the colonies. Meanwhile the Volksraad of the Orange Free State passed a resolution requesting the president to communicate with Sir George Grey on the subject, and proposing a conference. Sir George Grey replied that he would recommend the Cape parliament to consider the matter. Sir E. Bulwer Lytton then wrote to Sir George Grey that 'Her Majesty's government are not prepared to depart from the settled policy of their predecessors by advising the resumption of British sovereignty in any shape over the Orange Free State'.² No wonder South Africa has been called 'the land of lost opportunities'. If this proposal had met with the sympathetic consideration which it undoubtedly deserved, the future history of South Africa might have been different. But because Sir George Grey recommended the Cape parliament to consider the matter as he had promised, he was recalled by Sir E. Bulwer Lytton. 'You have therefore placed Her Majesty's government', he wrote, 'in a position of extreme embarrassment and difficulty. It is for Her Majesty's government alone to determine whether steps shall be taken. You have so far endangered the success of that policy which they must deem right and expedient in South Africa, that your continuance in the administration of the government of the Cape can be no longer of service to public interests'.³ Bulwer Lytton's successor, the Duke of Newcastle, withdrew the dismissal, but adhered to the view that it was for Her Majesty's government to decide what steps to take as far as unification was concerned. But Her Majesty's government was soon to learn that its view was entirely wrong.

All the South African states and colonies, for the next decade

¹ *Parliamentary Papers*, 216, p. 1, July 5, 1858. On November 19, 1858, Sir George Grey sent his famous dispatch to the secretary for the colonies at the latter's request. See Newton, *Select Documents*, vol. 1, p. 4. Grey recommended a federal form of government 'including even native states' on the New Zealand model.

² Newton, *Select Documents*, vol. 1, p. 8, *Parliamentary Papers*, 216, p. 34 February 11, 1859.

³ Newton, *Select Documents*, vol. 1, p. 11, *Parliamentary Papers*, 216, p. 35, June 4, 1859.

or two, were prepared for some form of union, even the house of commons of the United Kingdom passed in 1872 a resolution 'that it is desirable that facilities should be afforded by all methods which may be practicable for the confederation of the colonies and states of South Africa' ¹ But the method desired in South Africa was that union should come from within and not in a form dictated by Downing Street The advent of Lord Carnarvon as secretary for the colonies marks the end of a chapter containing much promise and the beginning of a new one not richer in good intentions than in disasters ²

In Canada the Canadian settlement was made by the citizens of the federating colonies but Carnarvon did not understand the lesson of Canada He thought that the success of the Canadian Act of 1867 was due to himself—the minister who introduced the measure—rather than to the colonial statesmen who drew up the resolutions on which it was based He accordingly set about to force upon South Africa a similar measure In this he was encouraged by the historian J A Froude To Froude was due one cause of one of the most remarkable periods in the relationship of any colony with the mother country At the Cape it was thought that Froude had been sent out by Carnarvon actively to agitate in favour of confederation, and his presence was greatly resented ³ At a public banquet in Uitenhage at which both Froude and Merriman were present, the latter rather unjustly denounced Froude's propaganda as 'an Imperial agitation, an agitation from abroad', and the visit of the famous historian came to an end ⁴ Carnarvon, however,

¹ See Sir J C Moltino *Further South African Recollections* (London, 1928), p 216 (Sir John Moltino was the first speaker of the Union parliament.), also Fremantle, *The New Nation* p 66 Williams *The Selborne Memorandum* Resolutions were passed by the Cape assembly, June 9, 1871, the Cape legislative council, June 16, 1875, Griqualand West legislative council, July 28, 1875, Natal legislative council November 23, 1875 For letters from the presidents of the South African Republic and the Orange Free State dated July 18 and November 11, 1875, respectively, approving in principle of confederation, see Newton, *Select Documents*, vol 1, pp 12-23

² The phrase is Fremantle's (*The New Nation*, p 68)

³ G M Theal, *Progress of South Africa in the Century* (London, 1901), p 402, Walker, *Lord de Villiers and His Times*, p 128 For a careful estimate of Froude's 'mission', see E A Walker, *A History of South Africa* (London, 1928), pp 362-8

⁴ Newton, *Select Documents*, vol 1 p 30, note, Walker, *Lord de Villiers and His Times*, p 128

followed the advice contained in Froude's report¹ When he, however, endeavoured to call a conference of South African representatives the Cape parliament disapproved of the proposal A conference was finally held at the Colonial Office, but the Cape was not represented² On August 13, 1877, the South Africa Act, 1877, was passed, but the act proved to be stillborn

It was 'An Act for the Union under one Government of such of the South African Colonies and States as may agree thereto, and for the Government of such Union, and for purposes connected therewith'³ It followed very closely the British North America Act of 1867, especially in regard to the powers of the 'union parliament' and the 'provincial councils', dividing the jurisdiction of each *exactly in the same manner as did the Canadian Act* But, generally speaking, it was an unsatisfactory type of enabling Act, and it never came into force in South Africa because it had no attraction for South Africans, and also because it was an Act which the South Africans thought had been foisted upon them from without, and not the creation of their own social desires and political aims It expired in 1882 despite various attempts to bring it into operation Carnarvon had first created difficulties in the way of any scheme of union, then he proposed an unattractive measure, and finally he selected the most controversial means of forwarding it⁴ Parnell's opposition to the bill in the house of commons was an unintentional expression of South African opinion: 'there was no proof that the South African colonies desired the proposed confederation, any confederation of the kind ought to be voluntary and spontaneous and not forced' The prospect of union now faded for nearly forty years There was some talk of union, but practical steps were not even suggested Other remedies were attempted A customs union was formed in 1889 between the Cape and the Orange Free State, and before 1899 Bechuanaland, Natal, Basutoland, and Rhodesia had joined it In 1899 the Boer war commenced In 1903 the customs union was renewed This time the Transvaal also was included There was to be a

¹ For this document see Newton, *Select Documents*, vol 1, p 24, *Parliamentary Papers*, C, 1399, pp 58-83

² August 3, 1876 (Newton, *Select Documents*, p 39), Walker, *Lord de Villiers and His Times*, p 129

³ 40 & 41 Vict c 47

⁴ Fremantle, *The New Nation*, p 70

common tariff for the whole of British South Africa¹ In the same year the Inter-Colonial Council was formed In 1906 another customs' tariff was established

From now on the question of union loomed largely, not only in the minds of South African statesmen, but also in the mind of the South African public Organizations were formed, societies sprang up, political parties, new and old, placed union in the forefront of their programmes In 1907 the Cape parliament unanimously passed a motion 'that in the opinion of this House it is desirable that the Government of this Colony should during the recess approach the Governments of the other self-governing British colonies in South Africa to consider the advisability of taking preliminary steps to promote the union of British South Africa'² Then came Selborne's *Review and Memorandum*

In June 1908 it was announced that the Customs and Railway Conference held earlier in the year had failed, but the conference passed the following resolutions

- A That in the opinion of this Conference, the best interests of the permanent prosperity of South Africa can only be secured by an early union, under the Crown of Great Britain, of the several self-governing Colonies
- B That to the Union contemplated in the foregoing resolution Rhodesia shall be entitled to be admitted at such time and on such conditions as may hereafter be agreed upon
- C That the members of this Conference agree to submit the foregoing resolutions to the Legislatures of their respective Colonies and to take such steps as may be necessary to obtain their consent to the appointment of delegates to a National South African Convention, whose object shall be to consider and report on the most desirable form of South African Union and to prepare a draft constitution
- D The Convention shall consist of not more than twelve delegates from the Cape Colony, not more than eight delegates from the Transvaal, not more than five delegates from Natal and the Orange River Colony respectively, and it shall meet as soon as convenient after the next session of all the Parliaments, provided that as soon as at least two Colonies shall have appointed their delegates, the Convention shall be considered as constituted
- E The Convention shall publish the draft Constitution as soon as possible and shall in consultation with the Governments of the

¹ See minutes of customs conference 1903 (Newton, *Select Documents*, vol. 1, p. 212)

² Sir Edgar Walton, *The Inner History of the National Convention of South Africa* (Capetown, 1912), p. 26

self-governing Colonies determine the future steps to be taken in reference thereto

- F In the Convention the voting shall be *per capita* and not by States. A Chairman shall be elected from the members who shall have the right of speaking and voting and in the event of an equality of votes shall have a casting vote ¹

To these resolutions there was no opposition in any of the parliaments, and on October 12, 1908, the convention met at Durban

3. The National Convention (1908-9)

The national convention consisted of thirty-three delegates the four South African colonies and Rhodesia being represented. One-third of the members were farmers, a few were university men, there were about ten lawyers, about two-thirds of the delegates had fought in the Boer war. Former enemies met together in peaceful comradeship to shape the future destinies of their common country. For three months they sat together day by day, and at the end of that period had drawn up a draft constitution, which, with a few amendments which were mostly matters of form, was passed through the parliament of the United Kingdom within twelve months of the first sitting of the convention.

Nothing can be more clear and precise than the opening speech of the convention's chairman, Sir Henry de Villiers. With regard to the duty of the delegates he said

'It is well, gentlemen, that we should at the outset clearly understand the exact nature of the duties entrusted to us by the different parliaments which have appointed us delegates. We have a mandate to enquire, not whether an early union is desirable, for that has already been decided upon by our principals, but what form that union should take and what should be the machinery for bringing it into being. There appears to be an impression abroad that this Convention is going to lay down the lines to be followed upon such questions as the future native policy of South Africa, but I think you will agree with me that questions of that nature can only be dealt with by us in so far as they bear upon the immediate matters submitted to us for consideration. The chief argument in favour of a closer union is that by that means only can we obtain one legislature for all the colonies of South Africa that will be able to cope with the great problems which are common to all the Colonies and which they cannot individually and at the same time effectually deal with. We cannot usurp the functions of such a legislature, but at the

¹ Walton, *The Inner History of the National Convention*, p. 27, Molteno *Further South African Recollections*, p. 151

same time we cannot avoid the discussion of the wider problems if such discussion becomes necessary for the due performance of the duties actually entrusted to us. A great opportunity now lies before us and it is an opportunity which may not soon occur again. We have the best wishes not only of those who sent us but of Great Britain and the Empire. No more striking proof could have been given by Great Britain of her sympathy with our aspirations than the sending of the squadron which lies at anchor in this harbour to greet the convention. We may well proceed hopefully with the full determination not to dissolve until we have succeeded in framing a scheme of union which shall be durable, and destined to create a strong and united, prosperous and contented South African nation within the folds of the British Empire.¹

No sooner had the formal proceedings been completed when Merriman, prime minister of the Cape, moved that all the debates be absolutely secret, and that no records of any speeches be made. This resolution was accepted, and it was only after a struggle that the convention succeeded in preserving even the official minutes. It has thus happened that no record now exists of the debates except the short summary given in Sir Edgar Walton's *Inner History of the National Convention of South Africa*. Even in that work the author was careful to 'avoid any indiscretion which might be regarded by any delegates as a breach of confidence'.² To this day the seal of confidence remains intact, and it says much for the honour of the delegates that this understanding has been adhered to so faithfully. But the task of the constitutional lawyer or historian is by no means easier on account of it. A little new matter has emerged in Professor Walker's *Lord de Villiers and His Times*³ in the shape of important confidential letters between Selborne and de Villiers. The Hon. R. H. Brand also makes a useful contribution to our knowledge on the subject in his *Union of South Africa*. Bearing in mind that Mr. Brand was secretary to the Transvaal delegation at the convention, we may accept his work as being of equal weight with the work of Sir Edgar Walton. Though not of such great detail as Sir Edgar Walton's work, much may be read between the lines written by Mr. Brand. With the aid of these three volumes and the official minutes, we may be able to give an account, not of the convention's actual deliberations,

¹ *Official Minutes of Proceedings of the South African National Convention*, p. 1

² Walton, *The Inner History of the National Convention*, p. 36

³ Walker, *Lord de Villiers and His Times*, Chapter XXV

but of the currents of opinion and the reasons why the convention adopted one form of constitution in preference to another Rhodesia's part in the convention need not be considered, because from the beginning she had no serious intention of joining the Union, and her three representatives took no part in the discussions or the divisions, nor did they go to London to assist in the passage of the draft act

There were certain questions which gave the convention a great deal of trouble. Undoubtedly the most difficult was the problem of the native franchise. This difficulty persisted right through until the act was finally passed at Westminster. Another difficulty was whether the form of the constitution should be a unified or a federal one. The powers of the provincial councils also involved much discussion. Other matters were the 'damned capital question' and the language problem. These are the only subjects that need claim our attention.

(1) *A Unified or a Federal Constitution?* The first important question which had to be decided, because on its solution the details of the whole constitution depended, was whether the union would be a federal one or not. Before the convention met there was a general feeling in favour of federation. Unification was regarded with apprehension. The Transvaal's treasury was full and overflowing, but the treasuries of the other three colonies were empty and they were faced with difficulties in balancing their budgets. They feared that the Transvaal's wealth would control the politics of the country under a purely unitary constitution. The Transvaal felt that she might have to carry the rest of the country on her shoulders. The two smaller colonies feared that they would be overwhelmed by the two larger colonies. The Orange River Colony was placated by the promise of an elastic delimitation of constituencies and more parliamentary representation than she was entitled to—in the form of 'equal state representation' in the senate and a minimum number of seats in the assembly for the first decade of union. Natal could not be placated with these advantages, and there were other considerations apart from her small area and population. She had a history and a tradition that were different from the history and tradition of each of the other colonies. Her white population was predominantly English, with English traditions and culture. She feared being overwhelmed by Dutch influences.

She did not want to begin to learn the Dutch language. Valiantly she strove until the very end for federation, but the railway traffic to the rich goldfields and the fear of being left out of the great project of union were too much for her. The Cape also had her fears: honourably she wished to protect the hard-won franchise right of her coloured population. When this fear was allayed the Cape was satisfied.

The merits of federation and unification were fully discussed. 'In the United States', it was pointed out by General Smuts, 'the sovereign power was so dispersed as to be ineffective for the essential purposes of civilised government'.¹ There each individual state made its own laws, while South Africa already had sufficient diversity of statutory confusion. Above all, the federal government of the United States did not seem to have sufficient powers, and the machinery of government was too cumbersome and complicated for prompt and certain action. In Canada the federal system emphasized local jealousies and differences of race and religion. In Australia there had been too much friction between the states *inter se* and the states and the commonwealth. South Africa had had friction enough, enough racial strife. She wanted a fresh start and members of the convention, Dutch-speaking and English-speaking, earnestly declared for a fresh start. With obvious sincerity patriotic Boers who had fought so tenaciously for the preservation of their own ideals now pleaded for a new beginning.

Behind the struggle between the federalists and the unifiers there was an influence greater, more subtle, more decisive than any argument. The relationship between the coloured races and the white races has always been the dominant factor in South African politics. It inspired the first Free State address on union to Sir George Grey in 1858, it was the central theme of Lord Selborne's *Review* in 1907. If a sudden disturbance broke out in one colony that colony might not be strong enough to meet the crisis, but under a single national control of the military and constabulary establishments the forces of a united country might be moved easily and swiftly to every part of a vast territory.

Every problem pointed to the possibility of solution under a unified form of constitution: there would be a single native

¹ Walton, *The Inner History of the National Convention*, p. 59.

policy, a common treasury, economy of administration, uniformity in the laws and statutes, one great state railway system, and in all things the voice of one people Union is strength¹ and federation is weakness The unifiers, therefore, won, and experience has confirmed the wisdom of their victory

(11) *The Franchise* It will be remembered that in the Cape there was a property and wage qualification for the franchise which enabled a number of native and coloured persons to vote and be elected to parliament In Natal a few natives and a number of Asiatics had secured suffrage rights But in the Transvaal and in the Orange River Colony there was a manhood suffrage confined to Europeans only There were four solutions to the franchise problem presented by these varying electoral qualifications (i) to adopt the Cape franchise for the whole of South Africa, (ii) to fix a civilization test for all electors; (iii) to draw a hard-and-fast colour-line throughout the Union, and (iv) to leave the position in the Cape as it was, and to allow the Union parliament to settle the question in the other colonies at some future date The Cape definitely refused to surrender the rights of her native electors, the Transvaal and Orange River Colony definitely refused to extend the coloured franchise northwards The first and third solutions were thus ruled out

It is necessary at this point to distinguish the various divisions into which the colour question in South Africa falls There is, in the first place, the pure-blooded Kaffir, or Bantu, or, as he is commonly called, the native In South Africa the problem of the native in his relation to the white man is one to which there has been no parallel in the experience of mankind In the United States the position of the white man had always been at least, secure The white population has vastly outnumbered the black In South Africa the numbers are reversed in the ratio of five to one The white man thinks that after the terrible struggles and privations which he has endured in order to build up a modern civilization in Africa, he ought never to allow himself to be placed in such a position that the numerical superiority of the natives will overwhelm him and the civilization which he has laboured to establish Great Britain has been singularly successful in her government of inferior races, but her success

¹ The motto on the Union coat of arms is *Ex unitate vires*

has been due to the fact that her problems were usually such as could be met by the application of certain simple principles of equity and equality. There had been no question of preferring the interests of one race to those of another. In South Africa problems of government are intensified by the clash of interests between different races. The simple expedient of applying the principle of equality means that if all adult whites possess the franchise, all adult natives must equally possess the franchise. It means that for every white man in a South African parliament there will be five natives. It means that the centuries of culture, of tradition, of knowledge, and of political accomplishment will be worth one-fifth in the government of the country as compared with the almost barbaric state, the superstitious beliefs, the crudeness and the childishness, of the native masses. To apply such a principle of equality would result in a state of affairs which the whites of the northern provinces (who still in great measure subscribe to the article of the Transvaal *Grondwet* admitting of no equality between the races) would never be prepared to tolerate. The British government had always excluded the government of the natives from the power of the colonial legislatures. But once the principle of self-government was admitted, it became increasingly difficult to insist upon this exclusion with any degree of rigidity. By the time that the draft South Africa Act had been brought to London, the last vestiges of this exclusion had almost disappeared. All that could be done was to vest the administration of native affairs in the governor-general-in-council in the hope that the personal influence of the governor-general would be of value to his ministers in the administrative control of the natives.¹ To have insisted on more would have meant the indefinite postponement of union, a responsibility which the parliament of the United Kingdom would not face. In the same way, if the Cape had insisted that the native franchise of that colony was to extend to the northern provinces, or if the northern provinces had insisted upon the abolition of the Cape franchise, union would never have become an accomplished fact. The result was a compromise. The Cape franchise remained and was 'entrenched'.²

¹ Section 147 of the South Africa Act 1909. Cf. H. E. Egerton, *Federations and Unions within the British Empire* (Oxford 1924), p. 283, note 1.

² Sections 35 and 152 of the South Africa Act 1909.

To have admitted natives to parliament, as the Cape constitution allowed would have been illogical in view of the fact that the overwhelming majority of natives did not possess the franchise, and whereas a native in the northern colonies did not possess a vote by emigrating he might obtain not only a vote in the Cape Colony but also a seat in parliament. Further, to allow natives to sit in parliament would have broken the rule of no equality. The Cape, therefore in order to save its native franchise, surrendered on this point, and did not press for an extension of its franchise northwards.

The government of the United Kingdom was interested in this question of the native franchise, because it was related to the eventual transference to the Union of the native protectorates. Lord Selborne insisted upon the two questions being discussed together. The admission of the protectorates at some time or other was inevitable. Now was the time to settle the conditions of their admission.¹ The administration of the protectorates had hitherto been under the control of the high commissioner. The schedule to the South Africa Act provides that the place of the high commissioner will be taken by the prime minister, assisted by a commission if and when transference takes place. The administration of native affairs is a most technical business and it can be entrusted only to the most highly trained officials. Commission government is thus the best form of government for the natives. But in order to restrict the very wide powers which commission government necessarily entails the schedule contains certain conditions safeguarding the interests of the natives.²

The other divisions of the colour question concern the half-castes and the Asiatics. To admit them to the franchise in the Transvaal and the Orange River Colony would have meant these colonies declared the insertion of the thin edge of the wedge. Once anyone but an European were granted the franchise no one could tell where the matter would end.

(iii) *The Provinces* South Africa was too large a country to have a form of government which consisted only of a parliament

¹ Walton *The Inner History of the National Convention*, Chapter V. Walker *Lord De Villiers and His Times*, pp 448-86, and see especially on the whole subject of the protectorates, Brand *The Union of South Africa*, Chapter X.

² Brand *op cit* Chapter X, see Appendix IV.

and purely local institutions like municipal or divisional councils. This fact, taken in conjunction with the fight for federalism put up by Natal, resulted in the creation of provincial councils. For the latter reason their territorial jurisdiction coincided with the former colonial boundaries for the former reason their subject jurisdiction or heads of power embraced what are more or less local matters.¹ Education was added to the jurisdiction of provincial councils because of language difficulties. Natal was predominantly English the Orange River Colony predominantly Dutch.

It was the wish of the convention that the provincial councils should be free from party divisions. Local matters and education were best dealt with without party politics. The members of the convention therefore searched for the most successful model of a non-party executive council and they found it in Switzerland. The provincial council system is thus based on the Swiss system and the election of the executive committee by proportional representation and an independently appointed administrator were thought to be further safeguards against party politics in provincial affairs.²

(iv) *Other Matters.* The above were the only subjects which gave great difficulty to the convention. Language rights were settled on the basis of perfect equality by making English and Dutch the official languages of the Union. The question of the capital was settled by a division of the spoils. Pretoria secured the civil service, Cape Town the parliament, and Bloemfontein the court of appeal. But Natal did not go empty away. On the same day the Cape, the Transvaal and Natal signed the railway agreement for which Natal had been pressing since 1903.³ The provisions relating to the judiciary did not give any trouble. They are in harmony with the rest of the South Africa Act, placing South Africa under one unified supreme court having provincial divisions with an appellate division of supreme judicial authority superimposed upon the whole structure.

It was a wise precaution to have the discussions of the convention held behind closed doors.

¹ Section 87 of the South Africa Act 1909.

² Brand, *The Union of South Africa* p. 80.

³ Walker, *Lord de Villiers and His Times*, p. 406. See section 148 (2) of the South Africa Act 1909. Under this agreement Natal secured 30 per cent of the heavy railway traffic to the Rand.

'The questions handled were so delicate, and the feeling upon them throughout the country so divided and acute, that it is not conceivable that an agreement could have been reached in public. It is well known that on more occasions than one feelings in the convention itself ran high. Its work was only brought to a successful issue because no appeal was possible to the gallery. The public was brought to recognize that the result must in any case be a delicately-balanced equipoise, and, instead of being daily inflamed, was content to wait and pass a final judgment on the completed work.'¹

4. The Passing of the South Africa Act, 1909

The convention sat in Durban from October 12, 1908, until November 5, at Capetown from November 23, 1908, until February 3, 1909. The draft act was then submitted to the four colonial parliaments, and the amendments suggested by them were considered by the reassembled convention at Bloemfontein from May 3 to 11, 1909. The Transvaal did not submit any amendments, the Cape submitted twelve, Natal seventeen, in a last attempt to obtain federation, the Orange River Colony submitted three. The reassembled convention made forty amendments to the draft act, the most important being the change from the three-member electoral divisions to single-member constituencies. During the months of May and June 1909, each colonial parliament, except Natal, approved of the final draft of the convention's work. Natal sent the draft act to a referendum, the result of which was the surprising majority of three to one in its favour. Each parliament thereafter drew up an address to the King praying him to cause the necessary steps to be taken to authorize the contemplated union. Delegates were then appointed by each parliament to proceed to London with power to agree to amendments 'not inconsistent with the provisions and principles of the draft act'.²

In England fifty-three amendments were made prior to the introduction of the bill in the parliament of the United Kingdom. These amendments were made in consultation between the South African delegates and the secretary of state for the colonies. The bill then passed through parliament without further amendments. It received the royal assent on September 20, 1909, and on December 2 a proclamation was issued declar-

¹ Brand, *The Union of South Africa*, p. 39.

² Official Minutes of the South African National Convention, pp. 358-9.

ing that May 31, 1910, should be the date of the commencement of the Union

The amendments made in England were concerned with the form of wording of the draft act and did not in any way affect the substance or principle of any section of it. It can with truth be said that the completed act which the delegates brought back with them from England was almost identical with the draft act which they took with them to England.

The following extracts from the speech of the secretary for the colonies, the Earl of Crewe, in the house of lords on July 27, 1909, reflect the attitude of the British government towards the proposed Union.

'When we come to the qualification for sitting in either House we approach a point which has been the subject of much discussion and as to which many protests have been made. Those who sit in either House of Parliament have to be of European descent. So far, the position is that in the Cape Colony no such restriction has hitherto existed. On the other hand, no one not of European descent has ever sat in the Cape House of Assembly. I say frankly that there does seem to me to be a strong case against the insertion of such a provision in this act or in any act. There are men not of European descent who are of high standing, of high character and of high ability. They regard this provision as a slight, and we regret that any loyal subjects of the King should consider themselves slighted.

'On the other hand the difficulties which have confronted those who have prepared this bill were no doubt considerable. In the first place, it is only in the Cape that the native has a vote, and therefore it would seem anomalous to allow a man to sit in an assembly for which the class to which he belongs have not a vote in the greater part of the Union. It is also fair to point out that in the Australian Commonwealth a similar restriction exists, so that therefore this cannot be said to be without precedent. It is also true that the grievance is probably not a practical one, because if it was the case that no coloured member was elected to the Cape assembly in the past it is extremely improbable, at any rate for a long time to come, that any such would be elected to the Union parliament. The fact which has decided us in not attempting to press this matter against the wishes of the South African delegates has been that this is undoubtedly one of those matters which represents a delicately-balanced compromise between themselves. As a government we cannot take—and personally I am not prepared to take—the responsibility for the possible wrecking of this Union measure altogether by a provision of this kind, and I am assured that such would be the result of any attempt to insert such a provision in the bill. The cause of those who desire this change to be made has been pressed with deep feeling and much eloquence by some of the natives themselves, and by those who specially

represent their cause. But I do feel that if this change is to be made it must be made in South Africa by South Africans themselves, and that it is not possible for us, whatever we may consider to be the special merits of the case, to attempt to force it upon the great representative body which with absolute unanimity demands that it should not appear.

'Before I sit down I should like to ask you to consider for a moment what the Union does. I have spoken of the political and economic advantages which it must bring in its train to South Africa. What may the Union be also expected to do in the less visible but not less important sphere of human relations? This union of colonies marks, as I believe, a great advance in the fusion of the races which inhabit South Africa. The inhabitants of South Africa are some of British, some of Dutch, and some of French Huguenot descent. Their ancestors through many years of history suffered and fought for freedom. They underwent forfeiture and exile and imprisonment, and on the scaffold and on many battlefields they bore witness in the cause of civil and religious liberty. It would have been one of the most tragic ironies of all history if men descended from such races as those had remained permanently estranged. Now I hope we may look forward to seeing them joined in a free union under the supremacy of the British crown, with a guaranteed freedom, for as many years in front of us as the imagination of man can venture to look.'

5. Conclusion

The Union of South Africa came into being on May 31, 1910 exactly eight years to the day on which the Peace of Vereeniging was signed. The Duke of Connaught performed the opening ceremony of the new parliament on November 4, the appellate division sat at Bloemfontein for the first time on June 4, 1910, and de Villiers, the first chief justice of the Union, and chief justice of the Cape for thirty-seven years, was raised to the peerage as Baron de Villiers of Wynberg, in the province of the Cape of Good Hope, in the Union of South Africa.¹ As he presided at the opening ceremony of the appeal court which he tried so valiantly and so long to establish, a notable company must have passed before his imagination.

'Grey with his anxious, keen blue eyes. Carnarvon with his Dun-dreary whiskers and good intentions, Froude, eloquent, ambiguous, disastrous. the burly, loosely hung figure of Rhodes battling mightily, not always according to Queensberry rules. Then Milner, courteous, smileless, determined, Selborne and Steyn. they were crowding round

¹ De Villiers was the first person in the Union of South Africa to receive a peerage. Since his elevation in 1910 no other person has been made a peer and the nationalist government in 1925 prayed the King by an address of the house of assembly to confer no further titles in the Union of South Africa, see *infra*, Chapter IV 4 (iii).

him now, the living and the dead, and among them all, from the days when the Cape parliament was young, moved the gaunt form of Merriman and his own. None knew better than the old chief justice that the real Union of South Africa was still to be made. The act was not the end but the beginning.¹

The continuity of constitutional development remained unbroken. The field was larger but the problems, the men, the constitutional forms were the same. The Union parliament that first met at Capetown met in the same building in which the Cape parliament had begun and ended its existence.

The Speaker of the old Cape House was re-elected Speaker of the Union House, and with only two exceptions its officials were reappointed. Its Standing Rules and Orders were adopted with very few alterations, and its buildings were taken over with the addition of a new wing. The very benches on which members sit to-day are the green benches of the old Cape House refurnished to match the new surroundings. The Speaker's chair is the chair occupied by four out of the five Cape Speakers. The table of the House is the table from which Sprigg and Merriman made some of their most famous budget speeches. The entries made in the journals at the table are in precisely the same form as the entries made by the clerks of the old Cape House. The sand glass which is turned when the House divides has been turned by the clerks at the table for every division since 1862. The mace is that same mace which, obtained by the Cape House in 1835, has symbolised the dignity of the Assembly and the authority of the Speaker ever since. More fittingly still, the box in which the mace reposes when the House is not in session is made from the wood of a tree known as van Riebeeck's Thorn, which was eighty years old when van Riebeeck established the first council at the Cape and which flourished just outside the buildings when it was blown down long after self-government had been obtained. In short, when the people of South Africa agreed "to pool their patriotism as well as their material resources" the old Cape House merged, rather than lost, its identity in the Union Parliament, and entrusted all its high traditions and historical associations to the safe keeping of a united nation.²

The new parliament soon found that legislation of a constitutional character was to occupy much of its time. Laws had to be passed regarding many important constitutional matters which were not dealt with by the South Africa Act. It was necessary to regulate and harmonize the police and defence systems of the former colonies, the civil service, the procedure in the lower courts, &c. Many of the provisions of the South Africa Act itself were found by the experience of actual practice

¹ Walker, *Lord de Villiers and His Times*, p. 485.

² R. P. Kilpin, *The Romance of a Colonial Parliament* (London, 1930), p. 110.

to require amendment. As time went on, the constitution of the Union, apart from the South Africa Act, developed and expanded through statutory enactment and constitutional convention. Finally, in 1934, following on the evolution in the status of the dominions since the Great War, and the Statute of Westminster, passed in 1931, important constitutional changes were made by the parliament of the Union. These are dealt with elsewhere in this book.¹

¹ See *infra*, Chapter III, 6, 7, 8, and see especially Appendixes VII, VIII and IX.

III

THE GENERAL SCHEME AND NATURE OF THE SOUTH AFRICAN CONSTITUTION

1. *The South Africa Act does not contain the whole of the Constitutional Law of the Union*

THE constitution of the Union of South Africa is to be found primarily in a single document, the South Africa Act, 1909. But in that act alone the whole of the constitutional law of South Africa cannot be found. That act provided the framework of a government, it did not give to South Africa even in its own contemplation and intention a complete constitutional code. An examination of the act itself will support this contention. There are, for example, provisions which contemplate either immediate change or change after the lapse of a definite period of time. A few illustrations of these provisions of a temporary nature may be given.

The constitution of the senate was originally fixed for a period of ten years (24) ¹. Its first election was an election by the houses of each colonial legislature, which disappeared on the establishment of the Union, and it was to endure, both as far as its membership and its defined constitution were concerned, for a period of ten years after the establishment of the Union. After ten years had elapsed parliament might provide a new constitution for the senate, but until parliament so provided, the senate was to be elected by the provincial councils.

The membership of the assembly also was fixed for ten years at least (33). The Cape was given *fifty-one* members, the Transvaal thirty-six members, and Natal and the Orange Free State seventeen each. These numbers might not be diminished until the total number of members reached 130 or until a period of ten years had elapsed, whichever happened to be the longer period. The manner of increase was based on the increase in population over the population revealed in the census of 1904 which the census of 1911 and subsequent quinquennial censuses might reveal. The first assembly had 121 members. The census taken

¹ The numbers in parentheses refer to the sections of the South Africa Act.

in 1904 in each colony showed a total male adult European population in the four colonies of 349,837. By dividing 121 into 349,837, we obtain what the act termed the quota, namely, 2,891 2. This meant that the assembly represented the male white adults in the whole of the Union (on the basis of the 1904 figures) in the proportion of one member to 2,891 2 white male adults. After the 1911 census any increase in any province equal to the quota would be compensated for by an extra member of the assembly for each quota unit. In the original constitution of the assembly, Natal and the Free State received more members than they were entitled to receive (a concession to the federationists), while the Transvaal and the Cape were under-represented. Any increase in the two over-represented provinces, therefore, was not to operate to increase their representation in the assembly until the population in these provinces had adjusted itself to the quota fixed by the act.

In certain matters the South Africa Act expected the newly constituted parliament to pass legislation as soon as possible. The powers and privileges of parliament (57), and the rules of procedure for each house (58), were dealt with in a makeshift manner, and were of force for a year only, for parliament passed the Powers and Privileges of Parliament Act, No. 19 of 1911, in the second year of its existence.

As far as the provinces were concerned, the South Africa Act left the whole of their financial powers in a state of temporary suspension. The act provided that a commission was to be appointed, consisting of representatives from each province, 'presided over by an officer from the Imperial service', to institute an inquiry into the financial relations which should exist between the Union and the provinces. Pending the completion of that inquiry there was to be paid annually out of the revenues of the Union to the administrator of each province a sum of money to meet the estimates of provincial expenditure up to an amount approved by the governor-general in council, and the provinces were not to incur any expenditure not provided for in the approved estimates (118).

The South Africa Act, therefore, contains provisions of an exceedingly temporary or ephemeral nature. Their force or operative existence was expected to expire within a short period of time. More important, however, than these ephemeral pro-

visions, were the omissions from the act. No provision was made regarding defence, the police, the civil service, and a multitude of other essential objects

Constitutional law consists of that law which governs the exercise of powers by the government of a state, whether that government be a single person, as he was in the beginnings of many states, or whether that government be what it is now, a complex organization, which includes the nominal or real head of a state, its organs of legislation, its executive, judicial, and administrative officers, and generally all those persons who directly or indirectly act in the name of the state. The legal rules which govern all the powers and duties of the servants and institutions of the state may be termed the constitutional law of that state. It may be that the constitutional law of a country is to be found in a single document, and that such a document contains the whole law of the constitution. But this could have been the position only for a very brief period of time. The 'constitution of the United States established and ordained by the people of the United States', is by itself a very imperfect document. It omits a great deal of what was found later to be essential for purposes of government, and much had to be read into the constitution, often with very great strain, in order to give the government of the United States those 'incidental' powers without which the government could not be carried on effectively. On the other hand, the constitution of the United States contains much which cannot by any stretch of the imagination, be termed constitutional law. No one can say that a law which prohibits the citizens of a country from consuming liquor is any more a constitutional law than a law which prohibits its citizens from gambling.¹ Yet the one is, and the other is not, contained in the constitution of the United States. It is true that there were special reasons for inserting the former prohibition in the constitution itself. The people desired to make it a 'fundamental law', so that there would be extreme difficulty in changing it. But a 'fundamental law' is not necessarily 'constitutional law', just as 'constitutional law' is not necessarily 'fundamental law'.

To provide for the effective government of the United States,

¹ For various points of view in connection with the Eighteenth Amendment (since repealed), see *National Prohibition Cases*, 253 U.S. 221.

it was necessary not only to read into the constitution 'incidental powers' but to pass new or subsidiary laws, not in any way amending the supreme constitution. These subsidiary laws, however, are as much constitutional law as are the laws which outline the powers of the American legislature or under which the president of the republic is elected. It is true that these subsidiary laws are not fundamental laws, because they can be altered without the restrictions imposed upon the alteration of the articles of the constitution, but so long as such laws regulate directly or indirectly, the government of the United States and the working of its constitution, they are part and parcel of the constitutional law of that country.

The South Africa Act, even though it does not contain the whole of the constitutional law of the country, is not a 'fundamental law'. It may be amended or repealed in the same way that the most unimportant law affecting the least important interests may be repealed by the parliament of the Union. There are, after the lapse of ten years in the two instances referred to above, only two exceptions to the ordinary power of amendment which the Union parliament possesses. The rights of the Cape natives and the rights of the official languages may not be affected, unless two-thirds of both houses of parliament sitting together agree to the proposed alteration of those rights (152).¹

What, then, is the constitution of the Union? As well might one ask, What is the constitution of the United Kingdom? The constitution of the United Kingdom is to be found in a varied and confused medley of statutes and charters, judicial decisions and ancient customs, constitutional conventions and private rights. It is a constitution, complex in its nature, uncertain in its origin, difficult to define, unmade and unmakeable—the careless creation of expediency, yet, withal, a symmetrical structure firm and stable and flexible and smooth in its working.

Very close indeed to the constitution of the United Kingdom is the South African constitution. Its constitution, also, is to be found in a varied and confused medley of statutes and judicial decisions, orders-in-council and constitutional conventions, elusive proclamations and cumbersome regulations. Some of the constitutional statutes are to be found only in the statute books

¹ See *infra*, sections 6 and 7 of this Chapter

of another parliament, and some of the proclamations and the orders-in-council cannot be found in any law book throughout the length and breadth of the land. Such a fundamental provision as the liberty of the subject, though dealt with in the constitutions of the United States and the Irish Free State does not appear in the South Africa Act, while other statutes contain most important constitutional provisions dealing with the administration of justice the franchise and parliament. The South Africa Act is the pivot upon which the constitutional law of the Union hinges. But nowhere in the statutes of the Union or in any decision of its courts are to be found many of those basic laws on which the smooth-working of the constitution depends. Such laws are known, recognized and applied. They are a part, probably the larger part, of South African constitutional law, but they are to be found only in the law books, or in the British law reports, or in the unwritten precedents of constitutional practice brought from the United Kingdom to South Africa in the first days of parliamentary government.

2. Summary of the South Africa Act as passed in 1909

The South Africa Act as passed by the parliament of the United Kingdom consists of ten parts and a schedule.¹ The keynote of the act appears in the preamble—the establishment of a legislative union. The preamble also states that the act makes provision for the eventual admission into the Union or for transfer to the Union of such parts of South Africa as are not originally included in it. The parts of South Africa thus tacitly invited are Rhodesia and the native protectorates.

The Act. After citing the title of the act (1), there is a definition of parliament as the parliament of the Union (2). Provisions referring to the King are deemed to include His Majesty's heirs and successors (3). Within one year of the passing of the act, the King with the advice of the privy council is to declare the date of the establishment of the Union, and after that day he may at any time appoint a governor-general (4). The original provinces of the Union are to have the same limits as the former colonies, but the name of the Orange River Colony was changed

¹ The summary which is given here for purposes of a general view, follows strictly the terms of the South Africa Act. The rules and conventions relating to the powers &c., under the Act are not at present in question.

to that of the Orange Free State (6), a gracious gesture to local sentiment. The executive government of the Union is vested in the King, and may be administered by His Majesty in person or by a governor-general as his representative (8). The governor-general may exercise in the Union, subject to the South Africa Act, such powers as the King may be pleased to assign to him (9). All officers in the public service are to be appointed or dismissed by the governor-general-in-council unless some other authority is given the power (15). The powers of the former colonial governors or governors-in-council are, as far as possible, transferred to the governor-general or governor-general-in-council (16). Pretoria is to be the seat of government (18), and Capetown the seat of the legislature of the Union (23).

Legislative power is vested in the King, a senate, and a house of assembly (19). The constitution of the senate is fixed for ten years (24). Eight senators are to be elected by both houses of each of the former colonies, and the governor-general-in-council appoints eight senators, half of whom are selected on the ground mainly of their thorough acquaintance, by reason of their official experience or otherwise, with the reasonable wants and wishes of the coloured races in South Africa (24). After ten years parliament may pass legislation affecting the constitution of the senate (25).

The house of assembly is chosen by direct election of the voters of the Union (32). As far as the qualifications of the voters are concerned parliament may deal with them, but the provisions of the Cape franchise regarding coloured persons may not be changed unless two-thirds of the members of both houses sitting together agree thereto. It must be noted that the two-thirds refers to the total number of members whether they attend the joint sitting or not (35). Until parliament changes the electoral qualifications of voters, the franchise for the house of assembly shall be the existing franchise in the various former colonies (36).

Parliament shall have full power to make laws for the peace, order, and good government of the Union (59). If the senate fails to agree with the assembly on a bill introduced in succeeding sessions, the governor-general may during the second session convene a joint sitting of both houses which may then proceed to pass the bill by a simple majority of both houses, but, in

relation to an appropriation bill the joint sitting may be convened during the same session (63) Bills may be assented to by the governor-general (64) or reserved for the King's pleasure (66), or disallowed by the King after assent by the governor-general (65)

There is a chief executive officer for each province appointed by the governor-general-in-council, styled the administrator of the province, and in his name are done all executive acts relating to provincial affairs (68) He holds office for five years, but may be removed by the governor-general-in-council for cause assigned and communicated immediately to parliament In each province, chosen on the same franchise as operates in the election of members of parliament there is a provincial council consisting of the same number of members as are elected in the province for the house of assembly with twenty-five as the minimum number (70) The qualifications and disabilities for membership of the provincial council are the same as those for the house of assembly (72) The council cannot be dissolved except after the prescribed period of its three-year life (73) Each provincial council elects from its members four persons to form with the administrator an executive committee for the province (78) Members of the executive committee need not find seats in the provincial council but they may take part in the council's debates (79) The executive committee carry on the administration of provincial affairs (80), deciding their questions by a majority vote (82) All the powers formerly vested in the colonial governor-in-council, and not transferred to the governor-general-in-council, are now vested in the executive committees as far as they relate to powers given to the provincial councils (81) The administrator, when required to act on behalf of the governor-general-in-council, may do so without reference to the executive committee (84)

Eleven distinct heads of legislative power are granted to the provincial councils (85), and the councils may be empowered to legislate on matters considered by the governor-general-in-council to be merely local or private matters within the province, or further powers may be specially delegated to them by parliament (85) Despite the grant of specific powers, there is a provision which shows more than any other the unitary nature of the South African constitution and the subordination of the

provincial councils No provincial council ordinance which is repugnant to an act of parliament shall have any effect in so far as it is so repugnant (86)

The seats of provincial government are to be the former capitals of the original colonies (94) All ordinances of the council must be submitted for the assent of the governor-general-in-council (90), when so approved they have the force of law within the province (91)

There is one supreme court for the whole of the Union, consisting of an appellate division with a chief justice and four judges of appeal (96), and provincial divisions in the place of the former colonial supreme courts, having original jurisdiction as exercised by those latter courts, and also having power to hear disputes between the crown and an ordinary litigant, and to pronounce on the validity of provincial ordinances (98) All former judges continue in office (99) and no judge's remuneration may be diminished while he is in office (100), and none may be removed except on an address from both houses of parliament (101) The appellate division is the last court of appeal in the Union and may hear appeals from Southern Rhodesia also (103), but litigants may, of course, obtain special leave to appeal from the privy council The parliament of the Union may limit appeals to the judicial committee, but such acts must be reserved (106) The appellate division sits at Bloemfontein but it may meet the convenience of suitors by sitting elsewhere (109)

All the revenues of the Union vest in the governor-general-in-council, to be administered in a railway and harbour fund and a consolidated revenue fund (117) No money can be paid out of either fund except under appropriation made by parliament (120) The Union assumes all the liabilities of the former colonies (124), as well as their assets (121), their public service (140) and the liabilities regarding pensions relating thereto (143), and all obligations of the colonies with foreign states under conventions or agreements (148) A railway and harbour board of not more than three commissioners, appointed for five years, controls the management of the railways, ports, and harbours of the Union (126) These are to be administered on business principles Any excess profits are to be paid over to the consolidated revenue fund (127) There is provision for monetary compensation to the former colonial capitals for any

diminution in their prosperity on account of a possible loss of status (133) There must be free trade throughout the Union (136), equality of the English and Dutch languages in all public matters (137), and naturalization throughout the Union for those naturalized in the former colonies (138) All laws in force in the former colonies are to continue in force until changed by parliament or a provincial council having power of legislating on the subject (135) A public service commission is to control and reorganize the public service of the Union (141-2) The services of former colonial civil servants are not to be dispensed with solely by reason of their ignorance of one of the official languages (145)

The control and administration of native affairs and of matters specially or differentially affecting Asiatics vest in the governor-general-in-council, who may exercise all special powers in regard to native administration which were vested in the governors of the former colonies, or exercised by them as supreme chiefs. The governor-general-in-council may also exercise the powers vested in former colonial governors regarding native reserve land, which in future cannot be alienated or applied to purposes other than for native requirements except by act of parliament (147)

Parliament may divide up or alter the boundaries of a province on the request of the provincial council affected (149) The parliament of the Union may petition the King to make provision for the admission of Rhodesia into the Union (150), or for the transference of the native protectorates to the Union (151)

Parliament may alter or repeal any provision of the South Africa Act, except where a definite time limit is placed against amendment as in the increase in members of the assembly (33-4), or in the constitution of the senate (24) To amend the law in regard to the provisions regulating the increase of assembly members or the native franchise rights in the Cape, two-thirds of the total number of members of both houses must agree to the proposed amendment (152)

The Schedule On transference of the native protectorates, the governor-general-in-council will legislate by proclamation laid before both houses of parliament. The prime minister of the Union will administer the affairs of the territories, assisted by

a commission appointed by the governor-general-in-council for five years. The commission will have an advisory majority voice in the affairs of the territories, but the prime minister need not necessarily take that advice unless the governor-general-in-council insists. A resident commissioner in each of the territories of Swaziland, Basutoland, and Bechuanaland, will, in addition to his other duties, prepare estimates of revenue and expenditure for the territory. No native reserve lands may be alienated, no liquor may be sold, and no differential duties imposed in the territories. Their inhabitants shall be free to move within the limits of the Union subject to the laws of the Union, and the custom of the natives to hold assemblies or pitsos shall be maintained.

Any bill to amend the provisions of the schedule must be reserved for the royal pleasure, and the King also reserves the right of disallowing any proclamation made by the governor-general-in-council within a year of its promulgation, and if a proclamation is disallowed by the King, its effect is annulled as and from the date of disallowance.

Nature of the Provisions of the Act The provisions of the South Africa Act can be divided into two groups, those which are enforceable by the ordinary processes of law, and those which are directory. When 'bills' are mentioned, the enactment is directory. The courts take no cognizance of 'bills', nor do they interfere in questions of parliamentary procedure: the jurisdiction of a court only arises when the 'bill' becomes an act, and only then may parliamentary procedure be brought into question, as for example, when the validity of the act is challenged¹ on the ground that it has not been passed by a two-thirds majority (152).

Many provisions of the act are of a structural character providing for the erection of the machinery of government of the Union, their sanction is purely political. Their due performance is governed by constitutional conventions of which the courts take no notice. No court would interfere if a speaker were not elected, or if parliament sat at Pretoria instead of at Capetown, or if only six instead of eight senators were nominated, or if one-half of the senators, instead of being chosen for their knowledge of native affairs, were chosen for their knowledge of aviation,

¹ *Re v. Ntobe*, [1930] A D 497

or if the provincial councils refused to elect executive committees, despite the fact that the wording of these particular provisions is couched in imperative terms *Eight senators shall be nominated* (24) *one-half of their number shall be selected on the ground of their knowledge* &c, *Cape town shall be the seat of the Legislature* (23), *each provincial council shall elect an executive committee* (78). These provisions are really permissive. There shall be an executive council (12) means that there may be one. In point of practice, if the executive council were meant to be a body distinct from the cabinet for the time being (14), the executive council does not exist. The cabinet ministers in practice are the executive council (14) for only they are summoned (12) to attend executive council meetings. These permissive or structural enactments have for their due performance political sanctions only. No court could interfere if the governor-general refused to appoint an executive council or even cabinet ministers, and no court would interfere if a provincial council were never assembled.

Section 118 provides that the governor-general-in-council shall appoint a commission to inquire into the financial relations which should exist between the Union and the provinces. As a matter of fact that commission was appointed, and as a result of its recommendations the Financial Relations Act, No. 10 of 1913, was passed. But if that act had been passed without a commission having been appointed, the courts would have taken no notice of the omission.

The mandatory or imperative provisions may be enforced either at the suit of litigants in the ordinary course of litigation or on application to court to enforce specific compliance with the provisions of the act. Those which may be enforced by litigants in the ordinary course of litigation usually fall under the category of empowering provisions. If a provincial council passes an ordinance beyond the powers granted to provincial councils by section 85 of the South Africa Act, any person sought to be made liable under it either criminally or civilly may dispute its validity. But if the ordinance falls within the powers of the provincial council which has enacted it either the crown may enforce a penalty for its breach, or a civil action may be brought by any person injuriously affected by a breach of its provisions.

Those provisions which may be specifically enforced on the

application to court of a person interested, are usually those which deal with private rights or privileges. If a person is entitled to have his name placed on the voters' roll, he may by law compel the person refusing to place his name on the roll, or removing his name from it so to place it on the roll or to refrain from removing it. Similarly, if a person has been duly elected a member of a provincial council, he is entitled to take his seat and vote in the council, and any person who without lawful cause endeavours to prevent him from sitting or voting may be restrained by the court from such unlawful action.¹ There are provisions which may be enforced in the negative sense. If it is found that a person has been elected to parliament who is disqualified from election, or has been otherwise unlawfully elected, any interested person may petition the court to unseat him.

In South Africa, the term 'unconstitutional' may have two meanings. It may have the British meaning of being contrary to the general principles of the constitution—for example, some breach of constitutional convention regarding the dissolution of parliament, or it may have the usual American or Australian meaning of being *ultra vires*, an exercise of powers capable of being ignored by the courts as invalid on the ground of transgressing a constitutional law—for example, a provincial ordinance on a subject not delegated to the province by the South Africa Act or the Union parliament, or an endeavour to enforce an ordinance not assented to by the governor-general-in-council, or an act of parliament falling under section 152 and not complying with the provisions of that section regarding a joint sitting and the assenting votes of two-thirds of the members of both houses.² Some matters are unconstitutional because they are opposed to constitutional conventions, and these are not noticed judicially, others are unconstitutional in the sense of being illegal, actual breaches of imperative law, and as such have no binding force or effect.

¹ *Conradie v Vermeulen*, [1920] O P D 203. A rule of the Orange Free State provincial council required members to take the oath of allegiance. This was held in the case cited to be *ultra vires* the provincial council under section 73 of the South Africa Act, 1909, and the chairman of the council was directed by the court to allow the applicant to sit and vote without taking the oath. *Cl van Veyeren v Administrator*, [1917] T P D 74.

² See now, *infra*, sections 6 and 7 of this Chapter.

3. The Leading Characteristic of the Union Constitution is the Supremacy of the Union or Central Legislature

The last provision of the Australian constitution reads as follows

'This Constitution shall not be altered except in the following manner: The proposed law for the alteration thereof must be passed by an absolute majority of each House of the Parliament, and not less than two nor more than six months after its passage through both Houses the proposed law shall be submitted in each State to the electors. And if in a majority of the States a majority of the electors voting approve the proposed law, and if a majority of all the electors voting also approve the proposed law, it shall be presented to the Governor-General for the Queen's assent'¹

Thus, in Australia, as in the United States of America, the constitution is 'the supreme law of the land'. The constitution is the basis of legislative authority: it lies at the foundation of all law, and is a rule and commission by which both legislators and judges are to proceed.² In the constitution of the late Republic of the Orange Free State there was a provision that the constitution could be changed only when three-fourths of the Volksraad assented to the alteration.³ The Canadian legislature, on the other hand, cannot change the constitution of Canada at all. Any change that may be necessary must be effected by the parliament of the United Kingdom.⁴

In South Africa, however, the legislature is empowered to amend the constitution. Parliament may by law repeal or alter any of the provisions of this Act.⁵ The South African 'constitution', therefore, does not dominate the legislature, the constitution is itself within the amending power of the legislature. Parliament has repeatedly altered the provisions of the South Africa Act, and it has done so with as little formality and with as little constitutional difficulty, as it has altered any other law of the land.

That the Union legislature is the supreme authority in and over the Union of South Africa is perfectly true, but under the

¹ 63 & 64 Vict. c. 12, s. 123.

² *Per Paterson J.*, in *Vanhorne's Lessee v. Dorrance*, (1795) 2 Dallas, 309.

³ See *supra*, Chapter I.

⁴ W. P. M. Kennedy, *The Constitution of Canada* (Oxford, 1931), pp. 450-1.

⁵ The Statute of Westminster, 1931 (22 Geo. V. c. 4), s. 7.

⁶ Section 152 of the South Africa Act, 1909.

South Africa Act there were two exceptions. In the first place, section 152 of the South Africa Act provided that certain sections might not be altered for ten years, and two sections, namely 35 and 137, which refer respectively to the Cape native franchise and to language rights, might not be altered except with the assent of two-thirds of both houses of parliament. In these respects, the South African constitution was, up to 1931 dominant. Legislation had to conform to the provisions of section 152. In the second place the South African parliament, when the South Africa Act was passed, could not override its own inherent subordination to the British parliament in that its legislation could not be repugnant to legislation of the United Kingdom within the meaning of the Colonial Laws Validity Act, 1865. But in discussing the supremacy of the Union legislature in and over the Union, it will be convenient to ignore for the time being, these erstwhile exceptions, for they are better dealt with in a later section of this chapter and they do not impair the accuracy of the general statement that within the Union the Union legislature is supreme.

There is in South Africa, in the general sense in which we are now discussing the subject, no law which the Union parliament cannot change. Dicey's statement that 'fundamental or so-called constitutional laws are under our constitution changed by the same body and in the same manner as other laws, namely, by parliament, acting in its ordinary legislative character',¹ may well describe the legislative characteristic of the Union parliament. It follows, therefore, that in South Africa there is no difference between constitutional and ordinary laws and (except for the one-time entrenched clauses of the South Africa Act)² there has never been, since the Union was established, any law in South Africa which can properly be termed a fundamental law. The South Africa Act is in a legislative sense no different from other laws, and is not in any way permanent.³

The most striking characteristic of the South African constitution is its unitary nature. The preamble uses a phrase—'united under one government in a legislative Union'. Section 59

¹ *Law of the Constitution* (London, 1915), p. 84.

² See section 152 of the South Africa Act, 1909, and sections 6 and 7 of this Chapter.

³ Some statutes in South Africa and also in the United Kingdom use the unnecessary phrase 'unless and until Parliament otherwise declares'.

of the South Africa Act, to which the parliament of the Union owes its legislative competence, has the bold sweep of unrestricted power 'Parliament shall have full power to make laws for the peace, order, and good government of the Union' Section 86 provides 'Any ordinance made by a provincial council shall have effect in and for the province as long as and as far only as it is not repugnant to any Act of Parliament' Thus there is removed from the sphere of government in South Africa any possibility of legislative conflict or overlapping¹ As soon as an object of legislation is dealt with by the Union parliament, or if some carelessly drafted act of parliament happens incidentally to touch on matters upon which the provincial councils have, under powers previously granted to them, legislated, every provincial ordinance on the same subject-matter falls to the extent of its repugnancy to the act of parliament² If parliament has already legislated upon any matter, all legislation by the provincial council, whether contemplated by parliament or not, must in future conform to the provisions of that act in respect of the same subject-matter No other legislative body in the Union can compete, expressly or impliedly, with the legislation of the Union parliament

Contrast the legal position under a federal constitution 'The theory of our governments, state and national,' said an eminent American judge, 'is opposed to the deposit of unlimited power anywhere The executive, the legislative and the judicial branches of those governments are all of limited and defined powers'³ Nothing can be more opposed to the South African constitutional view The powers granted to a federal legislature must of necessity be carefully defined The foundation of a federal structure is the division of powers between the central or national government and the state, or, as in Canada, the provincial, governments It may be that to the central body is assigned certain specific governmental powers, while the local governments retain the powers not assigned to the central government, or the converse may be the case But in each instance the powers granted to the two bodies, the central and the local legislatures, are mutually exclusive Each body has

¹ See Chapter XIII (iv) and (v) (b) *infra*

² *Morgan v Orange Free State Provincial Administration*, [1925] O P D 287

³ Quoted by Innes J A in *Rex v McCherry*, [1912] A D 224

different legislative functions. While, generally speaking, the functions of both bodies do not overlap, neither of them is superior to the other, they are both subordinate to the written constitution of the federal structure of which both form a part. In both cases, also, the component governments surrendered certain of their powers to the central government. In Australia and in the United States the local governments surrendered comparatively few, but very important powers, and kept the residuum of power, in Canada the local governments surrendered the major portion of their powers.¹ But in each case the local governments were not completely annihilated,² they remained in existence, and became poorer in governmental power than they were before the act of federation. In the Union of South Africa there is no real division of governmental powers between a central and a local legislature. The provincial councils are entirely new institutions, positively new creations, in no way resembling the old legislatures which once had the same territorial jurisdiction.³ The latter were completely wiped out. No trace of them remains. And the new provincial legislatures were granted a set of distinct powers. But the powers of the Union parliament and the provincial councils are not mutually exclusive. The Union parliament is supreme always. It can always, expressly or impliedly, override provincial ordinances. It can, at the present day, without any more legislative formality than is required for abolishing an education board, abolish the pro-

¹ For a discussion and criticism of Lord Haldane's view of Canadian federalism as expressed in *Attorney-General for the Commonwealth of Australia v. Colonial Sugar Refining Company Limited*, [1914] A.C. 237, see Kennedy, *The Constitution of Canada*, pp. 408 ff.

² Cf. for Canada, *The Liquidators of the Maritime Bank of Canada v. The Receiver General of New Brunswick*, [1892] A.C. 437.

³ 'The provincial legislatures [of Canada] having originally been supreme legislatures, continued to be so, but with their powers restricted to certain limits of subject and area. The position of our provincial councils is absolutely and entirely different. The Union of South Africa is not a federal union, but a perfect Union. The previously existing legislatures of the different Colonies have entirely disappeared and become absorbed and embodied in the Union parliament, in which all the legislative power of the Union is vested (section 19 of the South Africa Act). The provincial councils have no legislative power in themselves, but derive all their power from the South Africa Act, and that power is limited, subject to the provisions of that Act and the assent of the governor general in council, to the making of ordinances in relation to matters coming within section 85' (per Maasdorp J.A. in *Middelburg Municipality v. Gertzen*, [1914] A.D., at p. 559).

vincial councils altogether.¹ While the Union parliament is not subordinate to any written constitution, the provincial councils, as are all legislative bodies under a federal form of government, remain always subject to the constitution provided for them.

There is another aspect of the Union constitution which emphasizes the supremacy of the central legislature. In a federal constitution there is usually a vesting of judicial power in a federal judicature. The nature of a federal constitution, the fact that it cannot be amended by the ordinary process of legislation either by the central legislature alone or by the local legislatures alone, or by their joint action, because it is the expression in statute form of a compact between the people of self-governing political entities 'to mutually abrogate certain powers of self-government in favour of a central governing body'² and to retain certain powers of self-government until those powers are altered in a specific and previously agreed manner, necessitates the creation of a federal judicature co-ordinate with the legislature,³ and charged with the duty of enforcing the specified limitations to legislative authority.⁴ In the Union constitution there is no vesting of the judicial power in any court, because no court is co-ordinate with the Union parliament. The constitution and the powers of any South African court may be altered at will by parliament.

4. The Union Legislature has a Plenary Power and not a Delegated Power

The Union legislature owes its legal existence to an act of parliament of the United Kingdom, but it is in no sense an agent or delegate of that legislature. No dominion legislature, whether it be the parliament of Australia, Canada, New Zealand, or the Union is the delegate of the parliament of the United Kingdom, nor are the provincial legislatures of Canada or the provincial councils of South Africa both creations of acts of that parliament, delegates or agents either of that parliament or of the

¹ Such a bill would have had to be reserved under section 64 of the South Africa Act, 1909. See, however, the effect of the Statute of Westminster, 1931 (sections 6 and 7 of this Chapter) and cf. G. Hartog, 'Law Making' (2 *South African Law Times*, pp. 37 ff. 78 ff.).

² D. Korr, *Law of the Australian Constitution* (Sydney, 1925), pp. 5-6.

³ *Ibid.*, pp. 22-3.

⁴ Alexander Hamilton, *The Federalist* No. 78. Cf. *Marbury v. Madison*, (1803) 1 Cranch U.S. 137, 2 L. ed. 60.

dominion parliaments. This aspect of the nature of provincial legislatures has been judicially considered both by the privy council and by the South African courts. What is true of provincial legislatures is equally true in this respect of the dominion legislature. In considering the validity of a statute of Ontario the privy council, declared:

'[The provincial legislature] are in no sense delegates of or acting under any mandate from the Imperial Parliament. When the British North America Act enacted that there should be a legislature for Ontario and that its Legislative Assembly should have exclusive authority to make laws for the province and for provincial purposes in relation to matters enumerated in section 92, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits of section 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subjects and area the local Legislature is supreme'.¹

This statement is in general principle applicable to the Union parliament. The powers granted by section 59 of the South Africa Act are full powers. There is, except for the fact that the Union parliament is in legal theory a subordinate legislature in the sense that all dominion legislatures are subordinate to the parliament of the United Kingdom, no restriction on the legislative power of the Union parliament within South Africa. It does not matter how unjust, how oppressive, how severe and unequal its legislation is: this is not a question for courts of law to decide or even to consider. The duty of the courts is to apply the law as enacted, provided that the enactment is within the scope of parliament's legislative power. A leading South African case, *Rex v. McChlery*,² deals with all these aspects of the plenary powers of a legislative assembly.

In that case the validity of a Southern Rhodesian ordinance was in dispute, but the judgment of the appellate division would be equally applicable if the validity of a Union statute were in dispute.

'The British Parliament', Innes J.A. declared, 'is a sovereign body entitled to legislate for the whole Empire. Unfettered by a written constitution, it is clothed with supreme legislative capacity. No British Court can decline to enforce a British statute on the ground that it is unconstitutional, and therefore invalid. But all other law-giving bodies

¹ *Hodge v. The Queen*, (1883) 9 A.C. 117, at p. 132.

² [1912] A.D. 199.

within the Empire are subordinate. They derive their authority, not from ancient constitutional right, but from the instruments which create them. Any limitation contained in such instruments must be observed, for the legislative powers possessed by these bodies are confined to the terms of their characters. But it is settled law that within the area of the jurisdiction thus created subordinate legislatures have unrestricted liberty of action. They are not delegates of a central authority, but independent bodies, occupying within the limits of their own legislative subjects and areas, the same position as the British Parliament in its wider domain. The duty of deciding whether those limits have in particular instances been exceeded is one which devolves upon the courts of law. This must of necessity be so. For every enactment of a subordinate legislature not warranted by the powers conferred by its charter is invalid, and the Courts would not be administering the law of the land if they gave effect to it. Hence they are bound to inquire whether legislation challenged in the course of a particular dispute is, or is not within the legal powers of the subordinate body from which it proceeded. But in so doing they are also bound to remember that such bodies, acting within the limits of their constitution, have power of legislation equal and similar to those of the British Parliament itself. The Legislative Council of Southern Rhodesia is a law-giving body duly constituted by Order in Council in 1898, and the extent and the limitation of the legislative authority which it possesses must be ascertained from the terms of the document. Section 35 empowers it "to make Ordinances for the peace, order, and good government of Southern Rhodesia." The words of the section are very wide, and confer the amplest powers of legislation, for they cover the entire conceivable area of political action. The language is that frequently employed in constitutions and charters by which full legislative powers are conferred upon local authorities. A recent example of such employment will be found in the case of our own Parliament, whose practically unrestricted legislative capacity is based upon the 59th section of the South Africa Act, which in language practically identical with that of the Rhodesia Order in Council empowers it to make laws for the peace, order and good government of the Union. With regard to the scope of the words in question, I would make two remarks. The first is that they necessarily confer the power to tax. There can be no efficient administration without revenue, and the right to make laws for the good government of a country must include the right to impose taxation. The second is that power given to a legislative authority to make ordinances for peace, order and good government must mean a power to make such ordinances as to that authority shall seem necessary in the interests of peace, order, and good government.

His lordship then went on to discuss the question whether the courts could declare enactments *ultra vires* on the ground that they are inequitable, or opposed to the principles of natural justice, unfair and oppressive.

'Always assuming that the restrictive limits of the empowering documents are observed, the discretion to judge what measures are conducive to peace, order and good government lies with the law-giver and not with the Courts. Having regard to the fact that a subordinate legislature is (within the limits of its subjects and area) in a similar position to the British Parliament, it is impossible that the Colonial Courts should have an over-riding authority to say when measures are, and when they are not, in the general interests of peace, order and good government. Such a task would be in the highest degree invidious and difficult, and it is fortunate that the spirit of our constitution does not impose it upon the Judges.'¹

In the same case the late Chief Justice Solomon stated the principle as follows

'It is the Legislature and not the Courts of Law in Rhodesia as in the Union of South Africa, who are the judges of whether any law is required for the peace, order or good government of the territory under their jurisdiction. No Court of Law in Rhodesia is entitled to examine the policy of an Ordinance passed by the Legislature with the view of determining whether in fact the law makes for peace, order and good government. That is a matter entirely within the discretion of the Legislature and no matter how strongly any judge may feel that a particular law is antagonistic to good government, he has no authority on that ground to declare the law to be invalid. All that the Courts of Law can do is to inquire whether the Legislature has exceeded the powers conferred upon it by the Order in Council which created it, and in that event to declare the law invalid to the extent to which the powers have been exceeded.'²

So plenary are the powers of a dominion legislature that even when the judges are convinced that a law will not tend towards peace or order, and is the negation of good, in the sense of just government, that law cannot on that account be held inoperative.³ The late Chief Justice Solomon, in a case in 1927 referred to the powers granted to administrative officials under

¹ *Re v. McChlery* [1912] A D 199, at p. 220. Cf. Lord Birkenhead L.C. in *McCawley v. The King*, [1920] A C 691 at p. 706. 'Consistently with the genius of the British people what was given was given completely and unequivocally in the belief fully justified by the event that these young communities would successfully work out their own constitutional salvation.'

² *Re v. McChlery*, [1912] A D 199, at p. 226, citing *Regina v. Burah*, 3 A C 889 and *Riel v. Regina*, 10 A C 675. Cf. *Attorney-General for Ontario v. Attorney-General for Canada*, [1912] A C 571, at p. 583.

³ This is a better term to employ than 'illegal' or 'null and void'. 'When the court declares a statute to be unconstitutional, it does not annul or repeal the unconstitutional statute, it simply refuses to recognize it, and determines the rights of parties just as if such statute had no existence' (Kerr, *Law of the Australian Constitution*, pp. 24-5).

the Native Urban Areas Act, No 21 of 1923, as powers of a very remarkable nature, and spoke of 'the grave dangers that may arise to the liberty of the subject if persons can be dealt with in this informal manner, and sent for long periods of detention to penal institutions. That, however, is a matter for the consideration of the legislature. As far as courts of justice are concerned our duty is to give effect to the laws enacted by parliament, no matter whether we approve of them or not' ¹

5. The Plenary Nature of Provincial Council Powers

The provincial councils are only subordinate legislatures in the same sense in which the Union parliament, before 1931, was a subordinate legislature, and whatever powers they have, are full powers, falling within the principle stated above with regard to the Union parliament. Indeed, this principle of the plenary nature of the powers of a subordinate legislature was first applied in Canada to the powers of a provincial legislature in the case of *Hodge v The Queen*² and approved in South Africa in the case of *Rea v McChieley*³ which dealt with the powers of the legislature of Southern Rhodesia. The difference between the provincial councils and the Union parliament, apart from differences which spring from the fact that the latter is a constituent assembly in the sense that it can change its own constitution whereas the former cannot change their own constitutions, is that the powers of the provincial councils are much narrower both in respect of territorial jurisdiction and of subject-matter.

The provincial councils are not delegates or agents of the Union parliament, but they are original legislative bodies. Their powers were drawn originally from the South Africa Act and were not delegated to them by the Union parliament. Their ordinances are statutes and not by-laws, and they have the full force of law within the province. In a leading case the late Mr Justice Bristowe stated

'The status of provincial councils under the South Africa Act is analogous to that of the Canadian provincial legislatures under the British North America Act, 1867. There are no doubt differences between them, of which the most important is that in Canada the provincial legislative powers are throughout exclusive, while here they are not. But these

¹ *Hanke v Cape Town Municipality* [1927] A D 390, at p 388, quoting with approval the judge-president's criticism in *Rea v Jacobs*, [1925] C P D 20

² (1883) 9 A C 117

³ [1912] A D 199

differences are of degree rather than of kind. The fact that under the South Africa Act provincial statutes may be overridden by a Union statute does not make the provincial councils *subordinate legislatures* to¹ the Union parliament. Within the scope of their authority their powers are as plenary as those of the Dominion provincial legislatures. They do not exercise a delegated authority and they are only subordinate legislatures in the same sense in which the Union parliament itself is a subordinate legislature.²

Whereas the powers of the Union parliament are undefined, and to a certain extent unlimited, the powers of the provincial councils are positive, defined, precise, and limited.³ They fall within the heads of powers granted by section 85 of the South Africa Act, or the powers which the Union parliament may grant them. To that extent their powers are limited by precise definition, and beyond the ambit of their powers they may not tread. But within the limits of those powers the powers of the provincial councils are as plenary, as absolute and as discretionary as those of the Union parliament.⁴ They may make laws, as effectively and as freely as the Union parliament within their limits of subjects and areas. They have all the ancillary or auxiliary or implied powers that are necessary for the exercise of the direct powers granted to them. It does not matter whether they exercise their powers harshly, unjustly, or unreasonably or in so doing discriminate between races or defy fundamental principles of morality, justice or civilization.⁵ The only test which the courts can apply is that of legality and not that of ethics. The question always is: Was the power granted to legislate upon a particular subject? If such a power was granted the manner of its exercise is immaterial.

But the powers of the provincial councils, full as they are, are not immutably fixed.⁶ They may at any time be repealed or amended by the Union parliament. Section 86 of the South Africa Act provides that legislation by the provincial councils shall have force and effect only as long as it is not repugnant to an act of parliament. Parliament, therefore, without even contemplating the effect upon provincial legislation, may pass laws which indirectly or by implication nullify provincial ordi-

¹ 'Delegates of' might be better than the words in italics.

² *Williams and Adendorff v Johannesburg Municipality*, [1915] T.P.D. 1106.

³ See *infra*, Chapter XIII (ii).

⁴ See *infra*, Chapter XIII (ii).

⁵ See *infra*, Chapter XIII (iii).

⁶ See *infra*, Chapter XIII (iv).

nances The powers of a provincial council may thus be limited by the mere passing of a statute by the parliament of the Union which does not as much as mention the provincial councils In addition to this power of limitation, the governor-general-in-council has at all times the right to refuse his assent to provincial ordinances¹ The provincial councils, therefore, while having a plenary power of legislation, are at all times subordinate to the Union parliament and dependent upon the assent of the governor-general-in-council for the exercise of their legislative powers, a power on the part of the governor-general-in-council which is much more real in this case than in the case of assent to legislation of the Union parliament

6. The Former Limitations on the Powers of the Union Parliament and the Effect of the Statute of Westminster, 1931, and the Union Legislation of 1934

There were, up to 1931, three restrictions on the powers of the Union parliament² (i) those arising from the essential character of a parliament of a dependency as not sovereign in the full legal sense of the term (ii) those arising from what is termed territorial limitation and (iii) those arising from the full and unfettered legal sovereignty of the parliament of the United Kingdom in the sense that no dominion parliament might pass legislation which was repugnant to an act of that parliament applicable to the dominion within the terms of the Colonial Laws Validity Act 1865

(i) *The Union Parliament as a Subordinate Legislature* (1910-31) In the theory of British law the British parliament can legislate for any part of the world over which it chooses to legislate³ This right is subject only to the possibility of its being unable to enforce the laws beyond the limits of its own territory Blackstone, writing in 1765, correctly expressed the legal doctrine which holds good to-day in the minds of all jurists The King in parliament is supreme, that is the King in

¹ Section 90 of the South Africa Act, 1909

² This classification and the substance of this topic are adapted from H. J. Schlosberg, *The King's Republics* (London, 1929), pp. 57-73, and reference was freely made to an article by W. Pollak in the *South African Law Journal*, vol. xlviii, pp. 289 ff

³ *Rex v Earl Russell*, (1901) A.C. 416

the parliament of Westminster 'Ireland', wrote Blackstone, 'is a dependent subordinate kingdom. Our American plantations are dependent dominions, they are subject to the control of the parliament, though, like Ireland, they are not bound by any acts of parliament—unless particularly mentioned'.¹ This position has never to this day been abandoned by the law of England. It is true that the British parliament no longer legislates for any dominion because constitutional conventions have become superimposed upon the strict spirit of the law, making it 'unconstitutional' for that parliament to legislate for the dominions, but the legal position is, strictly speaking, the same. If the British parliament did legislate for the dominions, such legislation would be valid in law, and any one in the dominions disobeying the criminal provisions of such legislation might be indicted and punished. The sovereignty of the British parliament is still, in legal doctrine, as absolute in Toronto and in Capetown as it is in London or Cambridge.

'The British Parliament', declared Innes J A, 'is a sovereign body entitled to legislate for the whole Empire. Unfettered by a written constitution, it is clothed with supreme legislative capacity. No British court can decline to enforce a British statute on the ground that it is unconstitutional, and therefore invalid. But all other law giving bodies within the Empire are subordinate. They derive their authority, not from ancient constitutional right, but from the instruments which create them'.²

The constitutions of all the dominions owe their existence to acts of the British parliament. As they were made by the British parliament, so can they be modified by the British parliament. They can, in the theory of even present-day English law, be abolished by the British parliament. But in the constitutional practice of to-day 'no such abolishing act would be contemplated by an imperial ministry, and, if contemplated, would never be enacted, and, if enacted, would never be obeyed. The form of the law as enunciated by Blackstone persists, but its spirit and force are gone'.³ Legally the British parliament is supreme over the King's dominions and it cannot divest itself of that supremacy, but as it has done in the Statute of Westminster, it is

¹ *Institutes*, p. 98.

² *Re v. McChlery*, [1912] A.D. 190, at p. 218.

³ C. S. Kenny in 2 *Cambridge Law Journal*, 1926, p. 158. See *infra*, Chapter XXVIII. 1

equally clear that it can declare a constitutional principle which will be far more binding than any mere law' ¹

There were other limitations upon dominion legislation. There were certain topics of imperial importance that were considered so much above the status of a colony that no colonial legislation could validly affect them. Colonial legislatures had an inherent disability in these respects. When the South African colonies formed a Union, all owed their position to letters patent, supplemented in the Cape and Natal by local acts, and it could not be maintained that the need for a British act to effect a union was due to existing British legislation. It was clear that the need was based simply on the essential position that a colony could not alter its colonial status by becoming part of a federation or a union, and that no concert of neighbouring colonies could produce this effect ². Further, a colonial legislature could not extinguish itself, nor abolish the post of governor-general, nor pass an act placing itself under the sovereignty of a foreign power, nor an act of secession, nor might it enact that the enemies of the United Kingdom should not be regarded as the enemies of the dominions³, nor legislate in a manner restricting the King's prerogative in his political capacity, such as sovereignty and perpetuity ⁴. If the royal prerogative was to be affected as regards any action to be carried out in the United Kingdom, this had to be accomplished by a British statute⁵, as also any of the modifications just mentioned. The mode of restriction over this class of dominion legislation was by the reservation of bills by the governor-general, or by some method tantamount to reservation such as the insertion of a suspending clause, or by the disallowance of completed legislation by the crown.

The provisions regarding the reservation of bills in South Africa are to be found in the South Africa Act and in the royal

¹ A. B. Keith, *Speeches and Documents on the British Dominions, 1918-1931* (Oxford, 1932), p. xxx.

² *The Government of South Africa* (South Africa, Central News Agency, 1908), vol. 1, pp. 452-4.

³ H. Jenkyns, *British Rule and Jurisdiction Beyond the Seas* (Oxford, 1902), p. 69.

⁴ Joseph Chitty, *A Treatise on the Law of the Prerogatives of the Crown* (London, 1820), p. 25.

⁵ Cf. *Nadan v The King*, [1926] A.C. 491, section 108 of the South Africa Act, section 74 of the Commonwealth of Australia Act, 1900.

instructions Section 64 of the South Africa Act¹ required the governor-general to assent to bills according to his discretion or to reserve such bills as he may think fit to reserve, but he had to reserve bills amending the constitution of the house of assembly or of provincial councils. A bill reserved for the King's pleasure had no force unless and until it had received the royal assent, and this assent had to be given within one year, otherwise the bill was held to have lapsed.² But even though the governor-general had assented to a bill, the King might have disallowed such an act within one year after it had received the governor-general's assent, and the act then became void.³ The provisions of the South Africa Act regarding the reservation of bills have been repealed, and the assent to bills is now governed by the Status of the Union Act, 1934, and the Royal Executive Functions and Seals Act, 1934.⁴

This power of the crown to negative or veto a bill was virtually, though not in name, the right of the British cabinet to limit dominion independence, and it has been frequently exercised. In 1868 the crown refused to assent to a Canadian bill reducing the salary of the governor-general,⁵ and the crown has at times refused to assent to bills in Australia for checking Chinese immigration. In 1884 a New Zealand bill which proposed to authorize the dominion to annex any island in the Pacific that was not claimed by a foreign power was not assented to by the crown. In South Africa bills have been reserved in accordance with the provisions of the South Africa Act, and in 1928 the Liquor bill was reserved as, by repealing section 13 of Act 5 of 1922, which conferred certain powers on provincial councils regarding licences for the sale of liquor, it abridged the powers conferred on provincial councils by section 85 of the South Africa Act as those powers include authority to make ordinances

¹ This section has been repealed by Section 8 of the Status of the Union Act, 1934, and a new section substituted. The right to reserve bills is now abolished. The original section is printed in Appendix IV, and the new section is printed in Appendix VII.

² Section 66 of the South African Act. This section is repealed by section 11 of the Status of the Union Act, 1934. See Appendixes IV and VII.

³ Section 65 of the South Africa Act, this section is repealed under section 11 of the Status of the Union Act, 1934, see Appendix VII.

⁴ See Appendix VIII.

⁵ A. Todd, *Parliamentary Government in the British Colonies* (London, 1894), p. 137.

in relation to any subject not specifically mentioned in the section, in respect of which parliament may by any law delegate such powers to a provincial council.¹

The second veto of the crown, that of annulling acts already assented to by the governor-general, had not been exercised by the crown in any of the dominions for more than fifty years, and while it still had a legal existence it could be considered as constitutionally dead long before the Imperial Conference Report of 1926.²

(ii) *Territorial Limitation* In the celebrated case of *MacLeod v Attorney-General of New South Wales*,³ it was emphatically laid down that the legislative jurisdiction of all colonial legislatures is confined to their own territories. An act of New South Wales provided that whosoever being married marries another person during the subsistence of the first marriage, wherever the second marriage takes place, shall be liable to penal servitude for seven years. A certain MacLeod, during the subsistence of his first marriage in New South Wales in 1872, married again in the United States of America in 1889. When he returned to New South Wales he was arrested and convicted of bigamy. In an appeal to the privy council it was held that the enactment in question applied only to those persons who were within the territorial limits of the colony when the offence was committed. This decision has been followed in a case almost identical in New Zealand, where the first marriage took place, while the crime of bigamy was committed in England.⁴ This principle of territorial limitation applies also to legislation by the provincial councils.⁵

The territorial limitation upon the Union parliament's legisla-

¹ See *infra*, Chapters IV 4 (vi) and XI 5 (vii)

² Sir R. Borden, *Canadian Constitutional Studies* (Toronto, 1922), p. 66

³ [1891] A.C. 435. In *Re v Earl Russell*, [1901] A.C. 446, it was held that the accused was, under a statute of the imperial parliament, amenable to the jurisdiction of an English court even though the offence was committed outside Great Britain. This case illustrates the difference between a dominion's legislative power and the legislative power claimed by the imperial parliament.

⁴ *Re v Lander*, [1919] N.Z.L.R. 305. For a discussion on extra-territoriality, see A. B. Keith, *Responsible Government in the Dominions* (Oxford, 1928), vol. 1, pp. 321-338, J. G. Latham, *Australia and the British Commonwealth* (London, 1929), pp. 68 ff.

⁵ *Cape Provincial Administration v Direct Coffee Importing Company*, [1928] C.P.D. 148, *Smuthers v Commissioner of Inland Revenue*, [1928] C.P.D. 242, sections 85, 86, 91 of the South Africa Act.

tion was not imposed by express words in the South Africa Act, but it followed from the wording of section 59, giving power to the Union parliament 'to make laws for the peace, order and good government of the Union'. The extent of this territorial limitation was by no means clear. Shares situated in England, for example, could not be taxed in a dominion. Legislation purporting to tax dividends on such shares was held to be *ultra vires*.¹ Yet the appellate division has held that a tax may be imposed upon a person not resident in the Union,² and actions may be entertained against persons not resident in the Union.³ The Statute of Westminster, 1931, specially gives the dominions power to legislate with extra-territorial effect.⁴ The Union parliament, therefore, may now legislate for matters taking place in any part of the world it desires, its legislation is subject only to the possibility of non-enforcement by reason of lack of political power or through the nature of things as they exist.

(iii) *The Doctrine of Repugnance*. The Colonial Laws Validity Act, 1865, provided

Sect. 2 Any Colonial law which is or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the Colony to which such law may relate, or repugnant to any order or regulation made under authority of such Act of Parliament, or having in the Colony the force and effect of such Act, shall be read subject to such Act, order, or regulation, and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative.

3 No Colonial law shall be, or be deemed to have been, void or inoperative on the ground of repugnancy to the law of England unless the same shall be repugnant to the provisions of some such Act of Parliament, order, or regulation as aforesaid.⁵

¹ *Brassard v Smith*, [1925] A.C. 371, *Pass v British Tobacco Company (Australia) Limited*, 42 T.L.R. 771, see also *Spiller v Turner*, [1897] 1 Ch. 911. *Indian Investment Company v Boraz, etc.*, [1920] 1 K.B. 539.

² *Rhodesia Railways v Commissioner of Taxes*, [1925] A.D. 438.

³ This is a right given by common law, but it could have been given by statute. *Ashbury v Ellis*, [1893] A.C. 339.

⁴ Section 3 of the Statute of Westminster. See Appendix III. It should be noted that the Statute of Westminster says that the parliament has power (not shall have) to make laws having extra-territorial operation, and thus seems to be declaratory only. In this connexion see the important judgment of the privy council (*per* Lord Macmillan) in the Canadian case *Croft v Dunphy*, [1933] 1 D.L.R. 225, 48 T.L.R. 852, [1933] A.C. 156. Cf. *Alexander v Circuit Court Judge of Cork*, [1925] 2 I.R., at p. 170.

⁵ 28 & 29 Vict. c. 63. See on this act, Jenkins, *British Rule and Jurisdiction Beyond the Seas*, pp. 71 ff., for its history, see Schlosberg, *The King's Republic*, p. 70, and *Report of the 1929 Committee of the Imperial Conference*.

The obvious meaning of this act was to forbid the local legislature to enact any law repugnant to a British statute, but it did not otherwise derogate from the general powers of colonial legislatures.¹ With the passing of this act the condition of non-repugnancy to the general principles of English common law disappeared for good. The colonial law that was challenged under the act could not be repugnant to the law of England unless it involved, either directly or ultimately, a contradictory proposition, probably contradictory duties or contradictory rights, to those imposed by a British statute.² Moreover, a colonial statute was not void for repugnancy to the law of England unless it was opposed to some act of the British parliament made expressly or by necessary implication binding and applicable to the colony,³ for it is a fundamental principle of constitutional law that a British act has, save where expressly extended beyond the limits of the United Kingdom, no extra-territorial effect.⁴

It was the existence of the Colonial Laws Validity Act, 1865, which gave to section 152 of the South Africa Act its effective force. As long as the Colonial Laws Validity Act was of full force and effect, no Union legislation could alter the South Africa Act in a manner repugnant to the provisions of the latter act. Section 152 reads

Parliament may by law repeal or alter any of the provisions of this Act. Provided that no provision thereof, for the operation of which a definite period of time is prescribed, shall during such period be repealed or altered. And provided further that no repeal or alteration of the provisions contained in this section, or in sections thirty-three and thirty-four⁵ (until the number

¹ *In re Regina v. Marais*, [1902] A.C. 51. Cf. *Union Steamship Co. of New Zealand v. The Commonwealth*, 36 C.L.R. (per Higgins J.) at p. 155.

² *Attorney General for Queensland v. Attorney-General for the Commonwealth*, (1916) 20 C.L.R. 148.

³ *Robinson v. Reynolds*, Walsley's N.Z.R. 562.

⁴ An instructive example of the application of a British act to the British dominions is provided by the British Nationality Acts of 1914-22. Section 9 (1) of the Act of 1914 (4 & 5 Geo. V, c. 17), as amended by the Act of 1918 (8 & 9 Geo. V, c. 38), reads as follows: 'This part of this Act shall not have effect within any of the Dominions unless the legislature of that Dominion adopts this part of the Act.'

⁵ Section 33: the number of members for each province may not be decreased until the house has 150 members or until ten years have elapsed, whichever is the longer period. Section 34: the manner of increasing the number of members of the house.

of members of the House of Assembly has reached the limit therein prescribed, or until a period of ten years has elapsed after the establishment of the Union, whichever is the longer period), or in sections thirty-five¹ and one hundred and thirty-seven,² shall be valid unless the bill embodying such repeal or alteration shall be passed by both Houses of Parliament sitting together, and at the third reading agreed to by not less than two-thirds of the total number of members of both Houses. A bill so passed at such joint meeting shall be taken to have been duly passed by both Houses of Parliament

No Union act which purported to alter the South Africa Act in a manner contrary to the provisions of this section 152 would have been enforced by the courts because such act would have been repugnant to the South Africa Act, an act of the British parliament directly and expressly applicable to the Union and therefore most obviously within the provisions of the Colonial Laws Validity Act. The full power of amendment under section 152 possessed by the Union parliament will be considered in the following section of this chapter. Here we shall proceed to discuss the effect of the Statute of Westminster on the doctrine of repugnance.

The Statute of Westminster provides that the Colonial Laws Validity Act, 1865, shall not apply to any law made after the commencement of the statute, and future dominion legislation can amend any British act which is part of the law of the dominion.³ The effect of this enactment appears to be that the Union parliament now possesses power to pass legislation which is in conflict with legislation of the British parliament applicable to the Union. If this is so, it means that the clauses of the South Africa Act, 'entrenched' by section 152 of the act, are no longer safeguarded by law. The Union parliament will be able validly to repeal or alter the entrenched clauses of the South Africa Act without observing the requirements of section 152.⁴ The South African courts would no longer be able to declare such legislation invalid, that is, repugnant within the meaning of the Colonial Laws Validity Act, because that act would be no longer in force.

¹ This section lays down the qualification of voters and protects the coloured voters of the Cape.

² 'Both the English and the Dutch languages shall be official languages of the Union.'

³ Section 2 of the Statute of Westminster. See Appendix III.

⁴ W. Pollak in the *South African Law Journal*, vol. xlii, p. 282.

The constitutions of the other dominions are clearly safeguarded,¹ but the constitution of the Union appears to have been made as flexible, as uncontrolled, as easy to amend in every detail as the constitution of the United Kingdom. It was the legal force of the Colonial Laws Validity Act, it is argued, which stood behind the entrenched clauses of the South Africa Act, and which protected the governor-general's power of reservation. *With the coming into force of the Statute of Westminster the parliament of the Union now has the legal power to pass any legislation altering the South Africa Act.*

In 1934 the parliament of the Union passed two enactments which effected changes in the South Africa Act, 1909. The Status of the Union Act, 1934, refers in its preamble to the declarations and resolutions of the Imperial Conferences of 1926 and 1930, to the Statute of Westminster, 1931, and to the expediency of having the status of the Union as defined in those documents adopted and declared by the parliament of the Union. It provides that no act of the parliament of the United Kingdom shall extend to the Union, unless so extended by an act of the parliament of the Union.² The executive government of the Union in regard to any aspect of its domestic or external affairs is declared to be vested in the King, acting on the advice of his ministers of state for the Union.³ A slight change is made in the form of the oath of allegiance,⁴ and the right of the governor-general to reserve bills for the King's pleasure is abolished. The governor-general, subject to any instructions from the King, shall either assent or withhold assent to bills, in the King's name.⁵ Those sections of the Statute of Westminster, 1931, which are applicable to the Union, are re-enacted in the schedule to the act as an integral portion of the statute law of the Union.⁶ There are other amendments of less importance which may be seen in the act itself which is printed in Appendix VIII of this book.

The Royal Executive Functions and Seals Act, 1934, provides

¹ Sections 7, 8, 9, and 10 of the Statute of Westminster, 1931. See Appendix III.

² Section 2. This provision cannot, of course, affect the inherent power of the parliament of the United Kingdom to legislate for the whole Empire.

³ Section 4.

⁴ Section 7.

⁵ Section 8.

⁶ Section 3. A slight change is made by section regarding a British subject's qualification for election to parliament. See Chapters IX, 3, X, 1, & App. VII.

the Union with a royal great seal and signet ¹ The King's will and pleasure as head of the executive government of the Union shall be expressed in writing under his sign manual, and every such instrument shall be countersigned by one of the King's ministers for the Union ² but if the delay involved in obtaining the King's signature would retard the dispatch of public business, the governor-general may sign on behalf of the King ³

These acts have made the following changes in actual practice: first, the Union did not hitherto have a royal great seal and signet. It had and still has a great seal which is used by the governor-general in sealing all public documents in the Union. The governor-general will still use this seal, but documents signed by the King will bear the royal great seal of the Union. secondly, the King's signature will now be obtained as a matter of course, and the governor-general will only sign executive documents when it is inexpedient to obtain the King's signature ⁴ thirdly, the power of the governor-general to reserve bills (subject to the exceptions mentioned in the Statute of the Union Act) has now been abolished. This power had not infrequently been exercised. The provision that the King must act on the advice of his ministers of state for the Union merely expresses in statutory form what has for some time been a constitutional convention ⁵

The acts are a logical sequence to the Statute of Westminster 1931. The power of the parliament of the Union, so long as the Statute of Westminster remains unrepealed is, legally unfettered and as was stated above section 152 of the South Africa Act, 1909, no longer has any restrictive legal effect. At the same time, however, there appears to be the rudiment of what may become a new kind of constitutional convention. When the *Report of the 1929 Committee of the Imperial Conference* came up for discussion in the house of assembly of the Union on April 22, 1931, it was stated from the government benches that parliament had a moral obligation to respect the entrenched clauses of the South Africa Act and a resolution was passed by the house acknowledging that these clauses would be respected.

¹ Section 1

² Section 4

³ Section 6

⁴ When the governor-general is advised to sign on behalf of the King, the King would be informally approached on the matter.—Mr O. Pirow on behalf of the government, Union Assembly, April 25, 1934.

⁵ See Chapter IV 1 and 3 (ii)

both in the spirit and in the letter of the South Africa Act, as passed in 1909¹ While the Status of the Union bill was being discussed in the house of assembly, the Speaker stated that any amendment of the 'entrenched' clauses would have to follow the procedure laid down in the South Africa Act, 1909² The point of amendment of the entrenched clauses was not actually before the house, but the Speaker said that it was 'desirable to state my views for the guidance of honourable members' If it is desired to amend or repeal any of the entrenched clauses, then the procedure laid down in the South Africa Act must be followed' This statement was not based on the actual legal position, it is as yet too early to say whether it is to be a constitutional convention or a rule of parliamentary procedure In either case it seems that the clauses will be respected on the ground that they constitute a solemn undertaking not only by the national convention but also by successive parliaments The Speaker might thus have stated what is a constitutional convention based upon a sense of public honour It appears to be a definite and living force in the constitution, and as such merits cognizance by students of constitutional law

7. The Amendment and Interpretation of the South Africa Act

Section 152 of the South Africa Act gave the parliament of the Union full power to repeal or alter any of the provisions of that Act, subject, however to the proviso that section 152 itself and certain other sections could only be altered with the approval of two-thirds of the members of both houses of parliament in joint sitting at the third reading of the amending or repealing bill If the Union parliament had passed an act which repealed or altered any of the entrenched clauses, but failed to observe the procedure necessary under section 152, the courts of the Union would have held such an act invalid Moreover, in the absence of some indication in an act or proof *abunde* that such act was passed in the manner contemplated by section 152, the courts would have assumed that such act was passed in the

¹ *House of Assembly Debates* 1931 April 22, column 2739 See Keith, *Speeches and Documents on the British Dominions*, pp 288, 290, 291 On the question of 'entrenched clauses' in the South Africa Act see H J Schlosberg in 2 *South African Law Times* pp 69-72

² April 25, 1934

ordinary manner and would accordingly have held such act invalid if it amended the entrenched clauses of the South Africa Act¹ Since the passing of the Statute of Westminster, however, there are, as we saw in the previous section of this chapter, no legal fetters to the power of the parliament of the Union to pass legislation altering section 152 or any other section of the South Africa Act

The power of the Union parliament to amend the South Africa Act was dealt with in the case of *Krause v Commissioner of Inland Revenue*² In this case section 100 of the South Africa Act came up for interpretation The section provides that the judges shall receive such remuneration as parliament shall prescribe, 'and their remuneration shall not be diminished during their continuance in office' Mr Justice Krause contended that the income tax which he had to pay on his salary as a judge was a diminution of his remuneration and was in conflict with the provisions of the South Africa Act This contention was not upheld Mr Justice Wessels, delivering the judgment of the appellate division, expounded three rules bearing on the amendment and interpretation of the South Africa Act (i) 'Except in the cases mentioned in section 152 of the South Africa Act, the courts of this country cannot declare any portion of an act of parliament unconstitutional and therefore void, because it does not conform to the provisions of the South Africa Act, for section 152 of the South Africa Act makes it clear that parliament may repeal or alter any part of this act except in certain specified cases'³ His Lordship then went on to consider the manner in which the South Africa Act might be repealed (ii) 'If a later act of Parliament is inconsistent with the South Africa Act, the Court may hold that the later act impliedly varies such part of the South Africa Act as is inconsistent with the later act The court cannot say that acts of parliament must be so interpreted as to conform to the South Africa Act and that no other interpretation is admissible'⁴ The third rule is an

¹ *Rex v Ndobe*, [1930] A D 484, at p 497

² [1929] A D 286

³ *Ibid*, at p 290

⁴ *Ibid*, and see *Noble and Barbour v S A R & H*, [1922] A D 527, 537 *McCaulley v The King*, [1920] A C 691, *Freeman v Union Government*, [1926] T P D 638, which laid down that 'the Union parliament may impliedly repeal or alter a term of the South Africa Act by enacting a provision inconsistent with

amplification of the second rule (iii) 'In considering whether the legislature intended the later act to supersede a provision of the South Africa Act, the court must take into consideration the whole of the later act as well as the South Africa Act, and gather from these acts, as well as from the effect of the legislation, what the Legislature intended when it passed the later Act'¹

The fundamental principle governing the interpretation of the South Africa Act is that it is to be interpreted according to the well-recognized standards of interpreting documents in British courts, that is to say, by reference to its terms, and without regard to external factors.² In America it has been said

'Whether we are considering an agreement between parties, a statute, or a constitution, with a view to its interpretation, the thing we are to seek is the thought which it expresses. To ascertain this, the first resort in all cases is to the natural signification of the words employed, in the order of grammatical arrangement in which the framers of the instrument have placed them. If, thus regarded, the words embody a definite meaning, which involves no absurdity and no contradiction between different parts of the same writing, then that meaning, apparent on the face of the instrument, is the one which alone we are at liberty to say was intended to be conveyed. In such a case there is no room for construction. That which the words declare is the meaning of the instrument.'³

Yet, a constitution is a constitution. 'Although we are to interpret the words of the constitution on the same principles of interpretation as we apply to any ordinary law, these very principles of interpretation compel us to take into account the nature and scope of the act that we are interpreting, to remember that it is a constitution, a mechanism under which laws are to be made, and not a mere act which declares what the law is

such term, where such term is not one for the repeal of which special formalities are prescribed.'

¹ *Krause v. Commissioner of Inland Revenue*, [1929] A D., at p. 290.

² See Kerr, *Law of the Australian Constitution* p. 44 and *De Villiers v. Cape Divisional Council*, (1975) Buch. at p. 64 where de Villiers C.J. stated that the rules to be applied in South Africa are British rules of interpretation. 'In construing statutes made in the Cape Colony after the cession to the British Crown, the Court should be guided by the decisions of the English Courts and not by the Roman Dutch authorities.' See also *Rex v. Myburgh*, [1916] C P D. 680, *Beukes v. Knight's Deep Limited*, [1917] T P D. 683. In *Rodepoort United G M Company v. Du Toit*, [1928] A D., at p. 71, Solomon C.J. said 'The argument cannot be pressed too far, and does not justify us in adopting any English decision which is based upon legal principles which are foreign to our system of law.'

³ *Newell v. People*, 7 N.Y. 9, at p. 97.

to be ¹ Compare the words of Stratford J A in *Krause v Commissioner of Inland Revenue*

'Though [the South Africa Act] framed no unalterable constitution since its provisions, save for the few exceptions mentioned in section 152, can be revoked at the will of the Union Parliament, it contains provisions of which this² is one, which constitutes the very framework of our system of government. The purpose of this provision is obvious, namely, to safeguard the independence of the judiciary. It was not entrenched in the South Africa Act for the very simple reason that it was not contemplated that any parliament would ever tamper with so fundamental a principle. It is, therefore, much more than a pious maxim. Though in theory parliament is free at any time to repeal the provision, it would require the clearest expression of intention to induce the court to hold that parliament intended to depart from so sound a principle, one which is vital to the proper functioning of the machinery of government.'³

Probably these words mean nothing more than that the courts ought to be particularly slow to read into a later act an amendment to the South Africa Act unless the later act makes it very clear that such amendment was intended.

There is one rule of interpretation, however, which has an important bearing on the interpretation of a constitution act like the South Africa Act. An act of this nature was intended to be more or less permanent, that is it intended to set up a machinery of government, and certain rules of procedure and action which, it was hoped, would not require alteration for a considerable period of time. Do the words of such a constitution act remain ever with the meaning which they bore when the act was passed? The rule adopted in America is stated as follows. The meaning of the constitution is fixed when it is adopted, and it is not different at any subsequent time.⁴ The same rule has to some extent been adopted in Australia.⁵ It must, however, be borne in mind that the rule is much easier in its application in a constitution like that of the Union, than in a rigid constitution like that of Australia or the United States.

¹ *Attorney-General for New South Wales v Brewery Employees' Union* 6 C L R 469, per Higgins J at p 611.

² Section 100, which provides that the remuneration of judges shall not be diminished during their continuance of office.

³ [1929] A D., at p 294.

⁴ T. M. Cooley, *Constitutional Limitations* (Boston, 1903), p 89, *South Carolina v United States*, 199 U S 437, *Dred Scott v Sandford*, 19 How 393.

⁵ See Kerr, *Law of the Australian Constitution*, pp 54-9, where the doctrine of 'progressive interpretation' is discussed with references to the leading cases.

of America. The South Africa Act can be changed quite easily, and when words acquire a new meaning parliament can alter them at will. But the rigid constitutions can be changed only with the greatest of difficulty and years, even centuries, may pass without the constitution being greatly altered. Difficulties will then arise in applying this rule. One would have to project one's mind backwards—too rigid an adherence to the rule would lead to the interpretation of the Constitution 'by an eighteenth-century mind in the light of eighteenth-century conditions and ideals', and this were to command the race to halt in its progress"¹ 'With advancing civilization new developments, now unthought of, may arise with respect to many subject-matters'² Though difficult of application, the rule is well established. If the court is in doubt as to the meaning of a section of the South Africa Act, it may examine the state of the law at the time when the act was passed, that is, it may take into consideration all the surrounding circumstances, the fact that a Union was formed out of four colonies, and the object of the act to form a more or less permanent union.³

To sum up it may be said the South Africa Act, 1909, is an ordinary act of the parliament of the United Kingdom to be interpreted in the same way as an act of the parliament of the Union. If the act is re-enacted as a statute of the parliament of the Union, its interpretation and amendment would be governed by principles which apply to ordinary legislation. That it creates a constitution is not a deciding factor, but only a factor to be taken into consideration in matters of ambiguity, in the same way as the object and intention of any ordinary act would be.

¹ *Ibid.*, p. 55, quoting *Borgin v. Falk Company*, 147 Wis. 327.

² *Per Griffiths (J.) in Attorney General for New South Wales v. Brewery Employees' Union*, 8 C. L. R. 469 at p. 501.

³ *Pretorius v. Barkly East Divisional Council* [1914] A.D. 407, *Chotabhai v. Union Government* [1911] A.D. 13, *Robinson v. Canadian Pacific Railway*, [1892] A.C. 481, *Keir* (*Law of the Australian Constitution*, p. 50) says 'the Court will take notice of the well known facts on which the scheme was based, and matters which were common knowledge in connection with the inauguration of Federation. Recourse may be had to the history of the Constitution and contemporaneous circumstances'. In interpreting the constitution of Canada, methods vary. See G. F. Henderson in 7 *Canadian Bar Review*, pp. 617 ff., W. P. M. Kennedy, in 8 *Canadian Bar Review*, pp. 706-7, and in 44 *Juridical Review*, pp. 330 ff. where a remarkable example is pointed out of the use of external materials by Lord Sankey, L.C. in *The Auction Case*, [1932] A.C. 54, 1 L.J.P.C. 1.

taken into consideration in case of ambiguity. The South Africa Act being an ordinary act of parliament, to be so interpreted may be amended by ordinary means (subject to the exceptions of the entrenched clauses before the Statute of Westminster came into operation) and the amendments may be direct or by implication, so long as, in the latter case, the intention to amend is clear.

8. Amendments to the South Africa Act passed between 1910 and 1934

We propose to give in this section of the work no more than a general view of the amendments which have been passed, leaving their detailed discussion to later chapters. (The acts marked with an asterisk do not declare that they actually amend¹ or repeal any part of the South Africa Act.)

1910 *The Census Act*,* No. 2 of 1910, section 3 re-enacts section 34 (u) of the South Africa Act. The latter requires a census to be taken of the European population every five years; the former requires a census to be taken of the whole population whenever the governor-general may so determine.²

1911 *The Appellate Division Further Jurisdiction Act** No. 1 of 1911, amends section 103 of the South Africa Act respecting appeals to the appellate division.

*The Powers and Privileges of Parliament Act** No. 19 of 1911 fulfils the hope expressed in section 57 of the South Africa Act and declares 'the powers, privileges, and immunities of the senate and of the house of assembly and of the members and committees of each house'.

The Exchequer and Audit Act, No. 21 of 1911, section 1 expressly repeals section 132 of the South Africa Act and regulates all the powers and duties of the controller and auditor-general of the Union.

1912. *The Private Bill Procedure Act*,* No. 20 of 1912 is an

¹ The term is used in its widest possible sense to include provisions which do not actually amend but amplify or complete provisions of the South Africa Act, or which have a direct bearing on it. A full list of amendments to the South Africa Act is given in the various sections of the act in Appendix IV.

² The census mentioned in the South Africa Act is one 'for the purposes of this Act' (section 34 (u)). When a census of the whole population, European and native, is taken, such census may be used for the purposes of the South Africa Act.

act for the purpose of giving better effect to the provisions of section 88 of the South Africa Act, which empowers a provincial council to take evidence on private bills affecting the province.

The Administration of Justice Act, No. 27 of 1912, section 13 amends section 139 of the South Africa Act by abolishing the crown prosecutor's office in Capetown and transfers the powers of that office to the attorney-general of the Cape of Good Hope. Section 16 interprets section 109 of the South Africa Act in the matter of the venue of the appellate division in certain cases of special circumstances. There are various acts up to 1931 which amend the constitution of the appellate division and many of the rules of procedure in sections 95-116 of the South Africa Act.

The Public Service and Pensions Act,* No. 29 of 1912, establishes a public service commission and provides a public service code for the Union as contemplated in section 142 of the South Africa Act. This act was amended by Act 39 of 1914 and Act 27 of 1923.

1913. *The Financial Relations Acts*,* 1910-33, amend and restrict the taxing powers of the provinces granted by section 85 of the South Africa Act. Other powers such as education are also referred to in these acts, generally with regard to the expenditure on education.

1916. *The Railway Board Act*,* No. 17 of 1916, amplifies and interprets section 126 of the South Africa Act, establishes a fund for maintaining uniformity in railway rates, provides for the better management of railway and harbour balances, and with Act 20 of 1922, applying to South-West Africa, provides for railway construction.

1918. *The Electoral Acts*,* 1918-31, regulate the conduct of elections, but do not interfere with the Cape native franchise. The Act of 1931 grants the suffrage to European women. These acts also regulate the number of constituencies, delimiting them in accordance with the provisions of the South Africa Act.

1919. *The South-West Africa Acts*,* 1919-1931, provide the mandated territory with a constitution, and generally govern the administration of justice, the railways, and the services of the territory.

1925. *The South Africa Act, 1909, Amendment Act, 1925*, transfers section 1 of the South Africa Act to a new section, 153,

making it a new 'Supplementary' Part XI of the South Africa Act, and section 1 is made to read 'The people of the Union acknowledge the sovereignty and guidance of Almighty God'. The nearest approach to the wording of this section to be found in any political document in South Africa is in the programme of the Afrikaner National Party, 1884, Article I 'The Afrikaner National Party acknowledges the guidance of providence in the destiny of countries and of nations'.¹ There were some legal difficulties regarding the introduction of the bill and a select committee was appointed to consider them. There had been a select committee in 1914 which reported that the difficulties were such that it was impossible for the Union parliament to pass an act altering the preamble of the South Africa Act into which it was then proposed to insert this sentiment of acknowledgement of the Almighty, because section 152 gave parliament the power to amend the provisions of the act and the preamble of the act was not a provision of the act. Further it was thought 'inadvisable to put something into the mouth of the British parliament, which at that time was not considered or intended'.² The point had been considered by the national convention, but it was intentionally omitted, and this gave rise to further difficulties, as it was said that the proposed amendment was a reflection on the national convention. The 1925 bill, however, was introduced 'to meet the wishes of the very large majority of the people'.³ The proceeding was a very novel and interesting one from a constitutional point of view and therefore the whole act as passed is given here.

ACT⁴

To amend the South Africa Act, 1909

WHEREAS the people of the Union of South Africa, being a God-fearing people, have consistently acknowledged Almighty God as the

¹ See A. P. Newton, *Select Documents relating to the Unification of South Africa* (London, 1924), vol. 1, p. 95. Cf. The preamble to the Australian Constitution Act, 1900 (63 & 64 Vict. c. 12) 'humbly relying on the blessing of Almighty God'. For the history of this preamble see, J. Quick and R. R. Garran, *The Annotated Constitution of the Australian Commonwealth* (Sydney, 1901), pp. 287 ff.

² *Debates of the Union House of Assembly*, 1925, column 2644.

³ *Ibid.*, column 480.

⁴ It is very rare in South Africa to find a preamble to an act of parliament and, contrary to the English custom, the short title of an act is always the last section of the act, in England it is the first.

Supreme Leader by whom the destinies of the peoples of the earth are governed and determined

AND WHEREAS the people represented by the former Colonial Parliaments and the National Convention entered upon Union in prayerful dependence on God

AND WHEREAS the specific mention of the sovereignty and guidance of the Almighty was in no wise omitted from the South Africa Act, 1909, through any want of recognition towards Him

AND WHEREAS it is the desire of the people that the sovereignty and guidance of God shall be specifically mentioned

BE IT ENACTED by the King's Most Excellent Majesty, the Senate and the House of Assembly of the Union of South Africa, as follows

1 Section one of the South Africa Act, 1909, is hereby repealed and the following new section substituted therefore

1 The people of the Union acknowledge the sovereignty and guidance of Almighty God

2 The South Africa Act, 1909, is hereby further amended by the insertion of the following new part after section *one hundred and fifty-two*

PART XI

SUPPLEMENTARY

153. This Act may be cited as the South Africa Act, 1909 '

3 This Act may be cited for all purposes as the South Africa Act, 1909, Amendment Act, 1925

The Official Languages of the Union Act, No 8 of 1925, provides that the word 'Dutch' in section 137 in the South Africa Act and elsewhere is to include Afrikaans. Afrikaans is a language derived from Dutch or the language of Holland, but it differs very greatly from its mother language in grammar, pronunciation, and spelling indeed, the difference is so great that it would not be easy for members of the two countries to carry on a rapid conversation. High Dutch, as it is called, is hardly used in South Africa the language of the country towns, of the courts when English is not used, of the later statutes, of officials, is Afrikaans and not Dutch, and the definition in the amending section seems inaccurate

1926. *The Senate Act, No 54 of 1926*, is a short but important act providing that the senate may be dissolved within one hundred and twenty days after the dissolution of the assembly

1933 *South Africa Amendment Act, No 17 of 1933*, permits the governor-general to appoint a deputy for the time being to act for a minister of state

1934 *The Status of the Union Act*, 1934, and *The Royal Executive Functions and Seals Act*, 1934, have been dealt with in section 6 of this chapter, and the *South Africa Act Amendment Act*, 1934, is printed in Appendixes VII, VIII and IX of this book

There have been a number of minor amendments to the act which are indicated elsewhere. In all sixty-six sections of the South Africa Act have been amended, while the enactments altering, interpreting, or amplifying the South Africa Act number one hundred and fifty-six.

9. The General Nature of South African Constitutional Law

We stated at the commencement of this chapter that the South Africa Act does not contain the whole of the constitutional law of the Union, and we showed that a large number of amendments have been made to the act itself, so that some parts of it hardly bear any relation to the sections which were originally enacted by the parliament of the United Kingdom.

There are a large number of constitutional conventions which we shall not find in any statute of the Union,¹ there are proclamations and regulations which form an important part of the constitutional law of the Union, there are statutes which make such inroads into the personal liberty of the subject as to suggest the question whether that at one time all-pervading principle of the constitution still exists.² In this work we propose to discuss these other branches of constitutional law.

Many aspects of South African constitutional law are similar to the constitutional law of other parts of the British Commonwealth. The laws and conventions in regard to the governor-general, his relations with the cabinet and the procedure of parliament, are all very similar to the laws and conventions obtaining in England, Canada, or Australia. Where there are differences, we point them out. Many are found in the South Africa Act, many are unwritten, many are found in enactments of the Union parliament.

The judicial and legal system of the Union, and administrative

¹ e.g. the conventions which require a ministry to resign when defeated in parliament on an important measure.

² See *infra*, Chapters XIX, XXII, and XXV.

law and tribunals, have developed along well-known lines. The system of native law and native law courts is something new, and we deal with these fully.¹ The method by which the natives are governed presents unique features. We shall examine the powers of the governor-general as supreme chief of all the native peoples, and note that in this capacity he acts not only upon the advice of the executive council or cabinet, but with the advice also of the native affairs commission, a secondary advisory council in the affairs of the natives.²

The natives have been granted a certain amount of local government, they have their own councils. They are slowly being educated in the ways of civilization. But by reason of their backwardness, a method of government different from that applying to the white races is in force. Government and legislation by proclamation are carried to a further degree than in any of the dominions. We have, in South Africa, as far as the natives are concerned, an undefined 'colony' within a dominion, a 'colony', undefined in area, bounded only by the limits of the state itself, where a system of 'crown colony government' is in existence within the framework of an entirely independent and advanced state. Statutory sanction is given to this system, and these statutes form not the least important and certainly the most interesting branch of the constitutional law of South Africa.

We shall examine questions relating to the rule of law, especially in their bearing upon the natives. We shall find in the Riotous Assemblies Acts and the Native Administration Acts, features of constitutional law well worth studying. Indeed, those parts of the constitutional law of South Africa which cannot be found in the South Africa Act comprise by far the larger and more interesting portion of the constitutional law of the Union.

¹ See *infra*, Chapters XVII 9, XVIII 3.

² See *infra*, Chapters XXIII 2, and XXV 1.

PART II
THE EXECUTIVE GOVERNMENT

THE EXECUTIVE GOVERNMENT

IN the preceding chapters we have outlined the characteristic features of the South African constitution. In the following chapters we propose to discuss the executive government of the Union in detail, pointing out the peculiarities which exist in South Africa.

The law-making power of the Union resides in the crown in parliament. The interpretation of the law is the work of the crown in its courts, carried out through judges who are appointed by the crown and cannot be removed except in special and rare circumstances. The enforcement of the law is the work of the executive power, and the everyday administration of the departments of the state, together with the policy which governs their present and future administration, is in the hands of a board of directors or a body of ministers and a group of servants which is collectively known as the executive. The object of this part of the work is to describe the construction, the working and the law which govern the executive power of the Union.

On the threshold of our inquiry stands the crown, represented as it is in South Africa by the governor-general. We shall discuss the method of appointment of the governor-general, and his powers and duties. Next we shall discuss the crown-in-council, the cabinet system, and the party system, in this manner hoping to describe the organization of the executive control of the Union. Other branches of executive control are dealt with separately in other parts of this work, and especially must attention be drawn to Part VII dealing with 'The Government of the Natives', and Part VIII dealing with 'The External Relations of the Union'. After discussing the civil service, the railway and harbour administration, and the financial system of the Union, we go on to deal with Union nationality and immigration, and then with actions against the crown.

IV

THE GOVERNOR-GENERAL

1. The Appointment and Choice of the Governor-General

THE legal basis of the appointment of the Governor-General and the powers which he possesses are to be found in section 9 of the South Africa Act 'The Governor-General', the section declares, 'shall be appointed by the King, and shall have and may exercise in the Union during the King's pleasure, but subject to this Act such powers and functions of the King as His Majesty may be pleased to assign to him' The bare words of this section do not reveal the true constitutional position. The manner of appointing the governor-general to-day is the result of two previous stages of evolution in the appointments of British governors. We are now in the third stage, and the future points to a fourth stage. We shall examine each of these stages in turn.

(1) *The First Stage* Originally no British minister would have thought of consulting the wishes of any colony regarding the proposed appointment of a governor. The secretary of state for the colonies with the approval of the British prime minister, recommended for the sanction of the sovereign suitable persons to fill the office of governor. The wishes of the colonies were never considered. The discretion of the British government was unfettered. In 1888 the government of Queensland claimed the right of being allowed an opportunity of expressing an opinion, before any governor was appointed whether such appointment would meet with the approval of the people of the colony. New South Wales and South Australia supported this claim. In 1882 Natal objected to the appointment of Sir W. Sendall as governor, an objection which resulted in Sir Henry Bulwer being appointed in the place of the former.¹ The agitation which continued until 1889 resulted in a position where the colonies were informally consulted and where there existed an informal right to refuse a suggested governor.

¹ A. Todd, *Parliamentary Government in the British Colonies* (London, 1894), p. 108. See also Sir C. W. Dilke, *Problems of Greater Britain* (London, 1890), vol. 1, p. 338.

(11) *The Second Stage* The stage during which the dominions were consulted but in which the sole responsibility for appointment rested with the *British government* lasted until 1926. It was during this stage that the first governor-general of the Union was appointed. The commission of appointment was as follows:

COMMISSION

PASSED UNDER THE ROYAL SIGN MANUAL AND SIGNET, APPOINTING THE RIGHT HONOURABLE VISCOUNT GLADSTONE TO BE GOVERNOR GENERAL AND COMMANDER-IN-CHIEF OF THE UNION OF SOUTH AFRICA

EDWARD R I

EDWARD THE SEVENTH, BY THE GRACE OF GOD OF THE UNITED KINGDOM OF GREAT BRITAIN AND IRELAND AND OF THE BRITISH DOMINIONS BEYOND THE SEAS KING, DEFENDER OF THE FAITH, EMPEROR OF INDIA TO OUR RIGHT TRUSTY AND WELL-BELOVED COUSIN AND COUNCILLOR, HERBERT JOHN, VISCOUNT GLADSTONE

GREETING

WE do, by this Our Commission under Our Sign Manual and Signet, appoint you, the said Herbert John, Viscount Gladstone to be, during Our pleasure, Our Governor-General and Commander-in-Chief in and over Our Union of South Africa, with all the powers, rights, privileges, and advantages to the said Office belonging or appertaining.

II AND We do hereby authorize, empower, and command you to exercise and perform all and singular the powers and directions contained in certain Letters Patent under the Great Seal of Our United Kingdom of Great Britain and Ireland, bearing date at Westminster the 29th day of December, 1909, constituting the said Office of Governor-General and Commander-in-Chief, or in any other Letters Patent adding to, amending, or substituted for the same, according to such Orders and Instructions as you may receive from Us.

III AND We do hereby command all and singular Our Officers, Ministers, and loving subjects in Our said Union, and all others whom it may concern, to take due notice hereof and to give their ready obedience accordingly.

Given at Our Court at Saint James's this 30th day of March, 1910, in the Tenth Year of Our Reign.

By His Majesty's Command

CREWE ¹

It is to be noticed that this commission is countersigned by the secretary of state for the colonies. The responsibility for the appointment was that of the British government, though

¹ *Statutes of the Union*, 1910, p. 90. The letters patent and royal instructions, are printed at the end of the South Africa Act, 1900, in Appendices IV, V and VI of this book.

the government of the Union was consulted and their informal approval obtained. Thus, a dominion constitutional claim had become superimposed upon a British constitutional right, to give rise to a constitutional convention demanding, with the sanction of dominion public opinion behind it, the approval of a dominion for an act directly affecting it.

(iii) *The Present Position* After the Imperial Conference of 1926, the next governor-general, the Earl of Clarendon, was appointed on a commission countersigned by the prime minister of the Union and not by the British secretary of state. The Union government was solely responsible for the appointment, the recommendation to the King came from the prime minister of the Union submitted verbally to his excellency the Earl of Athlone before the latter's relinquishment of office, and tendered by the latter to the King in the usual manner. The commission was as follows:

COMMISSION

PASSED UNDER THE ROYAL SIGN MANUAL AND SIGNET APPOINTING
LIEUTENANT COLONEL THE RIGHT HONOURABLE THE EARL OF
CLARENDON, G.C.M.G. TO BE GOVERNOR-GENERAL AND COMMANDER-IN-CHIEF OF THE UNION OF SOUTH AFRICA

GEORGE R I

GEORGE THE FIFTH, BY THE GRACE OF GOD OF GREAT BRITAIN,
IRELAND AND THE BRITISH DOMINIONS BEYOND THE SEAS KING,
DEFENDER OF THE FAITH EMPEROR OF INDIA TO OUR RIGHT
TRUSTY AND RIGHT WELL-BELOVED COUSIN, GEORGE HERBERT
HYDE, EARL OF CLARENDON, KNIGHT GRAND CROSS OF OUR MOST
DISTINGUISHED ORDER OF SAINT MICHAEL AND SAINT GEORGE,
HAVING THE HONORARY RANK OF LIEUTENANT-COLONEL IN OUR
ARMY,

GREETING

We do, by this Our Commission under Our Sign Manual and Signet, appoint you, the said George Herbert Hyde, Earl of Clarendon, to be, during Our pleasure, Our Governor General and Commander-in-Chief, in and over Our Union of South Africa, with all the powers, rights, privileges, and advantages to the said office belonging or appertaining.

II AND WE do hereby authorize, empower, and command you to exercise and perform all and singular the powers and directions contained in certain Letters Patent under the Great Seal bearing date at Westminster the Twenty-ninth day of December, 1909, constituting the said Office of Governor General and Commander-in-Chief, or in any other Letters Patent adding to, amending or substituted for the same, according to such Orders and Instructions as the

Governor-General and Commander-in-Chief for the time being hath already received, or as you may hereafter receive from Us

III AND further, We do hereby appoint that, so soon as you shall have taken the prescribed Oaths and have entered upon the duties of your office, this Our present Commission shall supersede Our Commission under Our Sign Manual and Signet bearing date the Twenty-first day of November, 1923, appointing Our Most Dear Brother-in law, Alexander Augustus Frederick George, Earl of Athlone to be Governor-General and Commander-in-Chief of Our Union of South Africa

IV AND we do hereby command all and singular Our Officers, Ministers, and loving subjects in Our said Union, and all others whom it may concern, to take due notice thereof and to give then ready obedience accordingly

Given at Our Court at Saint James's this Third day of December, 1930, in the Twenty-first year of Our Reign

By His Majesty's Command,
J B M HERTZOG

The Report of the Imperial Conference of 1930 dealt with the appointment of the governors-general in the following manner

The report of the Inter-Imperial Relations Committee of the Imperial Conference of 1926 declared that the Governor-General of a Dominion is now the 'representative of the Crown, holding in all essential respects the same position in relation to the administration of public affairs in the Dominion as is held by His Majesty the King in Great Britain, and that he is not the representative or agent of His Majesty's Government in Great Britain or of any Department of that Government'

The Report did not, however, contain any recommendation as to the procedure to be adopted henceforward in the appointment of a Governor-General and the Conference felt it necessary to give some consideration to this question

Having considered the question of the procedure to be observed in the appointment of a Governor-General of a Dominion in the light of the alteration in his position resulting from the Resolutions of the Imperial Conference of 1926, the Conference came to the conclusion that the following statements in regard thereto would seem to flow naturally from the new position of the Governor-General as representative of His Majesty only

1 The parties interested in the appointment of a Governor-General of a Dominion are His Majesty the King, whose representative he is, and the Dominion concerned

2 The constitutional practice that His Majesty acts on the advice of responsible Ministers applies also in this instance

3 The Ministers who tender and are responsible for such advice are His Majesty's Ministers in the Dominion concerned

4 The Ministers concerned tender their formal advice after informal consultation with His Majesty

5 The channel of communication between His Majesty and the Government of any Dominion is a matter solely concerning His Majesty and such Government His Majesty's Government in the United Kingdom have expressed their willingness to continue to act in relation to any of His Majesty's Governments in any manner in which that Government may desire

6 The manner in which the instrument containing the Governor-General's appointment should reflect the principles set forth above is a matter in regard to which His Majesty is advised by His Ministers in the Dominion concerned¹

2. The Deputy Governor-General and the Officer Administering the Government

Section 11 of the South Africa Act provides that the governor-general may be authorized by the King to appoint any person to be his deputy within the Union during his temporary absence. The phrase 'Deputy Governor-General' is used to describe the person acting for the governor-general when the latter is temporarily absent for a short period from the seat of Government of the Union.² The difference between the 'Deputy Governor-General' and the 'Officer Administering the Government', is that the latter takes the governor-general's place and performs his duties while he is absent from the Union or dead or incapable, as provided in article IV of the letters patent, while the former acts for the Governor-General while he is temporarily absent from the seat of government or the Union. In the latter case the absence must not exceed one month.

The royal instructions require the governor-general to be always present within the Union. 'The Governor-General shall not, upon any pretence whatever quit the Union without first having obtained leave from Us for so doing under Our Sign Manual and Signet, or through one of our Principal Secretaries

¹ *Report of the Imperial Conference, 1930* (Cmd 3717), pp 26-7. The Status of the Union Act, 1934, and the Royal Executive Functions and Seals Act, 1934, express in statutory form some of the conventions referred to in the Imperial Conference Report of 1926. The next stage may possibly be the appointment of a governor general domiciled in the Union, and the amendment of the royal instructions and the letters patent to accord with the new position created by the abolition of the right of reserving bills for the King's pleasure and the recognized relationship of His Majesty with his ministers of state for the Union.

² See Appendix V of this book, letters patent, iv, v, vi.

of State, unless for the purpose of visiting some neighbouring Colony, Territory, or State, for periods not exceeding one month at any one time, nor exceeding in the aggregate one month for every year's service in the Union.' The temporary absence of the governor-general for less than one month in a neighbouring territory is not deemed absence from the Union within the meaning of the letters patent, provided he appoints a deputy to take his place during his absence.¹

The manner of appointing the officer administering the government and the powers granted him are set out in the letters patent as follows

IV In the event of the death, incapacity, removal or absence from the Union of the Governor-General, all and every the powers and authorities herein granted to him shall, until Our further pleasure is signified therein, be vested in such person as may be appointed by Us under Our Sign Manual and Signet to be Our Lieutenant-Governor of the Union,² or if there be no such Lieutenant-Governor in the Union, then in such person or persons as may be appointed by Us under Our Sign Manual and Signet to administer the Government of the same, and in case there shall be no person or persons within the Union so appointed by Us, then in the Chief Justice of South Africa for the time being, or in the case of the death, incapacity, removal, or absence from the Union of the said Chief Justice for the time being, then in the Senior Judge for the time being of the Supreme Court of South Africa then residing in the Union, and not being under incapacity. Provided always that the said Senior Judge shall act in the administration of the Government only if and when the said Chief Justice shall not be present within the Union and capable of administering the Government.

The manner of appointing the deputy governor-general is also set out in the letters patent. It will be observed that in the former case, which presupposes the governor-general's death, incapacity, removal, or absence, probably in Great Britain on long leave, the person to act in his stead is appointed by the King and has all the powers of the governor-general himself. But the deputy governor-general may be appointed by the governor-general to act in his stead during his temporary absence, that is, for not more than one month, from the Union or during his absence from the seat of government, and the person so appointed is an agent with limited powers his authority being limited to the special directions given him in

¹ Royal Instructions, x, Appendix VI

² There is not and never has been a lieutenant-governor of the Union

an instrument under the public seal of the Union, or other instructions given him by the governor-general from time to time. This appears quite clearly from the letters patent.

VI In the event of the Governor-General having occasion to be temporarily absent for a short period from the seat of Government or from the Union, he may in every such case, by an instrument under the Public Seal of the Union constitute and appoint any person to be his Deputy within the Union during such temporary absence, and in that capacity to exercise, perform, and execute for and on behalf of the Governor-General during such absence, but no longer, all such powers and authorities vested in the Governor-General as shall in and by such instrument be specified and limited, but no others. Every such Deputy shall conform to and observe all such instructions as the Governor-General shall from time to time address to him for his guidance. Provided, nevertheless, that by the appointment of a Deputy, as aforesaid, the power and authority of the Governor-General shall not be abridged, altered or in any way affected, otherwise than We may at any time hereafter think proper to direct.

At one time the practice in the colonies was to appoint the senior officer commanding the imperial forces to act in the place of the absent governor, but with the removal of the imperial forces this alternative disappeared and the chief justice was called upon to act. The first chief justice of South Africa, Lord de Villiers, was of such high standing in the country that no one ever doubted his impartiality, and succeeding chief justices have worthily upheld the tradition. They were always universally accepted as the men 'marked out by office, by reputation and by personality for the post'.¹

3. The Letters Patent and the Royal Instructions

The office of governor-general of the Union was constituted by letters patent under the great seal of the United Kingdom on December 29, 1909. This instrument was accompanied and supplemented by the royal instructions passed under the sign manual and signed on the same day. The appointment of the governor-general is made under the prerogative power of the crown to exercise executive authority in so far as no other provision has been made by an act of the British parliament.² The provisions of 'these Our Letters Patent' are not legislative in character, and differ essentially from such provisions as those

¹ E. A. Walker, *Lord de Villiers and His Times* (London, 1925), p. 497.

² A. V. Dicey, *Law of the Constitution* (London, 1915), Chapter XV.

creating a legislature of a representative character. The latter are irrevocable unless the power to revoke is expressed, the former are not. The power reserved by the King in clause viii of the letters patent 'to revoke, alter, or amend these Our Letters Patent' exists by law whether such reservation is included in the instrument or not.¹

In addition to the formal instructions accompanying the letters patent the governor-general was, before the Imperial Conference of 1926, required to obey such other instructions as he might from time to time have received from the secretary of state for the colonies on behalf of the King. Since 1926 the governor-general has in theory ceased to represent the British government and now is the representative of the King alone. It is therefore easier to appreciate the very foundation of the existence of the present office. He is the instrument through which the King exercises those powers in the government of the Union which by reason of space and the nature of things he cannot exercise in person. The Status of the Union Act, 1934, makes this position clear. 'The Executive Government of the Union, in regard to any aspect of its domestic or external affairs is vested in the King, acting on the advice of His Ministers of State for the Union, and may be administered by His Majesty in person or by a Governor-General as his representative.'² The King not being able to be present in person, appoints a governor-general to act for him, giving him 'such powers as His Majesty may be pleased to assign to him'.³ The powers thus referred to are contained in the letters patent and the royal instructions, and the commission under which each governor-general is specifically appointed commands him to obey the letters patent, the royal instructions, and the law. There is in reality no essential difference between the letters patent and the royal instructions. The provisions of both documents could well have been included in either the one or the other document, to the exclusion of one of them. But, as the titles of the documents convey, the letters patent constitute the office of governor-general for the Union, and its contents are concerned with the nature of such

¹ See A. B. Keith, *Responsible Government in the Dominions* (Oxford, 1926), p. 80.

² Status of the Union Act, 1934, section 4.

³ South Africa Act section 9. The King acts on the advice of his ministers in the Union on this point. See Status of the Union Act, 1934, section 4 (2).

office, and the powers appertaining to the office, the royal instructions contain the duties which such office entails and the manner of the performance of such duties. The governor-general has only those powers delegated to him in these instruments by the King, and those allowed him by the statute law of the United Kingdom or of the Union of South Africa. Under the Status of the Union Act, and the Royal Executive Functions and Seals Act, 1934, the letters patent, the royal instructions, and the instructions given to him from time to time will be framed by the ministers of state in the Union in consultation with the King.

4 The Powers and Duties of the Governor-General

The governor-general must follow his instructions and must act according to the law in force in the Union.¹ On behalf of the King he may exercise all the powers and should perform the duties which the King may exercise and should perform under the South Africa Act or otherwise in respect of the summoning, proroguing, or dissolving the parliament of the Union.² The provisions hereafter set out reflect the governor-general's powers and duties in accordance with the letters patent and the royal instructions which were in force at the time of the appointment of Lord Clarendon on December 3, 1930, no new instructions have been issued.

(1) *Pardon* The royal instructions empower the governor-general in the King's name and on behalf of the King 'when any crime or offence against the laws of the Union has been committed for which the offender may be tried within the Union, to grant a pardon to any accomplice in such crime or offence who shall give such information as shall lead to the conviction of the principal offender, or of any one of such offenders if more than one, and further, to grant to any offender convicted a pardon, either free or subject to lawful conditions, or any remission of the sentence passed on such offender'.³ Pardon, remission, or reprieve may not be granted, in cases other than capital punishment, without the advice of at least one of the ministers. Where sentence of death has been passed, the

¹ Letters patent, i, and see Royal Executive Functions and Seals Act, 1934, section 6.

² Letters patent, iii.

³ Royal instructions, ix. This power of pardoning an accomplice should be compared with the Criminal Procedure and Evidence Act, 1917, section 282.

governor-general must consult the executive council, submitting to it any report made by the judge who tried the case, and if necessary, inviting his attendance at the council ¹ The governor-general is given full power either to extend or withhold a pardon or reprieve 'according to his own deliberate judgment, whether the members of the executive council concur therein or otherwise' This provision in the royal instructions at present remains with the approval of the government of the Union, and, in that case, the presumption is that ministerial advice will be followed The effect of a free pardon is to discharge the convicted person from all the consequences of the conviction and render him free from any future prosecution in regard to that offence ²

Save as stated above, no power is given to the governor-general to pardon except after a conviction That portion of the royal prerogative which enables the King to grant a pardon before conviction is not entrusted to the governor-general, an illustration of the fact that the powers of the governor-general are only such as the King has been pleased to assign to him In the United Kingdom the King has on occasion pardoned an offender who was not an accomplice, before he was tried (though the granting of a pardon before conviction is very unusual) and the offender was able to raise the plea of a free pardon in court and had to be discharged ³ The point has once arisen in South Africa ⁴ A person had been convicted before a judge and sentenced At his trial certain questions of law had been reserved by the presiding judge for the consideration of the full court While the argument on these points was pending the executive council granted him a pardon and the accused purported to withdraw the points reserved Chief Justice Kotze took the view that, as the appeal court had not set aside or confirmed the conviction, the trial was still pending, and as a judge had reserved the points of law for the consideration of the appeal court the accused could not withdraw them A pardon could only be granted after the trial had been completed He therefore ordered the rearrest of the accused, in order to uphold the

¹ In practice, a report is also obtained from prosecuting counsel in capital cases

² See sections 157, 378 of the Criminal Procedure Code, 1917

³ Halsbury, *Laws of England*, vi, section 611

⁴ *State v. Nellmapus*, 4 C.L.J. 45, (1885) 8 S.A.R. 121 This was in republican days, but the principle is the same, because section 83 of the *Grondwet* allowed pardon only after conviction

independence of the judiciary and to show that the procedure of the courts could not be interfered with except as provided by law. The questions reserved were subsequently argued and were answered in favour of the accused, and he was then set at liberty by the full court.

The chief value of the power of pardon and remission of sentences lies in this: when the courts have finally dealt with a criminal trial, their jurisdiction ceases, and except where a verdict has been obtained by fraud, e.g. the perjury of witnesses, the courts have no jurisdiction to interfere with the verdicts and judgments finally given by them. It often happens that, through no one's fault, valuable evidence has been either unobtainable or its existence has not been suspected and consequently not been laid before the court. The proper procedure, in such a case, and one recommended by the courts,¹ is to lay the matter before the governor-general for the King's pardon. The courts have also, when appeal has been brought against the severity of a sentence, in view of their inability to reduce sentences in certain cases, especially those where a minimum punishment has been imposed by statute, recommended that the governor-general remit portion of the sentence.² In the case of *Rex v Simpson*,³ the accused, who was sixty-four years of age, had been convicted under the Insolvency Act. Mr Justice Krause stated

'In view of the fact that the appellant was found guilty on the evidence adduced although it is true it was partly due to the fact that the presumption of law created against him was not rebutted by reason of his inexperience in defending himself, the court is still faced with the fact that the accused was found guilty of the alleged contraventions, and his counsel in the circumstances, unfortunately, had to admit his inability, in view of the law, to contest the legality of the convictions. The sentence is one which the magistrate was entitled to impose. For the classes of offence mentioned the sentence is not a severe one, nor can it be said to be excessive. This Court can only reduce the sentence imposed by an inferior court if it is satisfied that the discretion exercised by the magistrate has been wrongly exercised, that he has taken into consideration circumstances which he ought not to have considered, or has omitted to take into consideration matters which are of vital importance, because it is the magistrate's discretion and not the discretion of this Court that has to prevail. As none of these circumstances are present, this Court,

¹ *Rex v. Nicholas*, 6 E D C 36.

² See, for example, *Rex v. Wallace*, 9 E D C 49, *Rex v. Afrukander*, [1914] C P D 835.

³ [1930] T P D 102, at p. 106.

whether it agrees with the sentence or not, cannot interfere. However, in view of the circumstances which I have already mentioned, and especially the fact that there is not a tittle of evidence of dishonesty in the transactions of the appellant, we think that this is a matter which should be dealt with by His Excellency the Governor-General, who in the exercise of the prerogative of mercy is entitled to remit the sentences which have been imposed. We would therefore suggest to the Crown that the execution of the sentence might be delayed until such time as the appellant has had an opportunity to make the necessary representations to His Excellency.

(ii) *The Appointment of King's Counsel* The appointment of King's counsel is an executive act. The appointment must not be regarded as one conferring an honour from the crown. It is an executive act concerning the internal government of the country, necessary for certain executive purposes, but what they are it is impossible to say. The appointment may be made either by the King or the governor-general. The usual South African form published in the *Gazette* is as follows:

His Excellency the Governor General of the Union of South Africa has appointed _____, an advocate of the Supreme Court of South Africa, to be of His Majesty's Counsel for the Union of South Africa.

(iii) *Honours and Precedence* On February 26, 1925 a resolution of the Union house of assembly prayed the King not to confer any new honours upon any citizen of the Union. The resolution was worded as follows.

'That in the opinion of this House an address should be presented to his Most Excellent Majesty the King in the following words: To the King's Most Excellent Majesty Most Gracious Sovereign,—We, your Majesty's most dutiful and loyal subjects, the House of Assembly of the Union of South Africa in Parliament assembled, humbly approach your Majesty praying that your Majesty hereafter may be graciously pleased to refrain from conferring any titles upon your subjects domiciled or living in the Union of South Africa or the mandated territory of South West Africa.'

No honours have since that date been bestowed in the Union.

The right to use the title 'honourable' before a name is granted in the Union according to the following extract from a dispatch dated April 23, 1911, from the Earl of Crewe, K.G., to the Right Honourable Viscount Gladstone.

'I have the honour to inform your Lordship that His Majesty the King has been pleased to approve of the following rules in regard to the titles to be accorded to certain officers in South Africa on the establishment of the Union.

- (1) The Governor General of the Union to be styled 'His Excellency' and his wife 'Her Excellency',
- (2) Administrators of the several Provinces to be styled 'Honourable' while in office,
- (3) Members of the Executive Council to be styled 'Honourable' for so long as they are Members of the Council,
- (4) Senators to be styled 'Honourable' during office,
- (5) The Speaker of the House of Assembly to be styled 'Honourable' during office,
- (6) The following to be eligible to be recommended for permission to retain the title of 'Honourable'
 - (a) Retiring Executive Councillors who have served for at least three years as Minister, or one year as Prime Minister¹
 - (b) Presidents of the Senate, and Speakers of the House of Assembly, on quitting office, after having served three years in their respective offices
 - (c) Senators on retirement or resignation, after a continuous service in the Senate of not less than ten years²

A dispatch, dated December 1911, extends the list so as to include also the Chief Justice and the Judges of the Supreme Court of South Africa, during tenure of office, and after retirement (on obtaining permission)

There are certain state occasions which require an order of precedence to be followed. A government notice describing the order of precedence for the Union is appended. It is to be noted that His Majesty had to approve of this order of precedence, a fact illustrating the rule that the prerogative of honour is not delegated to the governor-general but remains vested in the King alone

DEPARTMENT OF THE PRIME MINISTER AND OF EXTERNAL AFFAIRS

The following Government Notice is published for general information

H D J BODENSTEIN,

*Secretary, Department of the Prime Minister
and of External Affairs*

*Department of the Prime Minister
and of External Affairs,
Pretoria*

No 27]

[2nd January, 1931]

ORDER OF PRECEDENCE

UNION OF SOUTH AFRICA

It is notified that His Majesty the King has been graciously pleased to approve of the following Table of Precedence for the Union of South Africa

¹ Executive Councillors do not in practice retire, so that (a) does not really apply

- (1) The Governor-General and Commander-in-Chief or the Officer Administering the Government
- (2) The Prime Minister
- (3) The Chief Justice or Acting Chief Justice
- (4) Cabinet Ministers
- (5) The Representative in the Union of South Africa of His Majesty's Government in the United Kingdom, the Agent of the Government of India, in order mentioned ¹
- (6) President of the Senate
- (7) Speaker of the House of Assembly
- (8) The Naval Commander-in-Chief { In order of dates of appointment to their respective posts and irrespective of military rank
- (9) Administrator in his own Province
- (10) Judges of Appeal, according to seniority
- (11) Privy Councillors, Executive Councillors not under summons
Privy Councillors to take precedence according to seniority
- (12) Judges President, according to seniority
- (13) Administrators when not in their Province—seniority according to population of Province—and Administrator of South West Africa
- (14) Puisne Judges, according to seniority, and Judges of Natal High Court, according to seniority
- (15) Persons entitled to retain the prefix 'Honourable'
- (16) Members of the Senate
- (17) Members of the House of Assembly
- (18) Controller and Auditor-General, Permanent Heads of Departments of State in order of seniority by date of appointment, Clerk of the Senate, Clerk of the House of Assembly
- (19) Chairman of Provincial Councils, seniority according to population of Province
- (20) Members of Provincial Councils in a body, seniority according to population of Province
- (21) Mayor of Capital of Province in which function is held
- (22) Mayors of Provincial Capitals, seniority according to population of their Cities
- (23) Wives of foregoing to enjoy the precedence of their husbands
- (24) Persons not enumerated in the above Table shall take precedence assigned to them by the Governor-General

(iv) *Legal Status of the Governor-General* Prominent among the leading constitutional maxims which regulate the government of the United Kingdom is the maxim that 'the King can do no wrong' But the governor-general of a dominion is in a position that is quite different. He is not exempt from the jurisdiction of the law-courts, and is liable criminally and civilly, unless he can show that he has acted in accordance with

¹ Courtesy Precedence

law The governor-general in the same manner as any official or ex-official charged with committing a breach of official trust anywhere within or without His Majesty's dominions, may be brought to trial either in the place where the offence is alleged to have been committed or in England¹ He may be criminally prosecuted for private or public actions if contrary to law² He may even be sued civilly in any court, though he has the satisfaction of knowing that his person is not liable to be taken in execution of the judgment³ The governor-general, moreover, can legally do, not what the King can do, but what the King has legally entrusted to him, or what legislation empowers him to do Whatever power he has, it must be exercised according to law, and according to constitutional practice⁴

(v) *The Theory of the Royal Prerogative* Earlier in this chapter we touched on some of the powers and duties of the governor-general We saw that the power of pardon was specially delegated to him to be exercised in the King's name, we saw that the prerogative of honour was not delegated to him⁵ There are certain other prerogatives which the governor-general has no power to exercise He may not, it seems, grant royal charters of incorporation unless the power has been delegated to him⁶ Nor may he declare war or peace or make treaties He cannot create legislative bodies or courts of law The prerogative of coinage has always been excluded, and in the Union, is regulated by act of parliament⁷ It is, however, possible to empower the governor-general to exercise all the prerogative powers by special legislation⁸

The royal prerogative extends to the furthestmost limits of the territories of the crown Except where it has been diminished by legislation either in England or in the dominions, it is as extensive in the overseas possessions of the crown as it is in

¹ 1 & 2 Geo. 5, c. 28 (Official Secrets Act, 1911)

² *Rea v. Eyre*, (1968) 1 Q.B. 487

³ *Hill v. Bigg*, 4 St. Tr. N.S. 723, 3 Moo. P.C.C. 382, 13 E.R. 189

⁴ *Commercial Cable Company v. Newfoundland Government*, [1916] 2 A.C. 610, *Faure v. Colonial Government*, (1880) 10 Q.B. 82, *Cameron v. Kyte*, 3 St. Tr. N.S. 607, 12 T.R. 678, *Musgrave's Case*, *supra*, *Cock v. Attorney General*, (1909) 28 N.Z.L.R. 405

⁵ See section 4 (iii) *supra*

⁶ Cf., however, *Bonanza Creek Mining Co. v. The King*, [1916] 1 A.C. 586

⁷ Act 45 of 1919, 31 of 1922

⁸ *Attorney General of Canada v. Attorney General of Ontario*, [1898] A.C. 247, at p. 252

England¹ For, in the theory of English law, after a colony has received legislative institutions, the crown stands, subject to the special provisions of any colonial or British act, in the same relation to that colony as it does to the United Kingdom² But it is in each dominion governed by the law of that dominion

The common law governing the royal prerogative³ is generally the same in the oversea territories of the King as it is in England Local statute law may regulate the prerogative in the dominions⁴ As examples of the latter may be mentioned the prerogatives relating to the coinage and to the appointment of officers of state⁵

The greater prerogatives are those concerned with the declaration of war or the making of peace, the negotiations with foreign nations, the making of treaties, and the right of His Majesty to hear any petition for the redress of wrongs (e.g. granting leave to appeal to the privy council or a fiat for a petition of right)

The existing prerogatives may, however, best be divided into those affecting the external relations of the Empire and those prerogatives which govern internal matters Among the former the power of making war and concluding peace is the most important and is never delegated to the governor-general As incidents of this power the King has the right of sending and receiving ambassadors, of concluding treaties, of granting passports, safe-conducts, some of these may be delegated to the governor-general, such as, e.g. the right of granting passports The right of concluding treaties has never yet been delegated to the governor-general

The internal prerogatives may be divided generally into those which are personal, those which are political, and those which are judicial The personal privileges such as the title of Majesty

¹ *Liquidators of the Maritime Bank of Canada v Receiver General of New Brunswick* [1892] A.C. 437, *Exchange Bank of Canada v The Queen* 11 A.C. 137, *Re Baleman's Trust*, (1873) 13 Eq. 355

² *In Re Lord Bishop of Natal*, (1864) 3 Moo. P.C. (N.S.) 115, at p. 148, and see *Royal Executive Functions and Seals Act*, 1934

³ For the prerogative, see A. V. Dicey, *Law of the Constitution*, Chapter XX, E. C. S. Wade and G. G. Phillips, *Constitutional Law* (1st ed. revised, London, 1933) pp. 61 ff.

⁴ *Attorney General v Black*, (1828) K.B. 225 *Bishop of Natal's Case* *supra*

⁵ It is, of course, possible that constitutional conventions may govern the exercise of the prerogative in different manners in different dominions

and the use of the royal standard are never delegated. The political prerogatives, such as dissolving or proroguing parliament refusing assent to bills and appointing officers of state are delegated by statute to the governor-general. Judicially the King is the fountain of justice and the supreme conservator of the peace of the realm. As supreme conservator of the peace the King is the prosecutor of all crimes. Indictments for certain crimes in all parts of the Empire still conclude with the words *against the peace of Our Lord the King his Crown and dignity* ¹

The enumeration of these prerogatives is important, for they exist throughout the dominions and some of them (as indicated) are exercised for the King in the Union by his representative, the governor-general. The King is the King of each dominion. He may act for one dominion in his capacity as King of that dominion as distinguished from every other territory. When so acting he acts on the advice of his ministers in that dominion, and it is unconstitutional for the ministers of any other British state to advise him in such matters ²

It thus appears that the governor-general in no sense holds a position like that of the King: he is only the King's representative for certain specific purposes. Before the Imperial Conference of 1926 and the changes that followed soon afterwards he acted also as the representative of the British government. He held a dual position and as an imperial officer he was subject to instructions given him by the secretary of state. He administered the native territories and protectorates, and in this capacity was known as the high commissioner. His duties to the British government might or might not have clashed with his duties to his dominion government.

Since the appointment of a separate high commissioner for South Africa, the governor-general no longer acts as the representative of the British government. The only duties which remain to him are those of a local constitutional monarch, the representative of the King. When he dissolves parliament, he acts as a constitutional monarch. When he assents to acts of parliament, when he puts his signature to documents of state,

¹ In the Union of South Africa the words 'His Majesty and his government' are often used.

² *Inter-Imperial Relations Report* 1920, Part IV (c) Status of the Union Act, 1934.

when he appoints or dismisses ministers, when he summons the executive council, he does so as the representative of the King. He must act in exactly the same constitutional manner as the King himself would act in similar circumstances. Now that the governor-general has no duties which might conflict with his position as the local head of the dominion, he is, locally, in the same position, within the limited sphere of his constitutional discretion, as the King is in Great Britain as far as similar duties are concerned. That is, when he dissolves parliament or when he appoints ministers, he acts in the same manner and according to the same conventions as His Majesty would act in similar circumstances in Great Britain. The constitutional practice of Great Britain applies in these respects to South Africa.

(vi) *Personal Privileges* The governor-general has official residences in Capetown, Pretoria, and Durban. Attached to these residences are his offices, and the upkeep of these offices, like that of the residences themselves, is borne by the Union government. His salary of £10,000 per annum is paid to him for his personal requirements and those of his family, and for the social entertainment which his position makes necessary. The salary by itself is far from adequate.

The governor-general has certain privileges not governed by any law or convention. For example, the use of a crown on the governor-general's automobile is a mere matter of expediency and enables those concerned, e.g. the police, to accord privileges to His Majesty's personal representative in the Union.

There are no rules regarding the governor-general's household and entertainment, though the order of precedence governs all state occasions. These matters are within the governor-general's personal discretion.

(vii) *Reservation of Bills* Reservation means the withholding of assent by the governor-general to a bill duly passed by the competent legislature in order that His Majesty's pleasure may be taken thereon.

The South African constitution contained provisions for two types of reservation, namely,

- (i) reservation at the discretion of the governor-general under section 64 of the South Africa Act, and
- (ii) compulsory reservation under sections 64 and 106 of the South Africa Act, paragraph 25 of the Schedule to the

Act, and certain provisions of the Colonial Courts of Admiralty Act, 1890, and of the Merchant Shipping Act, 1894

The Inter-Imperial Relations Report, 1926, affected the former in that it laid down that it would not be in accordance with constitutional practice for advice to be tendered to His Majesty by His Majesty's Government in Great Britain in any matter appertaining to the affairs of a Dominion against the views of the Government of that Dominion. But before the question could arise of the attitude of the government of the United Kingdom in regard to a reserved (discretionary) bill, there had to be a concrete case of such discretionary reservation. Whatever the position might have been prior to 1926, in terms of the resolutions of that year the governor-general ceased to be the agent of the United Kingdom. The Report on the Operation of Dominion Legislation, 1929, however, made the position quite clear. No instructions were to be given by the British government concerning the reservation of dominion bills.¹ From 1926 until 1934 the governor-general was expected to exercise the discretionary power to reserve bills only when so advised by the Union government. It was hardly likely that any South African minister would have advised the governor-general to reserve (discretionary) bills passed by the parliament to which that minister was responsible, but if they did, then the United Kingdom government could not have tendered advice to His Majesty against the wishes of the Union government.

The position regarding compulsory reservation was different. The relative Resolution of 1926, a portion of which has just been quoted, specifically excepted compulsory reservation, i.e. 'Apart from provisions embodied in constitutions or in specific statutes expressly providing for reservation, it is recognized that it is the right of each government to advise the crown in all

¹ *Report on the Operation of Dominion Legislation, 1929*, paragraph 32. 'His Majesty's government in the United Kingdom will not advise His Majesty the King to give the governor-general any instructions to reserve bills and as regards the significance of the King's pleasure concerning a reserved bill it would not be in accordance with constitutional practice for advice to be tendered to His Majesty by His Majesty's government in the United Kingdom against the views of the government of the Dominion concerned.'

matters relating to its own affairs' Thus the Inter-Imperial Relations Report, 1926, left compulsory reservation *in statu quo* but recommended that a Committee be set up to report upon, and make recommendations concerning, *inter alia*, existing statutory provisions requiring reservation of dominion legislation

That Committee sat in 1929 and reported that as far as it concerned dominions (like the Union) which have the power to amend their constitutions, 'it is open to those Dominions to take the prescribed steps to that end if they so desire' ¹ Accordingly 'in cases where there was a special provision requiring the reservation of Bills dealing with particular subjects, the position would in general fall within the scope of the doctrine that it is the right of the government of each Dominion to advise the Crown in all matters relating to its own affairs, and that consequently it would not be in accordance with constitutional practice for advice to be tendered to His Majesty by His Majesty's Government in the United Kingdom in any matter appertaining to the affairs of a Dominion against the views of the Government of that Dominion' ² Thus the report of 1929 brought also compulsorily reserved bills within the scope of the doctrine that it was the right of the government of each dominion to advise the crown in matters relating to its own affairs The report of 1929 was adopted and approved by the Imperial Conference of 1930

As regards compulsory reservation under the Merchant Shipping and Colonial Courts of Admiralty Acts, sections 5 and 6 respectively of the Statute of Westminster do away with the necessity for the reservation or suspension of the operation of relative Dominion Acts, and the Statute of the Union Act, 1934 abolishes the right of reservation in all cases, except under section 106 of the South Africa Act, 1909 ³ In future, when a bill is presented to the governor-general for the King's assent, he must (subject to the exception mentioned) declare according to his discretion or to instructions given from time to time by the King, that he assents in the King's name or that he withholds assent ⁴

(viii) *Dissolution of Parliament* When the governor-general

¹ *Report on the Operation of Dominion Legislation, 1929*, paragraph 33

² *Ibid*, paragraph 33

³ Sections 8 and 10

⁴ See Chapter XI 5 (vii) *infra*.

exercises the prerogative of dissolving parliament, he acts, not as an imperial officer in imperial interests, but in the interests of the government of which he is the head. It is confusing to compare such action with the action formerly taken by governors-general in opposition to ministers on imperial grounds. For the governor-general was formerly obliged to act according to the instructions of the secretary of state. He was called upon to do so by the instruments which created his office and appointed him governor-general. He obeyed the secretary of state as the mouthpiece of the imperial government, and the instructions given by the imperial government in many cases placed the governor-general in opposition to his own ministry. The imperial instructions had always been based on some broad imperial interest. Therefore whenever the governor-general differed from his ministers he did so on grounds which the imperial government believed it its duty in the interests of the whole empire to maintain. As an imperial officer, the governor-general acted as the channel of communication between the British and dominion governments, keeping the former in touch with, and representing its wishes to the latter. Hence the spectacle of a governor-general dutifully accepting the policy of his constitutional advisers whilst at the same time writing hurried dispatches to the British government informing it of such policy, and perhaps suggesting that it should bring pressure to bear to secure its modification in certain particulars where it might affect imperial interests.

The governor-general might, in theory on imperial grounds, have dissolved parliament: on imperial grounds he might have refused a dissolution. This issue was an important one in the general election in Canada during 1926.¹ Lord Byng, acting in fact on his own authority without instructions from the British government, and without any imperial interest at stake, refused to dissolve the Canadian parliament when advised to do so by the prime minister. He appears to have thought that His Majesty would have refused dissolution in similar circumstances. He acted, it may be said, with a conscientious anxiety above and beyond and before all else to do the right thing: and no personal or political lack of good faith on Lord Byng's part can be

¹ For discussions of the Byng episode, see A. B. Keith, *Responsible Government in the Dominions* (2nd ed., Oxford, 1928), *passim*.

suggested. Having refused to dissolve the Canadian parliament, Lord Byng accepted the resignation which the prime minister tendered, and he called upon the leader of the opposition to form a government, being under the impression that such a government would be able to secure a working majority in the House of Commons. The latter, however, on becoming prime minister also advised a dissolution. This time the governor-general could not very well refuse. During the general election which followed, constitutional conventions were discussed and amplified throughout the country, and the defeat of the government was undoubtedly in some measure due to Lord Byng's actions.¹ The principle of dominion self-government rests on the same basis as the self-government of the United Kingdom. It is not found in any statute, or regulation, or judicial decision, but only in the practice which had long obtained at Westminster and that practice must be followed in the dominions. The position of the governor-general in relation to the dominion cabinet is altogether similar to the King's position in relation to the British cabinet. The crown in Canada means in effect the Canadian ministry.

The point is illustrated by the following extract from the Imperial Conference Report of 1926:

It is an essential consequence of the equality of status existing among the members of the British Commonwealth of Nations that the Governor-General of a Dominion is the representative of the Crown, holding in all essential respects the same position in relation to the administration of the public affairs in the Dominion as is held by His Majesty the King in Great Britain, and that he is not the representative or agent of His Majesty's Government in Great Britain, or of any department of that Government.²

From July 1, 1928, the governor-general of the Union began to act exclusively as the personal representative of His Majesty and his position is now governed by the Status of the Union Act and the Royal Executive Functions and Seals Act, 1934.

¹ For an important and convincing exposition of the issues, see the speech of the Right Hon. W. L. Mackenzie King (to whom Lord Byng had refused a dissolution) at Ottawa in A. B. Keith, *Speeches and Documents on the British Dominions, 1918-31* (Oxford, 1932), pp. xxii-iii, 149-60.

² *Inter Imperial Relations Report, 1926, Part iv (b)*

V

THE CROWN IN COUNCIL

1 The Executive Council

THE governor-general has, in the theory of law two committees or groups of persons advising him. These are the executive council and the ministers administering the departments of state. Strictly speaking the ministers of state have no function of giving advice to the governor-general, the only body which has that function in law is the executive council. The ministers of state act in an advisory capacity only in so far as they are members of the executive council. But in actual practice there are two executive councils—the one which, summoned to advise the governor-general consists almost invariably of the ministers of state or the cabinet and the one which consists of all those persons who have been sworn as executive councillors namely, the existing and past cabinet ministers some of whom are (like the existing cabinet) and some of whom are not (like the past ministers of state) called upon to advise the governor-general. The executive council therefore consists of all the persons who have been sworn as such. They are never dismissed, nor do they retire from the council. But the practice of constitutional government does not require the attendance of the whole executive council to advise the governor-general, indeed, such a course would be contrary to all ideas of government by a cabinet responsible to an elected assembly. It would mean that if the whole executive council were summoned to advise the governor-general, the existing cabinet and the past cabinets, which must necessarily include the opposition leaders in parliament, would be sitting at the same table advising the governor-general when to dissolve parliament and when not to dissolve parliament, what proclamations to make and what financial measures to recommend, and to do a great number of acts which were, and which might become matters of contention and conflict between the ministers and the opposition on the floor of the house of assembly. So the practice has been adopted of summoning only those executive councillors who are present ministers of state to advise the governor-general. The remaining executive

councillors are simply not summoned and when the executive council has to answer for anything in the houses of parliament, it is the ministers of state who defend what has been done for it is the ministers of state who have advised who have acted, who are responsible. Thus practice has rendered one body a more or less dormant one, kept alive only by the phraseology of proclamations and other documents of state. And thus can we reconcile the three sections of the South Africa Act which set up two bodies to do the work which constitutional practice requires only one body to do¹. And so again the practice of the constitution has become super-imposed upon the letter of the law, modifying it and moulding it to the requirements of political exigencies.

The legal basis of the executive council is to be found in sections 12 and 13 of the South Africa Act which are as follows—

There shall be an Executive Council to advise the Governor-General in the government of the Union and the members of the council shall be chosen and summoned by the Governor-General and sworn as executive councillors and shall hold office during his pleasure.

The provisions of this Act referring to the Governor-General in Council shall be construed as referring to the Governor-General acting with the advice of the Executive Council.

The powers and duties of the governor-general-in-council under the South Africa Act consist *inter alia* in these—the appointment and removal of officers of the public service; the exercise of the powers and functions of the former colonial governors-in-council; the nomination of eight senators; the fixing of polling days for parliamentary and provincial elections; the appointment of provincial administrators; the assent to provincial ordinances; the appointment of auditors to the provincial administrations; the appointment of judges and the auditor-general; the administration and control of the public funds of the Union, and the control and administration of native affairs.

All these powers and functions, as we have seen, are really in the theory of law, vested in the governor-general acting with the advice of the executive council, but in the practice of the constitution the executive council is a body no different from

¹ Sections 12, 13, 14

the cabinet, and therefore all these functions are performed through the cabinet

2 The Cabinet

The legal basis for the existence of the cabinet is to be found in section 14 of the South Africa Act

The Governor-General may appoint officers not exceeding eleven in number to administer such departments of State of the Union as the Governor-General in Council may establish, such officers shall hold office during the pleasure of the Governor-General. They shall be members of the Executive Council and shall be the King's ministers of State for the Union. After the first general election of members of the House of Assembly, as hereinafter provided, no minister shall hold office for a longer period than three months unless he is or becomes a member of either House of Parliament ¹

We have in this section all the elements of responsible government. The ministers hold office during the governor-general's pleasure, that is, during the pleasure of parliament. If the *ministers cannot command the confidence of the legislature*, the prime minister informs the governor-general of this fact, and either he advises the governor-general to dissolve parliament, or he resigns, and may advise the governor-general to send for the leader of the opposition. If the latter is prepared to form a government, he in due course submits the names of his proposed ministers to the governor-general, who then appoints them ministers of state for the Union. All this is in general accordance with British constitutional practice at Westminster. A minister must find a seat in parliament; for the cabinet is responsible to parliament, ministers must answer questions, introduce bills, give an account of their stewardship. And as the theory of the constitution is that parliament is responsible or answerable to the electorate, and the ministers responsible to parliament, it is becoming a practice that ministers sit in the assembly directly elected by the people, and they attend the senate more out of courtesy than of concern for their bills passing through that

¹ As amended by section 1 of Act 34 of 1925. (See Appendix IV of this book.) Ministers receive £2,500 per annum and the prime minister £3,000 per annum, provided for in the annual estimates. At present there is an extra minister without portfolio. See new subsection (2) added by Act No. 17 of 1933, which makes provision for a minister to have a deputy whenever he is unable to perform the functions of his office (see Appendix IV).

house, for under the new constitution of the senate a government majority in the senate is assured, and most bills are safely piloted through with the assistance of whips and a caucus.

Generally, the cabinet system in South Africa follows British precedents in every respect, and every detail relating to dismissal, collective responsibility, the relation of the house to the cabinet, and the dissolution of the house itself, as well as the relation in internal affairs between the cabinet and the head of the state in South Africa, may be found in the well-known manuals of English constitutional law.

There are seventeen departments of state in the Union, namely, the prime minister's department, the departments of external affairs, finance, justice, defence, agriculture, labour and industries, interior, Union education, public health, lands, mines, native affairs, irrigation, posts and telegraphs, public works, and railways and harbours.

At present there are eleven ministers in the cabinet and a minister without portfolio. The ministers have the following departments under their care, and each is known as the minister for any of the departments which he controls, in accordance with the subject-matter dealt with by him at the time: (1) prime minister's, external affairs, (2) justice, (3) finance, (4) railways and harbours, defence, (5) interior, Union education, public health, (6) native affairs, (7) lands, (8) agriculture, (9) posts and telegraphs, public works, (10) labour and industries, (11) irrigation. These groupings may be changed in each cabinet and are so made partly for personal reasons, partly for convenience and expediency.

Upon the resignation of an existing ministry, the governor-general summons the person whom he considers most fitted for the purpose and requests him to undertake the task of forming the new ministry. The governor-general usually acts upon the advice of the outgoing prime minister as to the person to be summoned, but he need not necessarily ask for or follow that advice. Broadly stated, the person to be summoned is the one most likely to be able to form a stable government. The choice is in practice limited to one or other of the persons recognized by parliament as the leaders of the party which commands a majority in the house of assembly.

The clerk of the executive council acts as the secretary to the

cabinet, he informs ministers of the prime minister's summoning of a cabinet meeting, and keeps whatever records are required by the prime minister concerning the proceedings in cabinet.

The relationship between the cabinet and the governor-general is, as we have stated, similar to that between the King and the British cabinet. But the relationship between a dominion cabinet and the King has hardly had time to work out along definite lines. When a matter concerns the internal affairs of a dominion, the position is not difficult. The King follows the advice of his ministers in the dominion concerned. The usual channel for such advice to be tendered to the King is through the governor-general, who is the King's representative. It would be unconstitutional for the British cabinet to tender advice contrary to the wishes of the dominion concerned. But where a matter affects more than one part of the Empire, the position becomes more complex, and we leave the field of constitutional rules and conventions, and allow political considerations to have full play.

3. Politics, the Party System, and the Cabinet

It is necessary to give a brief summary of the development of party politics in South Africa since the establishment of the Union.

Since Union there have been only three prime ministers in South Africa, Generals Botha, Smuts, and Hertzog. The first ministry of the Union was formed on May 31, 1910, the day the Union came into being. General Botha was sent for by the governor-general and he selected a ministry from his own party, the South African party. On September 15, 1910, the first general election was held. Botha received a majority of thirteen over all parties, the Unionists being the Opposition. The first Botha ministry was dissolved on December 20, 1912, on account of a difference of opinion which General Hertzog, minister of justice, forced on the cabinet. General Hertzog then formed the Nationalist party.

The next general election was held on October 20, 1915. The Union had been delimited into 130 seats. Of these the South African party won 54, the Nationalists 27, the Unionists 40, Labour 4, and Independents 5. The Unionists made almost a clean sweep of Natal, the Nationalists of the Orange Free State

The former province was almost entirely British, the latter almost entirely Dutch. The Unionists were anxious to maintain the imperial connexion. The Nationalists wanted an independent South Africa, but that independence, as General Hertzog later pointed out, need not be an independence outside the British Commonwealth of Nations. Rather than allow Botha to be defeated by the Nationalists, the Unionists consistently supported the South African party, but the Nationalists were making headway. Botha died on August 27, 1919, and General Smuts took his place. A general election was held in March 1920, and General Smuts lost 14 seats, mostly to the Nationalists in the country districts. The return of parties was: Nationalists 44, South African party 41, Unionists 25, Labour 21 and Independents 3, in a house of 134. With Labour in Opposition it was clear that General Smuts could hardly command a working majority in the house. He started negotiations with General Hertzog for a reunion of parties, but the negotiations fell through. He was more successful with the Unionists. The latter merged their identity in the South African party after a promise of representation in the ministry, and General Smuts went to the country in February 1921. The result was, General Smuts 79 seats, General Hertzog 45 seats, Labour 9, Independent 1.

The strength of General Smuts in the suburban areas was accentuated by the split opposition vote, and a political pact was entered into between General Hertzog and the Labour leader, Colonel Creswell, to work together at the next election to keep General Smuts out. In June 1924, 63 Nationalists were returned, 18 Labour, 53 South African party and 1 Independent. Thus General Hertzog came into power with a clear majority of 27 supporting his ministry which included Colonel Creswell and another Labour minister. In the following year the number of cabinet ministers was increased to 11. This pact continued in force at the general election of 1929, but this time owing to a split in the Labour party, the latter's representation was reduced to 8. Of these only 4 sat on the government benches. In a house of 148, the Nationalists had 78 members, the South African party 62, and Labour 8.

In 1933 the two great parties joined together in a coalition, with General Hertzog as prime minister and General Smuts as deputy prime minister and minister of justice. The cabinet seats

were divided equally between the two parties, a twelfth minister (without portfolio) being appointed by proclamation. The adherence of the Union to the gold standard while Britain was off the gold standard almost ruined the agricultural community, and General Hertzog's government found itself in a precarious position, especially after Mr. Tielman Roos had caused a split in the Nationalist ranks by his return to politics from the judicial bench. General Smuts seemed to have the country with him, but he magnanimously proposed a coalition, and General Hertzog, showing great courage and statesmanship, accepted the proposal. A general election took place in May 1933, and the coalition parties secured 144 seats out of 150. The two parties later merged into a single united party, but it appears that at least one new party besides the united party has come into existence.¹

The organization of parties in the Union has always been based on the federal idea. The branches in the constituencies send delegates to a provincial congress, which elects a central or head committee for the province. Each province had representation on a federal council. The Labour party has an annual conference, and a national council for South Africa is elected from that body. The parties are controlled as regards policy much in the same way as parties have always been controlled in the United Kingdom or the British dominions, while the Labour party has had the same difficulties regarding the control of its parliamentary representatives as the Labour party in other parts of the Empire has had. An attempt by the Labour National Council between 1926 and 1928 to control the Labour members of the cabinet failed.

The most striking characteristic of South African politics is the remarkable stability of ministries. South Africa has had in effect only four ministries. When the governor-general calls upon the person most likely to form a stable government, usually the leader of the largest party in the country, there come into operation those same principles of theoretically unfettered discretion in choosing a cabinet which the prime minister of Great Britain enjoys. In South Africa, as in Great Britain,

¹ On December 7, 1934 the old South African and Nationalist parties merged themselves in a new party called the United South African National Party, with General Hertzog as leader and General Smuts as deputy-leader.

ministers are chosen from the party leaders and those members of parliament who are prominent in party councils. They are chosen for their administrative and political skill, or because the power and influence which they wield with the electors make them useful and necessary elements of a democratic government. But the unfettered discretion of choice belongs to the prime minister, the leader of a party. He undoubtedly is influenced by the above considerations, as well as by geographical factors such as endeavouring to give each province some or equal representation in his ministry. He takes all these points into consideration because he is a wise or astute party leader desiring to hold the confidence of his party and at the same time to govern the country well. As long as the prime minister combines these two qualities of astute party leadership and able government, he retains the confidence of his party. These two requirements appertain to most countries in which the British system of party government exists, but in South Africa we have another characteristic which explains the remarkable stability of ministries and the machine-like cohesion of parties and the parliamentary caucus. The Dutch, even more so than the British, are very loyal to their leaders. If a leader has once proved himself he may reckon on the implicit trust of his followers.¹ The whole party follows its leaders most loyally. Then we have to take into consideration that with the small electorate in South Africa, parties are very much more thoroughly organized than elsewhere, and consequently there is a much smaller unattached vote than in a country where the electorate runs into millions. For the 'man-in-the-street' to change his political views requires little provocation, a party man is not so easily persuaded to transfer his allegiance from one party to another, and in South Africa nearly the whole European population and especially the people of the country districts, take a keen interest in political affairs and are attached to the one party or the other. This characteristic tends to give a prime minister very great moral power with members of parliament. As he can count on the support of his party outside the house, he need not be afraid of obstinacy from party members inside the house.

These features of party politics and the party system in South Africa also explain why the average life of the South African

¹ R. H. Brand, *Union of South Africa* (Oxford, 1909), pp. 56 and 118.

parliaments is so very high as four years, especially when it is borne in mind that parliament must be dissolved every five years. In nineteen years parliament was dissolved by the effluxion of time three times covering a period of fifteen years. The successive elections in 1920 and 1921 were caused not by instability, but by the very stability of the parties, for they were too evenly matched during that period in their various combinations to allow of a clear-cut victory for any one party. Up to recent times party stability was due in very large measure to the loyalty of members of parliament to the party leader, perhaps out of pure loyalty, perhaps in the hope of political favours. Lately a new incentive has been added to party loyalty. A member of parliament receives a substantial salary¹. If parliament is dissolved because he votes *against* his party, he has to face not only the expense of a bitter election, but he may not win his seat again, and with his seat goes his fairly substantial salary.

¹ £700 per annum

VI

THE PUBLIC SERVICE, THE RAILWAYS AND HARBOURS ADMINISTRATION, AND THE FINANCIAL SYSTEM OF THE UNION

1. The Public Service

(1) *Generally* The South Africa Act took good care to preserve and protect the existing rights of the public servants of the former colonies on the establishment of the Union. That act laid down that all officers of the public service of the colonies should become officers of the Union, and that a public service commission should be appointed immediately after Union to reorganize the public service. Any officer of the public service of any of the colonies who was not retained in the service of the Union was to be granted a pension, or such other compensation as he would have received in the circumstances if the Union had not been established. Officers of the public service of the colonies who were retained by the Union retained all such existing and accruing rights as they would have been entitled to by law in like circumstances if the Union had not been established. The services of any public servants were not to be dispensed with by reason of their want of knowledge of either of the official languages.

The laws governing the organization of discipline and conditions of employment in the public service of the Union have been consolidated by the Public Service and Pensions Act, No. 27 of 1923. The public service includes all persons in the employment of the government of the Union, or of the administration of a province, or of the mandated territory. It is divided into the following divisions:

- (i) the administrative division,
- (ii) the clerical division,
- (iii) the professional and technical division (referred to as the professional division),
- (iv) the general division, and
- (v) the services (i.e. the permanent defence force, the police and prisons staff)

The administrative division includes the secretaries and under-secretaries of the several departments of state, chief clerks, principal clerks, and senior clerks, provincial secretaries, provincial auditors of accounts, magistrates, and all other persons whose offices or posts the governor-general directs to be included in that division. The clerical and general divisions include all persons whose offices or posts the governor-general directs to be in those divisions. The professional division consists of a higher and a lower branch in the manner in which the governor-general directs the classification to be made.

The following are not included in the public service: ministers, administrators, the Union high commissioner in London, judges, private secretaries to ministers and judges, officers of parliament, the personal staff of the governor-general, members of the Public Service Commission, railway servants, any part time employee, and the teaching staff of the provincial administrations.¹

(ii) *The Public Service Commission*. Section 142 of the South Africa Act provides

After the establishment of the Union, the Governor General-in-Council shall appoint a permanent public service commission with such powers and duties relating to the appointment, discipline, retirement and superannuation of public officers as Parliament shall determine.

Act No. 29 of 1912 was passed in terms of the above section of the South Africa Act and its various amendments and modifications were consolidated by Act No. 27 of 1923.

The Public Service Commission consists of three members appointed by the governor-general, who appoints one of them chairman. Each member holds office for a period of five years and each is eligible for reappointment. The chairman receives £1,800 per annum and the other two members £1,700 per annum, payable out of the consolidated revenue fund. A member of the commission may be removed from office by the governor-general on an address being presented to him by both houses of parliament praying for his removal.

The powers and functions of the commission are as follows:

- (i) To recommend appointments and promotions in the public service (certain appointments and promotions in the

¹ To this list should be added Ministers Plenipotentiaries of the Union in other countries.

general division may be made without a recommendation by the commission),

- (ii) to keep a record of persons employed in the administrative clerical and professional divisions, and in prescribed posts in the general division,
- (iii) to make recommendations as to the grading and classification of posts in the public service,
- (iv) to make recommendations as to the control, reorganization and readjustment of any departments or offices in the public service, and to make recommendations as to the retirement from the public service of any persons in consequence of any such reorganization or readjustment
- (v) to make recommendations as to the retirement of officers on the ground of superannuation, continued ill health or inefficiency,
- (vi) to make recommendations for effecting economies and promoting efficiency in the management and working of departments and offices in the public service,
- (vii) to inquire into the grievances of officers
- (viii) to make recommendations as to the provisions of the regulations to be made under the Act,
- (ix) to frame an annual report for parliament,
- (x) to inquire into and recommend action in cases of serious misconduct

The recommendation of the Public Service Commission in respect of any appointment, promotion, remuneration, transfer, retirement or superannuation of any person, shall not be rejected or varied without the sanction of the governor-general. If the governor-general does not adopt the recommendation of the commission, the commission must report the whole matter fully to parliament either by means of a special report or in its annual report. The commission has full power to inspect offices, documents and records of departments, and may summon any officer of the public service or any other persons to give evidence before it on oath as to any matter falling within the purview of its powers and functions. The commission may delegate any of its powers to a member thereof, and it may delegate its power of holding inquiries to any fit and proper person. For the purpose of effectually carrying out its duties, the commission may ap-

point inspectors of public offices. Whenever the commission performs its duties regarding the persons serving under the administration of a province or the mandated territory, the commission stands in the same relation to the administrator as it does to any minister of state. All appointments are made by the minister of the department concerned, or by the administrator of the province, as the case may be, and in accordance with the commission's recommendations.

(iii) *The Public Service Advisory Council*. In terms of Act No. 27 of 1923, regulations in connexion with a public service advisory council were issued to form a council consisting of eight members nominated for a year by the various public service associations from amongst their members. This council acts in an advisory capacity to the Public Service Commission when so requested by that body. The first Public Service Advisory Council was established in December 1923. An official side, consisting of four permanent members nominated by the Public Service Commission is attached to the council for consultative purposes. The functions of the council include advising upon the following matters:

- (i) the best means of utilizing the ideas and experience of the staff,
- (ii) the general principles governing conditions of service, recruitment, hours, promotion, advancement, discipline, tenure, remuneration, and superannuation,
- (iii) the means of encouraging the further training and education of public servants, also their training in higher administration and organization,
- (iv) the introduction of improvements in office machinery and organization, and the provision of opportunities for the full consideration of suggestions by the staff on this subject,
- (v) legislation in so far as it has a bearing upon the position of the public servants in relation to their employment.

Rules have been prescribed for the recognition of associations and for the conduct of the business of the council.

(iv) *Qualifications for Appointment to the Public Service*. No person may be permanently appointed in the clerical division unless he has passed the matriculation examination of the joint matriculation board or an examination of an equal standard or

one which has been prescribed. Persons appointed to the service shall be over sixteen and under twenty-one, and must be British subjects of not less than three years' residence in South Africa.

Any person appointed within five years after the commencement of the act to the clerical division must have passed the above-mentioned examination or a prescribed examination in both official languages, or must within five years pass such an examination, otherwise he cannot have his salary increased beyond that drawn by him at the expiration of five years from the date of his first appointment. When a person has been stationed for this period of five years in places where he has had no facilities for acquiring a knowledge in the language in which he has not passed a prescribed examination, the Public Service Commission may grant him an extension of time in which to pass the examination. These language provisions apply to persons who were appointed to the public service after 1912. After the expiration of five years from the commencement of the Act of 1923, no person may be appointed to the service unless he has passed in both official languages in the examination above-mentioned. The above provisions apply more particularly to the clerical division, but the commission may apply standards of efficiency for the discharge of duties in either official language to the other divisions of the public service.

(v) *Discharge from the Public Service, and Pensions.* Officers of the public service may be discharged on account of superannuation, or in the case of a female officer, on her marriage, on account of continued ill health, owing to the abolition of an office or in consequence of a reorganization of a department, or on account of unfitness or incapacity not attributable to the performance of his official duties, or on account of misconduct, which has been defined by the act and regulations, and on no other ground whatsoever. The discharge is made by the minister or administrator after a recommendation by the commission. Full provision is made regarding pensions.

Pensions are protected by law from attachment under process of any court, and may not be ceded or transferred to any person. If a pensioner is sequestrated, his pension or part thereof may be withheld or the whole of it or part thereof may go to his dependents, or be kept for the personal use of the pensioner, and may not be attached by the creditors. A pensioner may lose his

pension rights if he is convicted and sent to prison for more than twelve months, but only for the period of his imprisonment. If a person is discharged from the public service on account of misconduct, no pension is paid to him. There are provisions for a widow's pension fund.

(vi) *Discipline* See Chapter XIX, 'Administrative Tribunals and Administrative Law'

2 The Railways and Harbours Administration

(i) *Generally* The South Africa Act provides that all ports, harbours, and railways belonging to the several colonies at the establishment of the Union shall at the date thereof vest in the governor-general-in-council, and no new public works of that nature shall be constructed without the sanction of parliament. *The control and management of the railways and harbours are to be exercised through a board consisting of three commissioners under the chairmanship of the minister of railways. The commissioners are appointed by the governor-general-in-council for five years, and removable by the governor-general-in-council for good cause, and the cause of removal shall be communicated to parliament as soon as possible. The railways and harbours are to be administered on business principles with due regard to the agricultural and industrial development of the Union and the promotion, by means of cheap transport, of the settlement of an agricultural and industrial population in the inland portions of all provinces of the Union. So far as may be the total earnings shall not be more than are sufficient to meet the necessary outlays for working, maintenance, betterment, depreciation and the payment of interest due on capital. The railway board may establish a fund out of railway revenue to be used for maintaining, as far as need be, uniformity of rates notwithstanding fluctuations in traffic.*¹

The servants of the railway and harbour administration, as we have noticed, are not members of the public service. Their conditions of employment are to be found in the Railways and Harbours Service Act 1925. The power of appointing and discharging servants is vested in the governor-general, who may delegate the whole or any portion of this power by regulation.² The

¹ See sections 125-8 of the South Africa Act.

² A large portion of these powers has been delegated to a permanent

salaries or pensions of the administration's permanent servants may not be reduced without their consent except in pursuance of a decision in regard to discipline or inefficiency or an act of parliament authorizing a general reduction throughout the service.

No person may be appointed to the service unless he is a British subject of good character and has resided for not less than three years in South Africa. The language qualifications of the clerical division of the railway and harbour service are similar to those of the public service. Discipline in the service is discussed in Chapter XIX, *Administrative Tribunals and Administrative Law*.

(11) *The Railway and Harbour Board* The function and powers of the Railway and Harbour Board are governed by the Railway Board Act No. 17 of 1916. The railways and harbours of the Union are administered and worked under the control and authority of the governor-general-in-council through a minister of state who is advised by the board. The management and working are carried on by the general manager, subject to the control of the minister. The functions of the board include dealing with, and advising the minister upon all matters of policy concerning the administration and working of the railways and harbours, more particularly upon the following matters:

- (i) *The general policy of the railways and harbours*
- (ii) any substantial alteration in the tariffs of rates, taxes, and charges;
- (iii) the estimates of revenue and expenditure, including loan expenditure, which are from time to time to be submitted to parliament,
- (iv) all bills affecting the railways and harbours which the minister proposes to submit to parliament,
- (v) the expenditure of any sum exceeding five thousand pounds in respect of any one railway and harbour work, other than a work expressly authorized by parliament,
- (vi) the general policy regarding the diminution of expenditure,
- (vii) any substantial alteration in the scales of salaries, wages, or hours of employment of the servants of the administration,
- (viii) any substantial change in the organization of any of the departments of the administration,

Railway and Harbours Service Commission of three members, appointed on January 1, 1935

- (ix) the investigations of such schemes of railway construction and development as the board thinks should in the public interest be carried out,
- (x) the administration of the fund for maintaining uniformity of rates

The board must by law meet at least once a month, but in practice the duties of the board keep its members fully occupied every day of the year

(iii) *The Shipping Board* The Shipping Board was established by Act No 20 of 1929. It consists of nine members, three being appointed by the governor-general, one by the association of chambers of commerce, one by the chamber of industries, and one by the agricultural union, and three members (who have no voting powers) in the employment of the railways and harbours administration, who are nominated by the governor-general-in-council. The functions and duties of the board are to investigate and report to the minister upon any matters relating to ocean transport, to, from, or between Union ports, including more particularly any question

- (a) as to whether the rate of freight charged by the shipowner on any particular commodity exported from the Union is prejudicial to Union exporters as compared with their oversea competitors,
- (b) as to whether the rate of freight charged by any shipowner on any particular commodity imported is unreasonably high having regard to the rate of freight for that particular commodity operating on other ocean routes,
- (c) as to failure on the part of a shipowner to give reasonable notice of changes in freight classifications or rates,
- (d) as to the levying by any shipowner of differential freight or other charges as between one shipper and another in respect of the ocean conveyance of goods to, from, or between Union ports,
- (e) as to differential or unfair treatment by any shipowner or any shipper in respect of the allocation of space accommodation or any other matter

3. The Financial System of the Union

The financial system of the Union is similar to that of other countries having constitutions based on the parliamentary

system of Great Britain. Money is voted by the parliament of the Union. If parliament does not vote any money, the government and administration of the Union cannot be carried on. Thus, supply becomes the basis of parliamentary government.

(i) *The Consolidated Revenue Fund* Under the financial system of the Union, all revenues, except those of the railways and harbours administration, and including post office revenues, are carried to the consolidated revenue fund. This fund comprises the revenue account and the loan account, the former being credited with all moneys received from revenue proper, the latter with moneys derived from the raising of loans, from repayment of loans or from the alienation of fixed property and such other moneys as parliament may direct to be paid into that account. The charges upon the revenue and loan accounts are provided for by annual appropriation acts, and, subject to section 26 of the Exchequer and Audit Act, 1911, it is only under the authority of such an act that a withdrawal from the consolidated revenue fund can take place. The section referred to provides that withdrawals to meet unforeseen and necessary expenditure, not provided for in an appropriation act, or expenditure in excess of an amount so provided, may be made under special warrant of the governor-general up to a total amount not exceeding £300,000. Special retrospective authorizing legislation is always required to cover this expenditure.

The funds of the treasury are kept in an authorized bank in an account called the exchequer account, which includes the consolidated revenue fund. When there is a deficiency in the exchequer account, the treasury obtains advances by means of treasury bills.

(ii) *The Railways and Harbours Fund* The revenues of the railways and harbours administration are carried to a fund styled the railways and harbours fund, and are appropriated for purposes of the administration by annual appropriation acts. A similar provision to that described above exists for meeting unforeseen or excess charges on the fund within certain limits. The railways and harbours fund embraces a capital account and a revenue account, and the funds to meet capital expenditure are in the main provided by the treasury from the proceeds of general treasury loans by way of loan to the railway administration at rates of interest corresponding to those paid by the treasury.

The funds of the railways and harbours administration are kept with an authorized bank in an account called the railway and harbour account. When there is a deficiency in this account, loans are made from the treasury.

(iii) *The Public Debt Commissioners* All trust moneys, e.g. the pension fund, sinking fund, guardians' fund, and post office savings bank moneys, coming into the hands of the government or the railways and harbours administration, and funds held by provincial administrations, are handed over for investment and management to the public debt commissioners, and are paid into and out of the public debt commissioners account in an authorized bank. The public debt commissioners consist of the minister of finance as chairman *ex officio*, a member of the railway board, and one other member. The powers and functions of the Commissioners are governed by the Public Debt Commissioners Act, 1911¹. This act provides that the surplus of revenue over expenditure in each year shall be paid to the commissioners and applied by them in redemption of debt. This was, however, modified in 1926, as is explained in the next paragraph.

(iv) *The General Sinking Fund* An important and salutary departure was made by Act No. 50 of 1926. The afore-mentioned provision in regard to surplus revenue was withdrawn, and provision was made for the creation of a general sinking fund. Into this fund is to be paid from the consolidated revenue account the sum of £650,000 per annum for forty years. The object of this measure is to extinguish the non-productive debt of the Union, including the cost of public works and buildings, and the above enactment makes ample provision for the object it has in view.

(v) *Audit* The South Africa Act made provision for the appointment of a controller and auditor-general, but this provision has been repealed by the Exchequer and Audit Act, 1911, and substantially re-enacted by section 4 of that Act. The auditor-general is appointed by the governor-general at a salary of not less than £1,500 per annum and not more than £1,800 per annum, with an annuity, on retirement, of one-sixtieth of his average salary for each completed year of service. He has under him an assistant controller and auditor-general. The auditor-

¹ As amended by sections 6, 7 of Act 38 of 1921, Act 50 of 1926.

general may make orders, rules, and regulations for the conduct of the internal business of his office and for the framing of accounts, and the assistant controller has similar powers in regard to the auditing of railways and harbours accounts.

The duties of the auditor-general consist in the examination and auditing of the accounts of all persons entrusted with the receipt, custody, or issue of public moneys, stamps, securities, or stores, with the exception of railways and harbours accounts, which fall under the audit of the assistant auditor-general. The auditor-general must satisfy himself that all reasonable precautions have been taken to safeguard the proper collection of public moneys, and that all payments are made in accordance with proper authority and are supported by sufficient vouchers or proof of payment.

No money may be paid out of the consolidated revenue fund or the railways and harbours fund unless appropriated for a specific purpose for the year in which it is appropriated by parliament.¹ All money voted by parliament is paid out on a warrant signed by the governor-general,² but, as stated above, unforseen or excess expenditure to a total amount not exceeding £300,000, may be authorized by warrant of the governor-general and must be retrospectively authorized by parliament at its next sitting.

After the close of every financial year, the auditor-general must transmit a copy of his accounts and his report to the minister of finance for presentation to parliament, and he must in his report especially draw attention to any irregularity on the part of public officers. The assistant auditor-general has similar duties regarding the accounts and report of the railways and harbours administration which must be sent to the minister of railways as well as to the treasury, and must be presented by the former to parliament.

(vi) *The Financial Relations between the Union Government and the Provinces* This topic is dealt with fully in Chapter XIV (i) (ii).

(vii) *Revenue of the Union* The revenue of the Union government and the provincial administration is classified in four principal groups, namely, taxation, services, public estate, and

¹ Section 117 of the South Africa Act, 1909

² Section 25 of Act 21 of 1911

miscellaneous The government estimates of revenue and the reports of the auditor-general follow this classification. The revenue of the Union government under the various groups consists chiefly of the following:

(a) *Taxation* Customs, excise, diamond export duty, licences, income tax, excess-profits duty, death duties, native taxes, native pass and compound fees, and stamp duties.

(b) *Services* Posts and telegraph receipts, fees of office and court, and half of the departmental receipts.

(c) *Public Estate* Mining revenue not credited to income tax, state mining, quit-rent forest revenue, rents of government property, recoveries of advances, and about two-fifths of the departmental receipts.

(d) *Miscellaneous* Interest and fines and forfeitures, and the remaining portion of departmental receipts.

The provincial revenue has been allocated on the same principles. Taxation consists chiefly of licences, transfer duty and various taxes, and services chiefly of education receipts, hospital fees, &c.

(viii) *Expenditure of the Union* The expenditure of the central government is divided into two sections, central government expenditure and subsidies to the provinces. The former includes all the expenditure required for general government, law, order and protection, public health, payments on account of the public debt, and the maintenance of the native affairs department. There is a special fund known as the native development fund.

VII

UNION NATIONALITY

1. Who are Union Nationals

THE Union Nationality and Flags Act, 1927, defines those who are nationals of the Union. A Union national is a British subject who enjoys Union citizenship in accordance with the terms of the 1927 act. Union nationals are defined to include the following: any person born in any part of the Union (which for the purposes of the act includes South West Africa) who is not an alien or a prohibited immigrant under any law relating to immigration, British subjects whose entry into any part of South Africa included in the Union was in accordance with the immigration laws, and who have for a period of at least two years thereafter been continuously domiciled in the Union, so long as they retain that domicile, persons domiciled in the Union and, not being prohibited immigrants, who became naturalized British subjects under the laws of any part of South Africa included in the Union, and who have for a period of at least three years after entry into that part of South Africa been continuously domiciled in the Union, so long as they retain that domicile and do not become aliens; a person born outside any part of South Africa included in the Union whose father was a Union national at the time of such person's birth, or would have been a Union national if this act had at the time of such person's birth been in force, and was not in the service of an enemy state provided that such person *if he enters or is found in the Union is not by the immigration laws a prohibited immigrant*, the wife of a Union national is deemed to be a Union national and the wife of a person who is not a Union national, is not deemed to be a Union national. But where a man ceases during the continuance of his marriage to be a Union national, his wife, if she makes the prescribed declaration, *may remain a Union national*. A woman who has been a Union national and has in consequence of her marriage ceased to be a Union national, shall not by reason only of the death of her husband or the dissolution of her marriage become a Union national, and a woman who, not having been a Union national, has in consequence of her marriage become a Union national, shall not,

by reason only of the death of her husband or the dissolution of her marriage cease to be a Union national. Where a Union national ceases to be a Union national whether by declaration renouncing status as a Union national or otherwise, every child of that person under the age of twenty-one, shall also cease to be a Union national, but any child who has so ceased to be a Union national may, within one year after attaining the age of twenty-one, make a declaration that he wishes to resume status as a Union national and may thereupon again become a Union national.

In the Union the following are natural-born British subjects, any person born in one of His Majesty's dominions, or out of His Majesty's dominions whose father was, at the date of that person's birth, a British subject, and who fulfils any of the following conditions, that is to say, if either his father was born within His Majesty's allegiance, or his father was a person to whom a certificate of naturalization had been granted, or his father had become a British subject by reason of any annexation of territory, or his father was at the time of that person's birth, in the service of the crown, or his birth was registered at a British consulate within twelve months after its occurrence or within two years after its occurrence in certain circumstances, and any person born on board a British ship whether in foreign territorial waters or not. A person born on board a foreign ship is not in the Union deemed to be a British subject by reason only that the ship was in British territorial waters at the time of his birth.¹

Any person of European descent born in the South African Republic between June 18, 1894, and September 1, 1900, whose father was not a burgher of that republic by birth or naturalization, or whose father was not a British subject, shall be regarded as a British subject by birth unless he has in the interim assumed some other nationality or within six months of the commencement of the British Nationality in the Union and Naturalization and Status of Aliens Act, 1926, he makes a declaration of alienage.

2. How to become a Union National

The British Nationality in the Union and Naturalization and Status of Aliens Act, 1926, was promulgated on July 1, 1926, the Union of South Africa thereby falling into line with other

¹ Section 1 of Act 18 of 1926

dominions in adopting Part II of the British Nationality and Status of Aliens Act, 1914¹ Aliens naturalized under this act acquire British nationality throughout the Empire, except in those dominions which have not adopted Part II Aliens naturalized in other British countries which have accepted Part II of the British act, are deemed to be naturalized under the Union act To be eligible for naturalization as a British subject in the Union, an alien must satisfy the following conditions²

- (a) He must have attained the age of twenty-one years,
- (b) he must have resided in the Union or some other part of the British Empire for not less than five years during the eight years immediately preceding the date of his application This period of five years must include actual residence in the Union for one year immediately preceding the date of application, with the remaining four either in the Union or some other part of the British Empire, or
- (c) he must have been in the service of the crown, e.g. in the army, navy, or civil service for a period of five years during the eight years immediately preceding the date of his application for naturalization,
- (d) he must be of good character and repute,
- (e) he must be able to read or write either of the official languages of the Union to the satisfaction of the minister
- (f) he must intend, if naturalized to continue to reside in the Union or in some other part of the British Empire or to serve under the crown

Persons in respect of whose nationality as British subjects a doubt exists, or who, not having been British subjects or burghers of the late South African or Orange Free State Republics, served with the British or Republican forces in the war of 1899-1902 and who after May 31, 1902, remained aliens under the existing laws, provided that they were domiciled in the Union for five years immediately prior to July 1, 1926 may, in the discretion of the minister, be naturalized³

A person naturalized under the act becomes, unless the law provides otherwise, entitled to all the rights, powers, and privileges, and subject to all the obligations of a natural-born British subject throughout the British Empire, its dominions and dependencies, except in those dominions which have not

¹ As amended

² Section 2 of Act 18 of 1926

³ Section 4 of Act of 1926

adopted Part II of the British Nationality and Status of Aliens Act, 1914. Persons naturalized under the laws in force in the Union prior to the passing of Act No. 18 of 1926, who do not apply for a certificate under the last-mentioned act, retain their existing rights and privileges.

The Naturalization and Amnesty Act, No. 14 of 1932, was passed in order to confer British and Union nationality upon certain former burghers of the late South African Republic and the Republic of the Orange Free State, many of whom had left South Africa after the Boer war, and later returned. The act provides that any person who was, immediately prior to the date on which the two republics ceased to exist, a national of either of the republics, and who, after that date did not become a national in any other state, shall be deemed to have become a British subject if he returned to and became a resident in the Union prior to the commencement of the Union Nationality and Flags Act, 1927, and if he became resident in the Union after the commencement of that act, he shall be deemed to have become a Union national. The act also removes disqualifications imposed upon persons by reason of convictions in connexion with the Witwatersrand industrial disturbances in 1922.

Naturalization as a British subject or being a British subject is only a preliminary or essential qualification for Union nationality, and except in the case of birth in the Union or marriage to a Union national, British subjects have to have a further qualification. Those entering the Union as British subjects have to be domiciled in the Union continuously for two years after such entry, and those naturalized as British subjects in the Union have to be continuously domiciled in the Union for three years after such naturalization. When either of these two periods of time, as the case may be, has elapsed, the acquisition of Union nationality becomes automatic, and no certificate or documentary proof is required or given.

3. The Oath of Allegiance

The oath of allegiance to be taken in South Africa is as follows:

I, A. B. swear by Almighty God that I will be faithful and bear true allegiance to His Majesty, King George, his Heirs and Successors, according to law.¹

¹ Act 18 of 1926, Third Schedule. Cf. the form of oath to be taken by members of parliament in the introduction to Part III of this book.

Persons who become naturalized or who enter on certain offices are required by law to take the oath of allegiance or to make an affirmation or declaration in lieu of an oath in the manner provided. But the taking of the statutory oath does not add to the natural duty of a British subject, for in all cases he is bound in allegiance to the King as though he had taken the oath. This allegiance is not owed to the government, nor to the governor-general, but to the crown as represented by the King. 'I will be faithful and bear true allegiance to His Majesty King George, his heirs and successors according to law.' The common allegiance of all subjects of His Britannic Majesty to a single sovereign is the sole legal bond of the Empire. This common allegiance normally carries with it also a common nationality, for all persons who were born or naturalized within the King's dominions are deemed British subjects. But they may be nationals also of a particular dominion. But this double nationality does not affect the common allegiance.

4. How Union Nationality is Lost

Nationality is lost by foreign naturalization, by a declaration of alienage, by naturalized subjects divesting themselves of their status, and by the minister revoking a certificate of naturalization. Where any British subject ceases to be a British subject, he is not thereby discharged from any obligation, duty, or liability in respect of any act done before he ceases to be a British subject. Only the revocation of certificates of naturalization requires to be discussed. The British Nationality in the Union and Naturalization and Status of Aliens Act, No. 18 of 1926, provides that any certificate of naturalization granted under the act may be revoked by the minister if the person to whom it was granted is convicted of having obtained such certificate by fraud or false representation, of high treason, *crimen laesae maiestatis*, sedition or public violence, or of having, during any war in which His Majesty is engaged, unlawfully traded or communicated with the enemy or with a subject of an enemy state or been engaged in or associated with any business which was to his knowledge carried on in such manner as to assist the enemy in such war, and a certificate of naturalization may also be revoked if any person has, within five years of the date of the grant of the certificate, been sentenced by any

court in His Majesty's dominions or in the Mandated Territory of South-West Africa to imprisonment for a term of not less than twelve months or to a fine of not less than one hundred pounds, or has, since the date of the grant of the certificate, been for a period of not less than seven years ordinarily resident out of His Majesty's dominions or the Mandated Territory of South-West Africa otherwise than as a representative of a British subject, firm, or company carrying on business, or an institution established in His Majesty's dominions, or in the service of the crown, and has not maintained substantial connexion with His Majesty's dominions, or remains according to the law of a state at war with His Majesty a subject of that state

A certificate of naturalization granted in some other part of His Majesty's dominions and held by a person resident in the Union, may be revoked with the concurrence of the government of that part of His Majesty's dominions in which the certificate was granted. Where a certificate of naturalization is revoked, the minister may order that the wife and minor children of the person whose certificate is revoked shall cease to be British subjects, and such persons shall thereupon become aliens, but, except where the minister so directs, the nationality of the wife and minor children of the person whose certificate is revoked shall not be affected by the revocation, and they remain British subjects

5 Immigration

By the Immigrants' Regulation Act, No 22 of 1913, the immigration department of the Union is empowered to regulate the entry of immigrants, and certain classes of persons denominated *prohibited immigrants* may be excluded from the country, or their residence may be circumscribed as to time and in other respects. Amongst such classes are persons who have been convicted of serious crime, persons who are insane, diseased, including those who suffer from tuberculosis, or who are otherwise physically afflicted. Persons likely to become a public charge, and in some cases illiterate persons, are also regarded as *prohibited immigrants*, while by section 4 (1) (a) of the act the minister of the interior is empowered to deem as *prohibited immigrants* persons, or classes of persons, whose presence for economic or certain other reasons is undesirable. This section

has been applied by the minister to Asiatics as a whole, and has been declared valid by the courts ¹

The immigration appeal boards have been established to deal with appeals from decisions of immigration officers restricting or arresting alleged prohibited immigrants. They consist of three or more persons, presided over by a magistrate, and the decisions of the board are by the Act, to this extent final, that no court of law in the Union may, except upon a question of law reserved by a board, have any jurisdiction to review, quash, reverse, interdict, or otherwise interfere with any proceedings, act, order, or warrant of the minister, a board, an immigration officer or a master, had, done, or issued under this Act and relating to the restriction or detention, or to the removal from the Union or any province, of a person who is being dealt with as a prohibited immigrant.

Prohibited immigrants are unable to obtain licences for the carrying on of any business or calling in the Union, and may be severely punished if found within the Union.

Under the provisions of the Immigration Quota Act, 1930, a person born in any country not mentioned in the Schedule to the Act (known as non-scheduled countries) may not enter the Union for permanent residence, unless he is in possession of a permit to enter, issued by the prescribed officer, who is the secretary for the interior. The scheduled countries are the territories comprised within the British Commonwealth of Nations, Austria, Belgium, Denmark, France, Germany, Holland, Italy, Norway, Portugal, Spain, Sweden, Switzerland, and the United States of America.

Persons born in any colony or dependency of any country are deemed to have been born in that country, and persons born in a mandatory territory are deemed to have been born in that country in which was vested the sovereignty over that territory on July 1, 1914. The wife and minor children of any person are deemed to have been born in the same country as that person. Not more than fifty persons (men, women, and children) born in any non-scheduled country are permitted to enter the Union in any one calendar year.

Under the regulations issued under the Act, preference for admission under a quota is given in the following order (a) to the wife and minor unmarried children of a person permanently

¹ *Res v Padsha*, [1923] A D 281

and lawfully resident in the Union, (b) to a person skilled in agriculture or industry and his wife and minor children (c) to a person who is not likely to pursue a calling in which a sufficient number of persons is already engaged in the Union to meet the requirements of its inhabitants, and (d) to a person who, in the opinion of the prescribed officer, is likely to be readily assimilated in the population of the Union

In addition to the quota of fifty persons for each non-scheduled country, the Immigrants' Selection Board, appointed for the purpose, may permit the entry in any one calendar year of any person born in a non-scheduled country, notwithstanding that the quota of fifty persons for that country is complete, provided that in the aggregate for all non-scheduled countries the number of 1,000 persons is not exceeded. A person admitted under the unallotted quota must be (a) of good character, (b) in the opinion of the Board likely to become assimilated in the population and become a desirable citizen, (c) not likely to be harmful to the economic and industrial welfare of the Union, (d) in the opinion of the Board not likely to pursue a calling in which a sufficient number of persons is already engaged in the Union to meet the requirements of its inhabitants, or (e) the wife or minor child, or a destitute or aged parent or grandparent of a person permanently and lawfully resident in the Union who is able, and undertakes to maintain him or her

Of the unallotted quota of 1,000, the number of 750 is reserved for the wives and minor children of persons, who were at May 1, 1930, permanently and lawfully resident in the Union

Persons domiciled in the Union, or those who lawfully entered the Union prior to May 1, 1930, for permanent residence therein, and persons who are Union nationals in terms of the Union Nationality and Flags Act, 1927, are exempt from the provisions of the Act relating to admission under the quota. Persons from non-scheduled countries may be admitted for temporary purposes under conditions laid down in the regulations. The provisions of the Quota Act, 1930, are in addition to and not in substitution of the Immigrants' Regulation Act, 1913

6 The Position of Asiatics

Under the Immigrants' Regulation Act, 1913 (which is applicable to all classes and races), Asiatics, with the exception of

wives and children of domiciled relatives, are prohibited from entering the Union, not *eo nomine*, but under a certificate of the minister issued in terms of section 4 (1) (a) of the Act. The provisions of the Act also restrict the movements of Asiatics to the province in which they are resident. In certain areas of the Union, Asiatics may not own land nor may they occupy fixed property.

The Asiatic question in the Union has an imperial context, to which brief reference may here be made. The Imperial Conference of 1917 accepted the principle of reciprocity of treatment between India and the British dominions in the matter of immigration. The conference of 1918 elaborated the principle and laid down that Indians already permanently domiciled in the other British countries should be allowed on certain conditions to bring in their wives and minor children. At the Imperial Conference held in 1921, the position of Indians in the British Empire was further discussed, and a resolution was passed which, while approving the resolution of the 1918 conference on the subject, expressed the opinion that in the interests of the solidarity of the British Commonwealth it was desirable that the rights of the British Indians to citizenship should be recognized. This resolution was not accepted by the South African representatives, and the Indian delegates expressed the hope that by negotiation between the governments of India and the Union the objections of the latter could be overcome. The question was again raised at the conference of 1923, when the Indian representatives made certain proposals with a view to giving effect to the policy laid down in 1921. In the case of the Union, the suggestion was that the Union government should agree to the government of India sending an agent to South Africa who would protect Indian nationals there and act as an intermediary between them and the Union authorities. In rejecting the proposal, General Smuts on behalf of the Union stated that he could hold out no hope of any further extension in the political rights of the Indians in South Africa. He defined the issue in the Union to be the question of economic competition and not of race and colour, and declared that the white community in South Africa felt that the whole question of the continuance of western civilization in that country was involved in this issue.

Consequent upon a proposal in 1926 to introduce into the house of assembly the *Areas Reservation and Immigration and Registration (Further Provision) Bill*, a deputation from India arrived in the Union to study at first hand certain aspects of the Indian population problems. This deputation was followed by a return visit to India of a parliamentary deputation from the Union government. As a result of the investigations of these deputations, the governments of India and of the Union arranged for a meeting in the Union of a further delegation from India to explore every possible avenue in order to arrive at a satisfactory solution of the Indian problem.

The Indian delegation assembled in conference with the parliamentary deputation in Capetown on December 17, 1926. At this session the contentious differences were discussed by the delegates freely and openly and in a spirit of determination to find a satisfactory solution of the outstanding difficulties. At the close of the conference the delegates were able to recommend the following articles, which were unhesitatingly approved of by the respective governments as a basis of agreement.

- (1) Both governments reaffirm their recognition of the right of South Africa to use all just and legitimate means for the maintenance of western standards of life,
- (2) The Union government recognizes that Indians domiciled in the Union, who are prepared to conform to western standards of life, should be enabled to do so,
- (3) For those Indians in the Union who may desire to avail themselves of it, the Union government will organize a scheme of assisted emigration to India or other countries where western standards are not required. Union domicile would be lost after three years' continuous absence from the Union in agreement with the proposed provision of the law relating to domicile, which would be of general application.¹ Emigrants under the Assisted Emigration Scheme, who desire to return to the Union within three years, will be allowed to do so only on refund to the Union government of the cost of the assistance received by them,

¹ See Immigration and Indian Relief (Further Provision) Act, No. 37 of 1927. This act provides that domicile in the Union shall be deemed lost by an Asiatic if he absents himself from the Union and does not re-enter the Union within three years from the date of departure therefrom—section 10.

- (4) The government of India recognizes its obligation to look after such emigrants on their arrival in India ,
- (5) The admission into the Union of the wives and minor children of Indians permanently domiciled in the Union will be regulated by Paragraph 3 of Resolution XXI of the Imperial Conference of 1918 ,
- (6) In the expectation that the difficulties with which the Union has been confronted will be materially lessened by the agreement which has now happily been reached between the two governments, and in order that the agreement may come into operation under the most favourable auspices and have a fair trial, the Government of the Union of South Africa has decided not to proceed further with the *Areas Reservation and Immigration and Registration (Further Provision) Bill* ,
- (7) The two governments agreed to watch the working of the agreement now reached and to exchange views from time to time as to any changes that experience may suggest ,
- (8) The government of the Union of South Africa requested the government of India to appoint an agent in the Union in order to secure continuous and effective co-operation between the two governments

An agent-general for the government of India in the Union was thereafter appointed, and the *Areas Reservation and Immigration and Registration (Further Provision) Bill* was dropped

In accordance with paragraph 7 of the Capetown agreement delegates of the two countries met again in 1932 to exchange views on the working of the agreement Both governments considered that the agreement had been a powerful influence in fostering friendly relations between them It was recognized that the possibilities of the Union's scheme of assisted emigration to India were almost exhausted as more than 80 per cent of the Indian population of the Union were South African born The two governments agreed to explore the possibilities of a colonization scheme for settling Indians in South Africa, both South African born and Indian born, in other countries No other modifications of the agreement were considered necessary

7. Deportation

Any person not born in the Union who has been sentenced to imprisonment for a contravention against certain offences under the gaming and immorality laws contained in the schedule of the Immigrants' Regulation Act, 1913, or who has been convicted of selling liquor to a non-European, or of selling habit-forming drugs, or of being in possession, without licence, of unwrought precious metals or uncut precious stones, or has aided and abetted the commission of an offence against the immigration laws, or who has contravened the Immorality Act, 1927, may in the discretion of the minister be removed from the Union.¹ The Insolvency Act, 1916, Amendment Act, 1926, makes persons not born in the Union liable to deportation if convicted for any offence under the Insolvency Acts, and the Riotous Assemblies (Amendment) Act, 1930, and the Native Administration Act, 1927, make persons convicted under their provisions similarly liable for deportation.

8. Flags of the Union

The Union Nationality and Flags Act, No 40 of 1927, provides that the flags of the Union are to be (a) the Union Jack, to denote the association of the Union with the other members of the group of nations constituting the British Commonwealth of Nations, and (b) a national flag of the Union. The design of the National Flag of the Union is declared to be three horizontal stripes of equal width from top to bottom, orange, white, blue, in the centre of the white stripe the old Orange Free State flag hanging vertically, spread in full, with the Union Jack adjoining horizontally spread in full towards the pole, and the old Transvaal *Vierkleur* adjoining horizontally spread in full away from the pole, equidistant from the margins of the white stripe. The flags shall all be of the same size, and their shape shall be proportionally the same as the National flag, and the width of each equal to one-third of the width of the white stripe. The Union Jack must be flown with the National flag from the houses of parliament and from the principal government buildings in the capitals of the Union and of the provinces, at the

¹ Section 4 of Act 15 of 1931

Union ports, and on government offices abroad, and at such places in the Union as the government may determine. The governor-general may by regulation fix the manner in which the flags may be flown on the high seas or for special purposes or occasions.

VIII

ACTIONS BY AND AGAINST THE GOVERNMENT AND ITS SERVANTS

1. Actions by and against the Union Government

IN England, as a general rule, whenever a person seeks redress against the government in a civil matter, he has to proceed by way of petition of right. A petition of right is the process by which property of any kind, including money or damages for breach of contract, is recovered from the crown. But since the King can neither do nor authorize a wrong, a petition of right will not lie for damages for a tort alleged to have been committed either by the crown or by a servant of the crown acting on the crown's authority. The proper remedy in such a case is by action against the person who committed the alleged tort, since, as the crown cannot authorize a wrong, it follows that a servant of the crown cannot plead the crown's authority in his defence.

In South Africa the whole position is regulated by statute, and the procedure by way of petition of right, as well as the doctrine that 'the King can do no wrong', is unknown. The Union parliament commenced its legislative existence by passing the Crown Liabilities Act, No. 1 of 1910. This Act provided that

2. Any claim against His Majesty in His Government of the Union which would, if that claim had arisen against a subject, be the ground of an action in any competent court, shall be cognizable by any such court, whether the claim arises or has arisen out of any contract lawfully entered into on behalf of the Crown or out of any wrong committed by any servant of the Crown acting in his capacity and within the scope of his authority as such servant.

Provided that nothing herein contained shall be construed as affecting the provisions of any law which limits the liability of the Crown or the Government or any department thereof in respect of any act or omission of its servants or which prescribes specified periods within which a claim shall be made in respect of any such liability or imposes conditions on the institution of any action.

3. In any action or other proceedings which are instituted by virtue of section two, the plaintiff, the applicant, or the petitioner (as the case may be) may make the Minister of the department concerned nominal defendant or respondent.

- 4 No execution or attachment or process in the nature thereof shall be issued against the defendant or respondent in any such action or proceedings aforesaid or against the property of His Majesty, but the nominal defendant or respondent may cause to be paid out of the Consolidated Revenue Fund, or if the action or proceedings be instituted against the Minister of Railways and Harbours, out of the Railway and Harbour Fund, such sum of money as may, by a judgment or order of the court, be awarded to the Plaintiff the applicant, or the petitioner (as the case may be)

The Crown Liabilities Act does not create any new liabilities. Before union each of the four colonies had statutes governing the liability of the crown for the wrongs of its servants, and these statutes employed language almost identical with the Union act. Where claims against the crown, therefore, did not exist before the passing of the Union act, they did not come into being as a result of the passing of the act. What the act did was to give the courts of the Union jurisdiction to hear and determine actions against the crown in cases in which similar causes of action could ground claims against individuals.¹

Actions may be brought in the supreme court, as well as in the magistrates' courts, according to the limit of jurisdiction governing each particular court,² and the crown may also be sued *in forma pauperis*.³ It is not necessary that the claim be for damages only. A declaration of right or a mandatory interdict may be granted against the government.⁴ The government may be sued for a refund of money paid to it under a fraudulent misrepresentation of one of its servants.⁵ A civil servant may sue for wrongful dismissal,⁶ just as any person may sue for breach of contract. But torts and breaches of contract are not the only grounds of claim. In South Africa there exists that ancient *actio de pauperie*, which cannot be classified under any form of negligence. In the case of *South African Railways v. Edwards*,⁷ a pedestrian walking in a public street passed a mule belonging to the South African Railways, and was kicked and thrown under a passing tram-car. He recovered damages against the

¹ *Heilbron Municipality v. Minister of Public Works*, [1914] O P D 83

² *Du Plessis v. Union Government*, [1916] A D 57

³ *Baincoll v. Minister of Justice*, [1913] T P D 327

⁴ *Minister of Finance v. Barberton Municipal Council*, [1914] A D 335. *Fair v. Union Government*, [1913] C P D 818, but see *Braunschweig Board v. Minister of Lands*, [1913] E D L 386

⁵ *Khurwa v. Minister of the Interior*, [1912] N P D 441

⁶ *Norton v. Union Government*, [1920] N P D 267

⁷ [1930] A D 3

crown The mule was perfectly docile and was assumed to be accustomed to city noises It was held that an animal which is upset by such noises and injures a pedestrian must be held to have acted from 'inward excitement contrary to the nature of its kind' If the pedestrian had provoked the animal, then it would have acted according to its nature and retaliated, as teasing a docile dog might provoke a bite¹ Knowledge of the ferocity of an animal is, of course, an element in an action based on negligence, but for the *actio de pauperie*, ownership is the ground of liability for injury done

Considerable difficulty has arisen in connexion with actions against the crown by reason of the acts of members of the police force A member of the police force is not a servant of the crown, he is independent of the crown, for he carries out duties which parliament and the law and not the crown commands him to carry out²

In *Union Government v Thorne*,³ a native constable in the course of his duty had been instructed by a superior officer to proceed to a certain place with a trolley and mules, and upon the road had negligently run into and injured the plaintiff The crown was held liable in damages To take the case out of the Crown Liabilities Act, there must be a lack of one or more of the essentials of the law relating to master and servant If a police officer performs a public duty, such as arresting a person under the duties which the law imposes upon him, he acts independently of the crown independently of any master But where a police officer acts in the course of his duties for his department, not under an obligation which the criminal law generally imposes upon him to arrest offenders, or to prevent crime or public disorder he acts as a servant of the crown and the crown is liable for his torts A police officer may drive a van from one place to another if he causes injury, the crown is liable If, in driving the van, he stops to arrest a person on

¹ The doctrine of *scienter* is not part of the Roman-Dutch law The liability of the owner of a tame animal which does damage without provocation to a person lawfully at the place where he was injured is absolute in South Africa *O'Callaghan, N O v Chaplin*, [1927] A D 310 On the question of absolute liability in Roman Dutch Law, see R W Lee, *An Introduction to Roman-Dutch Law* (Oxford, 1931), p 324 and note 2.

² See *Lawford v Minister of Justice*, [1914] N P D 284, *British S A Company v Crickmore*, [1921] A D 107, *Heiberg v S A R*, [1918] W L D 42

³ [1930] A D 47

reasonable grounds, the crown is not hable for any wrongful arrest. In the first instance he is acting on departmental duty under departmental instructions, in the second instance he is acting independently, carrying out the duties of a police officer under the law. *Prima facie* he may be a servant of the crown, but when acting under the general provisions of the criminal law, he is a servant of the law.

Another case which illustrates the distinction is *Lawrie v Union Government*¹. In that case the plaintiff was arrested while driving a motor-car, and the car was detained by the police for safe custody. While the arrest was carried out by the police under statutory duties, the detention of the car was not part of the arrest. In detaining the car the legal relationship of the police to the owner of the car was for all practical purposes that of *negotiorum gestor*. The crown was therefore held hable for damage to the car owing to the negligence of the police in failing to look after it properly.

All actions against the crown must be brought within statutory time. Most of the statutes regulating the conduct of officials of the government contain provisions limiting the time within which actions must be brought. The time limit is usually six months.

Though the Union government, as such, instead of the minister at the head of a department, may be cited as the defendant or respondent,² it is proper to cite the minister of the department concerned as the nominal defendant.³ An official subordinate to the minister should not be cited.⁴ Nor should the governor-general be cited, even though the subject-matter of the action concerns a native tribe, over which the governor-general is paramount chief, being such over all the native tribes.⁵

2 Actions by and against the Provincial Administrations

There is considerable difficulty in determining who the right plaintiff or defendant would be in an action in which the pro-

¹ [1930] T P D 402

² *Mavias v Union Government*, [1911] T P D 127, 132

³ *Minister of Railways v Johannesburg Municipality*, [1912] A D 595

⁴ *Paul and Meer v Postmaster Dundee*, 2 P H f 79, though the commissioner of customs, the commissioner of inland revenue, and the public debt commissioner may, by statute, sue and be sued as such.

⁵ *Ex parte Mathibe*, [1923] T P D 462

vincial administration is involved. The South Africa Act is not at all clear on this point. It provides merely that

- 68 In each province there shall be a chief executive officer appointed by the Governor-General-in-Council, who shall be styled the administrator of the province, and in whose name all executive acts relating to provincial affairs therein shall be done

The section suggests that the right person to sue and be sued is the administrator in his official capacity, since union, however, actions have been instituted against the 'Provincial Administration of the Transvaal' or 'the Cape', &c, as the case may be. There is no legal foundation for such a course of procedure or citation.

This topic has been dealt with in this chapter for reasons of convenience. The action against the provincial administration is not an action against the crown. The provincial administration is not part of His Majesty's government in the Union, in this respect it is similar to a local government body.

3. The Civil Liability of Public Officers

A distinction is to be drawn between the civil liability of the crown for the acts of its servants, and the personal liability of servants of the crown acting in the course of their duties. Up to now we have dealt with actions against the crown and the provincial administrations. We now propose to deal with actions against public servants in their individual capacity.

Where a person acts as a servant of the crown and does damage by a wrongful act while acting within the scope of his authority, the crown is liable for his wrongful act. If a servant commits a breach of his duty, that is, goes beyond his jurisdiction or omits to carry out his duties, the crown, generally, may not be sued, and the person who has suffered damage must proceed against the individual servant. The remedy against the crown is barred where a person does not act within the scope of his duty, and this is especially so when the duties of a public servant are clearly laid down by law. But as long as the acts of a servant come within the scope of his authority, no matter how negligently or wrongfully he acts, the crown, as master, is liable for its servants' wrongs under the Crown Liabilities Act, No. 1 of 1910. The doctrine of 'the King can do no wrong'

has no application in South Africa by reason of the provisions of the Crown Liabilities Act, 1910

As far as executive officers of the government are concerned a distinction is made according to the nature of the relationship between them and the persons complaining of their acts. If a public officer owes a specifically defined duty to a particular person, and as a direct result of a breach of that duty damage ensues to that particular person, he is liable for the damage which he has caused by his dereliction of duty, in the absence of any provision to the contrary. The case of *Cape of Good Hope Bank v Fischer*,¹ illustrates the above principle and a quotation from the judgment of de Villiers C J is instructive not only on the legal principle, but of the manner in which the courts go back to the old authorities for the law. De Villiers C J says:

"The conveyance of land was always a ceremonious proceeding in the different provinces of the Netherlands, and, in this respect, bore a close resemblance to the *mancipatio* of the old Roman Law. The Judge was there to add to the solemnity of the occasion, but the ministerial act of recording the transfer was performed by an independent officer, who is generally referred to in the text books as the *actuarus*. In the year 1580, if not before, it was deemed advisable that all mortgage bonds should be registered in the same way as transfer deeds had previously been registered, and that the acknowledgement of debt should be made in solemn form before a Judge or Magistrate. I can find no authority for the contention that such a Judge or Magistrate would have been liable for any loss occasioned by mistakes made by him in good faith in the performance of his duties. The Registrar of Deeds is entrusted with the formal duties formerly performed by judicial officers, but his chief duties are of a ministerial nature, and consist in registering deeds and bonds duly passed before him, exercising supervision over the subordinate officials of his department and generally performing the functions which, in the Netherlands, had appertained to the so-called actuary. Now, I quite concur in the view that our system of registration would be worse than useless, for it would be actually misleading, if the Registrar were not kept to a strict performance of his duties, and were allowed to shelter himself behind his judicial immunity when sued for a loss arising clearly and directly from a breach of his ministerial duties. If, therefore, a properly executed mortgage bond had been passed before him, and is presented to him for registration, it is his duty to register it in the manner required by law, and if he fails in this duty he is liable to the mortgagee for any damages occasioned by his loss of preference. A case in point is reported by Sande to have been decided by the High Court of Friesland, on appeal from the Commissary's Court.² It appears that bonds

¹ 4 S C, at p 374

² *Laquart v Jans*, Decisions of the high court of Friesland, 3 12 15

passed in the town of Bolsward were required to be registered by the town clerk in the presence of a magistrate, and that bonds not so passed conferred no legal preference. The town clerk, having registered a certain bond in the absence of a magistrate, was held liable to the mortgagee for damages occasioned by his bond having been postponed to a bond of later date duly registered in the presence of a magistrate. This case is cited by Matthaeus¹ "If the Judge himself, or the actuary, upon being questioned, fraudulently (*dolo malo*) conceals a prior incumbrance, he is liable for the damages sustained by the person imposed upon in an action *in factum*. The action also lies if the actuary has not made an entry, or, as we term it, a registration, of a person's mortgage." The actuary here mentioned stood in the same position as the town clerk in the case of *Laquart v Jans*, and was, therefore, quite a different person from the Judge or Magistrate before whom the solemn acknowledgement of debt was made. Voet says upon the same subject² "If through the default or fraud (*culpa vel dolo*) of the actuary a solemnity required for the validity of a general or special mortgage had been omitted, or the actuary, upon being questioned, has declared the property to be free from incumbrance, whilst in fact a mortgage in favour of another had already been duly registered, and the creditor should on that account fail to obtain his right of preference, he would have an action *in factum* for damages against the actuary." It appears from both these authors that, in their time, the Aquilian Law had received an extension by analogy to a degree never permitted under the Roman Law. The action *in factum* was no longer confined to cases of damage done to corporeal property, but was extended to every kind of loss sustained by a person in consequence of the wrongful acts of another, and, thus extended, bore a curious analogy to the action on the case in English Law. In the case of *In re Carter*,³ a dictum of Menzies J. is reported to the effect that, if the registration of the bond in that case had been omitted to be made, or had not been made in the form prescribed by law, the creditor would have an action for damages against the Registrar. This dictum, in my opinion, embraces perfectly sound law. The Registrar owed a duty to the creditor, who had advanced his money in consideration of the bond, and his failure in this duty would have directly led to the loss of the very preference which it was the object of the bond to create. But a person who has no interest whatever in a bond is not damaged by the Registrar's omission to register it.

It is seen, therefore, that while the registrar owes a specific duty to a particular individual and contravenes that duty, in the absence of any other remedy defined by law, he will be liable in damages to the person who can prove damage by such act, but he will not be so liable to a person to whom he does not owe any such duty. The fact that another remedy is provided in the

¹ de Auct. 1 19 86

² 20 1 11

³ 2 Menz. 335

relevant statute tends to show that no liability to action was intended to be created against the public servant ¹

Where the act complained of is done in the exercise of a discretion conferred by law, no action will lie in the absence of malice or improper motive, the exercise of such a discretion is subject to the rules governing the exercise of quasi-judicial powers ²

Where an officer is required by law to obey the decrees of a court of justice, no liability can attach to him for any act done in obedience to such an order of court, but to obtain this protection he must prove strict obedience to the terms of a writ or a warrant valid on the face thereof ³ Officers need not examine the judicial act of the court whose servants they are, but are bound to execute it and are therefore protected by it. But where such officer, e.g. a sheriff or messenger of court, fails to execute a process entrusted to him, he will be liable for any damage sustained also if he does an act not authorized by his writ or warrant, or acts negligently ⁴ Special statutory provision protects members of the police force who act under the warrants of judges, magistrates or justices, even if the warrants are illegal or invalid ⁵

It is the duty of a public officer to exercise due vigilance and effective supervision over all subordinates in his department. He cannot excuse his own carelessness on the ground that the government and he himself had unbounded confidence in his subordinates, nor can he be heard to say that more duties than he could reasonably be expected to perform were imposed upon him. If he is given public moneys, he is liable for their safe custody or deposit, if, by reason of his negligence, any money is stolen, he must make good the loss ⁶

¹ *Haarhoff's Trustees v. Frieslich*, 11 S.C. 330. *Jordaan v. Worcester Municipality*, 10 S.C. 159.

² *Transvaal Coal Owners' Association v. Board of Control*, [1921] T.P.D. 447.

³ *Barnes v. White*, 3 S.C. 181.

⁴ *Louw v. Fife*, 2 S.C. 65, *Weels v. Amalgamated Agencies*, [1920] A.D. 218, *Mulder v. Lichtenburg Messenger*, (1916) T.P.D. 117.

⁵ Section 29 of Police Act, 14 of 1912.

⁶ *Colonial Government v. Green*, (1870) Buch. 14, *Colonial Government v. Davison and others*, (1877) Buch. 1.

PART III
PARLIAMENT

INTRODUCTION

THE parliament of the Union consists of the King, a Senate, and a House of Assembly 'The legislative power of the Union', the South Africa Act declares, 'shall be vested in the parliament of the Union, herein called Parliament, which shall consist of the King, a Senate, and a House of Assembly' There are no exceptional circumstances as there may be in the United Kingdom under the provisions of the Parliament Act, 1911, when the concurrence of the upper house is not required for legislation. The parliament of the Union is, in the accepted sense of the word, a thoroughly bi-cameral parliament, and the legislative power of the Union is definitely vested in three organs, even though one of them may have formal efficacy only. The enacting clause of every statute of the Union parliament runs thus

BE IT ENACTED by the King's Most Excellent Majesty, the Senate, and the House of Assembly of the Union of South Africa, as follows

It does not matter whether the statute is a private statute, an appropriation act, or any other kind of act, the formula is always the same. It does not matter whether the act has been passed by both houses sitting together under sections 63 or 152 of the South Africa Act, for those sections specially provide that any act so passed 'shall be taken to have been duly passed by both Houses of Parliament'

The South Africa Act, section 56, lays down that members of parliament shall receive an allowance of four hundred pounds per annum. After various amendments to section 56 of the South Africa Act, the law governing the payment of members of parliament is now to be found in the Payment of Members of Parliament Act, No. 51 of 1926. Each member of parliament now receives seven hundred pounds a year. For every day he is absent from the house, he loses two pounds,¹ except if he is attending a meeting of any committee of the house of which he is a member, or if he is ill, or if he has to attend a court of law (unless he be convicted while so attending the court on a criminal charge against himself), or if his wife is seriously ill or has died, and his absence is condoned by the committee on standing rules.

¹ As amended by section 2 of Act No. 29 of 1933

and orders of the assembly, or the sessional committee on standing orders of the senate (as the case may be) A member is, however, allowed to be absent for fifteen days without penalty provided that such absence does not occur during a session at which the estimates of expenditure are considered Members receive their allowances in equal monthly instalments from the clerk of the house either of the senate or the assembly, payable out of the consolidated revenue fund

It is obligatory for every member of parliament to take the oath of allegiance, though every subject of the crown and every citizen of the state owes allegiance to the crown and loyalty to the established government, in the legal sense of the word loyalty He may not endeavour to overthrow the government by force of arms, nor may he make war against the government These are inherent duties owed to the state without the necessity of taking the oath of allegiance Nevertheless the South Africa Act contains provisions making it obligatory for members of the Union parliament to take the oath

- 51 Every senator and every member of the House of Assembly shall, before taking his seat, make and subscribe before the Governor General, or by some person authorized by him, an oath or affirmation of allegiance in the following form

Oath

I, A B, do swear that I will be faithful and bear true allegiance to His Majesty King (or Her Majesty Queen—*here insert the name of the King or Queen for the time being as the case may be*)¹ His (or Her) heirs and successors according to law So help me God

Affirmation

I, A B, do solemnly and sincerely affirm and declare that I will be faithful and bear true allegiance to His Majesty (as above) heirs and successors according to law

To be a member of the senate carries with it the custom of being addressed as senator, and members of the assembly have the right to place after their names the letters 'M P' following British custom, though whether this right could be enforced

¹ As amended by section 7 of the Status of the Union Act, 1934 For the previous form of oath, see section 51 of Appendix IV For definition, of heirs and successors' see section 5 of the Status of the Union Act, 1934, Appendix VII

legally it is difficult to say. It may be that the assembly can regulate the matter as part of its control over its own members.¹

While the primary duty of parliament is undoubtedly to make laws, it has other functions such as the criticism of matters of national importance and the conduct of ministers and public bodies. It is the high court of the nation, the forum where the nation's criticism is brought forward. This criticism, however, has for its ultimate object the passing of laws to remedy the faults or defects criticized, or to eject from office the ministers who have allowed these defects or faults to occur. Members of parliament have the powerful weapon of being able to ask each minister questions relating to matters within the control of his department. These questions may elicit information upon which a case may be founded to cause the downfall of a government by a direct motion of no confidence, and the knowledge that questions may be asked acts as a spur to ministers and to officials. Parliament may also sit, by means of committees, as a non-judicial court of inquiry, and in certain matters parliament is a court of justice. It may receive the complaints of the people by means of petitions brought before the house by a member of the house, and on motion made to that effect the house may discuss the complaint, and, if necessary, legislation may be introduced. Such are the varied functions of parliament—to legislate for a vast country, to control the executive government, to hear the complaints of the people, and to redress their grievances. To be equal to its task it needs the guidance of

¹ Members of the house of assembly used to be designated by the letters 'M.L.A.' (member of the legislative assembly) after their names. But on March 21, 1930, the Union house of assembly adopted the following recommendation by the sessional committee of the house (S.C. 18-30): 'Your Committee begs to report that it has had under consideration a proposal submitted to it through Mr. Speaker by representatives deputed for the purpose by the Empire Parliamentary Association (South Africa Branch) that the designation after the names of members of the House of Assembly be altered from "M.L.A." to "M.P.", with a view to securing a designation identical with that applied to members of the Lower Houses of other Dominion Parliaments who are affiliated with the Association. The letters "M.L.A." (which were used to describe members of the Legislative Assemblies of three Provinces prior to Union as well as members of the lower House of the Parliament of the Cape of Good Hope) do not correctly represent the words "Member of the House of Assembly" which appear in the South Africa Act, and as your Committee is in accord with the views which were put to it in favour of the proposed change, it recommends that for the future members of the House be officially designated by the letters "M.P."—J. H. H. de Waal, Chairman.'

accomplished statesmen and an organization which will make fruitful the wisdom and practical knowledge of the ablest men of the generation. Its history has been short but not without a record of eloquence, of statesmanship, and of generous sympathy with the people. If there have been signs of narrowness of vision, these have not been sufficient to dim the hope that the future holds forth a promise that the parliament of the Union will take its place among the great debating and legislative assemblies of modern democracy.

There are some criticisms to make with regard to the position of the senate. The effect of an upper house is to be measured neither by the number of bills that it throws out, nor yet by the number of amendments that it succeeds in making. Ministers will not if they can help it provoke a conflict between the two houses, and are very chary of asking the lower house to adopt proposals which they do not think can be carried through the upper. Nearly all legislation is initiated by the government and not by members of either house apart from the government. The mere existence, therefore, of a second chamber has a silent but powerful effect in tempering the proposals of the ministry. The fact is that a second chamber is required not as a check on the action of the lower house, but upon the action of the government for the time being. It is for this reason that in practice a conference between representatives of the two houses is comparatively rare in South Africa, where the same ministers can sit and speak in the senate as well as in the assembly. The government always has its majority in the lower house and there is generally a majority in the upper house which is mindful of its true position in the constitution. The second chamber has another function, quite uncontentious in character, the prevention of errors made through haste. It often makes a number of amendments which are accepted without demur, because they are corrections of oversights in drafting, and are recognized as improvements in the form of a bill. Technical defects in legislation are apt to escape the attention of a popular house absorbed in a party struggle over the main issue of a measure. An upper house may do useful work by concentrating its attention on blemishes, many of which result from the process of amendment in the lower house. There is also another function which ought to receive much more attention from the senate than it gener-

ally does, that is the introduction of measures which are none the less necessary because they are non-party and un-sensational in character. More especially it should devote itself to consolidating in comprehensive statutes matters which have been dealt with by parliament at different times in a number of different laws. A splendid opportunity for public usefulness in this direction has been missed, though the fault lies more with the government of the day than with the senate. A great deal of time might be saved in the lower house if certain bills were dealt with by the upper house first of all. The government has the right to appoint eight members to the upper house, and it should arrange that a few more distinguished lawyers should be members of the senate so that they can assist in piloting important non-party measures through the senate. At least two members of the ministry should be senators in order to take charge of and originate government measures in the senate. If more bills were originated in the senate, the senate would not have to sit idle for half the session and at the end of the session be inundated with bills from the assembly to which it can give but a cursory attention.¹

In this part of the work we shall discuss first the constitution of the senate and the election and qualifications of senators. Secondly, we shall discuss the constitution of the assembly, the legal qualifications of its members, the number and distribution of seats, the delimitation of electoral divisions, the franchise and elections. We shall then study parliament at work, in the first place assembling it, then describing its organization, its rules of debate and procedure, the method of dealing with deadlocks and bills which require a special statutory procedure under the South Africa Act, and the steps that are required to make a bill actual law. As we go along we shall illustrate the discussion with practical forms and extracts from the official debates of parliament so that something may be obtained of that atmosphere which makes the proceedings of parliament so attractive to the onlooker, yet so difficult for the inexperienced to understand and appreciate. Finally, we shall examine the powers and privileges of parliament, not its legislative powers, for we have already dealt with them, but the powers which it possesses to enable it to preserve its dignity and authority.

¹ See further on this topic Chapter XI 4 (iii)

IX

THE SENATE

1. The Constitution of the Senate

THE senate consists of forty members. Eight are elected by each of the four provinces, and eight are nominated by the governor-general-in-council, which means in effect, the prime minister. Of the eight nominated senators, four are selected on the ground mainly of their thorough acquaintance, by reason of their official experience or otherwise, with the reasonable wants and wishes of the coloured races of South Africa. A nominated senator holds office for ten years from the day he was appointed, whether his appointment is an original one or one to fill a vacancy which has occurred. The elected senators of the first parliament of the Union also hold office for ten years, but vacancies are filled for the remainder of the period only. On the dissolution of the senate under the Senate Act, 1926, all members whether elected or nominated, vacate their seats.

The senate reveals the only real element of federation in the constitution of the Union—that of equal representation of the provinces. There is a trace of federation in the first constitution of the assembly, but this has almost disappeared. Both elements, however, are so negligible that they have had no effect on the politics of the Union. The reason for both was to endeavour to prevent the two smaller provinces from being steam-rolled by the larger provinces. But the election of senators and members of parliament has consistently been on party and not on provincial lines, and the greater provincial safeguard has been the provincial councils.

2. The Election of Senators

The South Africa Act prescribes four methods of choosing senators. (1) The first election took place by a joint sitting of the two houses of the legislature in each colony before the day appointed for the establishment of the Union, but after the passing of the act, that is, during the period between September 20, 1909, and May 31, 1910, (ii) vacancies were filled by the provincial council of the province in which the vacancy oc-

occurred, (iii) after the first ten years and until parliament otherwise provides, senators shall be chosen by the members of the provincial council of each province sitting together with members of the house of assembly elected for such province¹ Vacancies are filled by the same persons, but a by-election may take place and be decided by postal voting, (iv) Nomination by the governor-general-in-council

The method of electing senators is by proportional representation, each voter having one transferable vote The first regulations governing this proportional method of representation were drawn up by the delegates who went to England to assist in the passing of the South Africa Act, and were approved by the governor-general-in-council They are based on the Tasmanian Act and on the Municipal Representation Bill introduced into the House of Lords in 1907 These regulations have been amended from time to time and are extremely complicated²

After an election has taken place, the minister of the interior publishes the names of the persons elected and the province they represent, in the Gazette

¹ The form of proclamation used is as follows

PROCLAMATION

BY MAJOR-GENERAL THE EARL OF ATHLONE, GOVERNOR-GENERAL, (*etc*)
WHEREAS the Senate, constituted in terms of section 25 of the South Africa Act, 1909, has by my Proclamation No 191 of the 19th August 1929 been dissolved in terms of the Senate Act, 1926, And whereas it is expedient to proceed to the election of Senators, Now, therefore, under and by virtue of the powers and authority vested in me by section 25 of the South Africa Act, and sub paragraph (2) of paragraph 2 and sub paragraph (1) of paragraph 5 of the Regulations in regard to the joint election of Senators, published under Government Notice No 2011 of the 8th November, 1920, as amended by Government Notice No 155 of the 25th January, 1921, and as further amended by Government Notice No 1574 of the 14th September, 1928, I do hereby proclaim, declare and make known as follows —

- (1) That Friday the sixth day of September, 1929, shall be the day on which a sitting of all members of the House of Assembly and the Provincial Council within the meaning of paragraph 1 (i) of the aforesaid Regulations shall be held in each Province for the purpose of the election of Senators,
- (2) (Time of sitting)
- (3) (Place of sitting—usually the Provincial Council assembly chamber)
- (4) (Returning Officers)

ATHLONE, (*Gov -Gen*)

Dated Seal

D F MALAN, (*Min of Interior*)

² For regulations, see government notices no 989 of 1910, November 29, 1910, no 2011, November 8, 1920, no 155, January 25, 1921, no 1574, September 14, 1928

3. The Qualifications of Senators¹

The qualifications of senators follow Cape Colony precedent²
The property qualification in the South Africa Act is worth noting

26 The qualifications of a senator shall be as follows

He must

- (a) be not less than thirty years of age,
- (b) be qualified to be registered as a voter for the election of members of the House of Assembly in one of the provinces
- (c) have resided for five years within the limits of the Union as existing at the time when he is elected or nominated, as the case may be,
- (d) be a person of European descent who has acquired Union nationality whether (1) by birth, or (2) by domicile as a British subject, or (3) by naturalization or otherwise in terms of Act No 40 of 1927, or of Act No 14 of 1932³
- (e) in the case of an elected senator, be the registered owner of immovable property within the Union of the value of not less than five hundred pounds over and above any special mortgages thereon

For the purposes of this section, residence in, and property situated within, a Colony before its incorporation in the Union shall be treated as residence in and property situated within the Union

¹ The disqualifications of senators are the same as the disqualifications of members of the house of assembly See *infra*, Chapter X 1 (1)

² See *supra*, Chapter I 1 (iii) Cf section 23 of the British North America Act, 1867

³ The words 'British subject' which were previously in the South Africa Act have been deleted and the words set out above substituted by section 6 of the Status of the Union Act, 1934

X

THE HOUSE OF ASSEMBLY

1. The Constitution of the House of Assembly

(i) *The Qualification of Members* Every member of the house of assembly must be qualified to be an elector in one of the provinces and must have been resident within the limits of the Union for five years before he or she was elected. He or she must also be a person of European descent who has acquired Union nationality by birth or by domicile as a British subject or by naturalization or otherwise in terms of Act No. 40 of 1927 or of Act No. 14 of 1932.¹ If the election is contested, a candidate must be qualified on polling day; if it is not contested, he or she must be qualified on nomination day, for it is on either of those days that he becomes a member of parliament. Thus, in a contested election, a man not a British subject was nominated, but before polling day he became a British subject. His election was challenged by way of election petition, but the court held that he had been duly elected.² A member of either house of parliament is incapable of being chosen as a member of the other house.³

Disqualifications from being elected are the same for both houses.⁴ Any person who has been convicted of an offence for which that person has been sentenced to imprisonment without the option of a fine for a term of not less than twelve months (unless that person has received a free pardon, or unless such imprisonment has expired at least five years before the date of his election) cannot be elected to either house. The same rule applies to an unrehabilitated insolvent or a declared lunatic and to a person who holds an office of profit under the crown within the Union. A minister of state for the Union, or a person in receipt of a pension from the crown, or an officer or member of the army or navy on retired or half pay, or a member of the military

¹ Section 44 of the South Africa Act, as read with Act 15 of 1918 and section 3 of Act 18 of 1930, and section 6 of the Status of the Union Act, 1934

² *Van Deventer v Oost*, [1925] T P D 32

³ Section 52 of the South Africa Act

⁴ Section 53 of the South Africa Act, as amended by Act 10 of 1915, Act 23 of 1920, Act 12 of 1918, and Act 11 of 1926

or naval forces of the Union whose services are not wholly employed by the Union, does not fall within the category of persons holding offices of profit under the crown. On the other hand, a member of a provincial executive committee falls within the category, for the office is not one especially excluded by section 53 of the South Africa Act.¹ If any member of parliament becomes subject to any of the disabilities above mentioned, or ceases to be qualified as required by law, or fails for a whole ordinary session of parliament to attend without the special leave of his house, or resigns, his seat becomes vacant.² If any person sits in parliament when he ought reasonably to know that he is disqualified from being a member, he is liable to a penalty of one hundred pounds for each day he sits or votes.³

(11) *The Number and Distribution of Seats* In the composition of the first house of assembly the principle of provincial representation was largely followed, though not by any means to the same extent as in the senate. The members were not distributed on a uniform basis throughout the Union, but a certain arbitrary number was allotted to each province. Section 33 of the South Africa Act declared that the number of members to be elected in each province was to be

Cape of Good Hope	51
Natal	17
Transvaal	36
Orange Free State	17
Total	121

The basis of this distribution of seats is to be found in section 34 of the South Africa Act. The number of European male adults as ascertained in the 1904 census in each colony was taken to be

For the Cape of Good Hope	167,546
For Natal	34,784
For the Transvaal	106,493
For the Orange Free State	41,014
Total	349,837

This meant that the assembly represented the male white adults in the Union (on the basis of the 1904 figures) in the

¹ *Ex parte van der Merwe*, [1916] O P D 26

² Section 54 of the South Africa Act, as amended by sections 49-52 of Act 11 of 1928

³ Section 55 of the South Africa Act, see Act 10 of 1913

proportion of one member to 2,891 2 white male adults. According to this quota, as the South Africa Act termed the average of male white adults represented in the Union parliament by each member, the representation of each province should have been

Cape of Good Hope	58
Natal	12
Transvaal	37
Orange Free State	14
Total	<u>121</u>

The Cape Province thus suffered grievously to the advantage of the two smaller provinces. The under-representation of the Cape becomes greater when it is borne in mind that in that province the franchise was exercised by a considerable number of coloured people. They were not taken into consideration when fixing the quota. But by naming an arbitrary number of seats for each province, the fears of the two smaller provinces were allayed, while the Transvaal did not wish to give the coloured voters of the Cape any greater influence in parliament than it could help.

From the above considerations two important features stand out clearly. First the separate identity of the provinces is recognized. The Union is divided into four groups, each returning members of parliament in single-member constituencies. From this recognition of the provinces and the under-representation of at least one of them, there emerges another peculiarity in our electoral system. The vote of a Natal resident, for instance, simply by virtue of his residence in Natal, is of much more value than the vote of a resident in the Cape or the Transvaal.

It was not intended, however, that these anomalies should be permanent. They were simply protective devices for the smaller provinces, to disappear in time but to remain for the first few difficult and more or less experimental years of Union. The act provides that no province may have its representation decreased until the total number of members of the house of assembly reaches 150, or until a period of ten years has elapsed after the establishment of the Union, whichever is the longer period.

This provision presupposes the increase of representation in every province. It was seen that two provinces were considerably

over-represented in the first assembly of the Union, and it will readily be inferred that increases in representation will go to the under-represented provinces first, and in that way the representation of the provinces as well as the number of electors in each constituency throughout the Union will be brought gradually into a state of equilibrium.

The method of increase is as follows. In 1911, and every five years thereafter, a census of the European population of the Union shall be taken for the purposes of these provisions of the South Africa Act. Every increase in full quota units in the population as compared with the 1904 census shall be compensated for by an increase in parliamentary representation provided that no additional member shall be allotted to any province until the male adult European population of that province exceeds the quota multiplied by the number of members which that province has. This proviso, then, ensures that the increase in representation shall go hand in hand with a process of levelling up—a stationary representation in the smaller provinces until their representation becomes equal in value with the representation in the other provinces, which, during that stagnation period for the smaller provinces, are steadily increasing their representation.

By this system the Cape stood to increase its representation most rapidly, Natal would, on the other hand, be the last to receive an additional member of parliament. The increase in population has not quite borne out these expectations, as the subjoined table will show, the population of the Transvaal having increased most rapidly.

MEMBERS

<i>Census of</i>	<i>Cape</i>	<i>Natal</i>	<i>Transvaal</i>	<i>Orange Free State</i>	<i>Total</i>
1904	51	17	36	17	121
1911	51	17	43	17	130
1918 ¹	51	17	49	17	134
1921	51	17	50	17	135
1926	58	17	55	18	148
1931	61	16	57	16	150

As soon as the membership of the assembly reaches 150 it

¹ The quinquennial census was postponed on account of the Great War.

shall not be further increased without the sanction of parliament. This sanction has not been given up to the present.

(iii) *The Delimitation of Electoral Divisions*. Constituencies are to be delimited by a commission of judges. The first delimitation commission was appointed before the establishment of the Union, but after the passing of the South Africa Act. It consisted of one judge from each colony appointed by the respective governors-in-council.¹ After the establishment of the Union, and 'as soon as may be after every quinquennial census, the governor-general-in-council shall appoint a commission consisting of three judges of the supreme court of South Africa to carry out any redivision which may have become necessary as between the different electoral divisions in each province, and to provide for the allocation of the number of members to which such province may have become entitled under the provisions of this Act.'² Thus, throughout, the recognition of provincial representation is maintained, and the fact that the commission confines its calculations and redivisions to provincial groupings explains why no constituency in the Union ever overlaps provincial boundaries.

The principles on which the delimitation commission works are set out in the South Africa Act.³ Each division may return only one member, and the number of electors in each division of a province shall be, 'as nearly as may be', equal. We have already shown that the constituencies in the different provinces have an unequal number of electors, i.e. fewer electors are required for a constituency in Natal than for one in the Cape, the latter being (under the first delimitation) considerably under-represented. But in each province, considered as a province, the electoral divisions should contain almost equal numbers. The duty of the commission, therefore, is to obtain the average number of electors required for each constituency in the province. The commission knows the total number of electors in that province from the recently concluded census, it also knows the number of parliamentary representatives to be elected in that province by a calculation based on the quota for the Union.

¹ Section 38 of the South Africa Act.

² Section 41 of the South Africa Act. 'As soon (as in text above) Act. In carrying out such redivision and allocation the commission shall have the same powers and proceed upon the same principles as are by this Act provided in regard to the original division.'

³ Sections 30, 40, 42, and 43 of the South Africa Act.

which remains constant, being based on the 1904 census.¹ Taking the total number of electors in that province, and dividing that number by the number of members of parliament to be elected for the province, it arrives at the provincial quota. The South Africa Act thus makes provision for two quotas, a Union quota, which remains constant, and a provincial quota, which varies with the number of voters in the province. The Union quota and the increase in the number of seats in the provinces are based on a male adult European quota, the provincial quota is based on electoral strength. The following table shows the variation in provincial quotas.

	<i>Cape</i> ²	<i>Natal</i> ²	<i>Transvaal</i>	<i>Orange Free State</i> ¹
1910	3,285	2,046	2,958	2 412
1911	2,913	1,729	2,557	2 342
1918	3,655	1,939	2,869	2 793
1921	3,863	2,035	2 834	2,881
1926	3,381	2,259	2,506	2 641
1931	3,526	2,832	2,867	3,145

When the delimitation commission has ascertained the quotas for the provinces, it proceeds to divide the constituencies of each province in such a way that each constituency has, 'as nearly as may be', an equal number of electors. But, while taking the provincial quota of voters as the basis of division the commissioners may, whenever they deem it necessary, depart therefrom but in no case to any greater extent than 15 per cent more or 15 per cent less than the quota. This margin has been given to the

¹ See *supra*, Chapter III, 1

² Including coloured voters. There are no coloured voters in the Transvaal and Orange Free State. The figures relating to registered voters are (coloured voters in brackets)

	<i>Cape</i>	<i>Natal</i>	<i>Transvaal</i>	<i>Orange Free State</i>
1911	125,459 (21,021)	29,100 (205 approx)	115,056	38 261
1913	131,550 (24,317)	30,798 (126 ,)	118,559	40,731
1921	158,501 (41,072)	34,041 (436 ,)	140,589	49,310
1926	167,184 (41,398)	42,584 (346 ,)	151,504	49,357

In 1931 the population warranted an increase in the number of members of the assembly to 150, so that the delimitation commission could apply section 34 (v) of the South Africa Act, which declares that the quota in each province shall as far as possible be identical throughout the Union. The disparity in the provincial quotas shown in the text for the year 1931-2 is hardly warranted.

³ The provincial quotas in the provincial council elections for Natal and Orange Free State are about 700 voters less for each division.

commissioners so that they may preserve, as far as possible, existing electoral boundaries and give due consideration to community or diversity of interests, means of communication, physical features of the country and the sparsity and density of the population. In a country of vast spaces it is desirable that discretion be afforded to a delimitation commission to make the country constituencies somewhat smaller than they should be according to the number of voters in them even though such an arrangement has the effect of giving the country more electoral power as against the towns.

2 The Franchise

The South Africa Act made no attempt to settle the franchise problems of South Africa. It built a framework of a national government and it left to the future the establishment of a uniform franchise throughout the Union. The qualifications of electors in each colony existing at the time of the establishment of the Union were declared to be the qualifications necessary to entitle persons in the corresponding provinces to vote for the election of members of the house of assembly.¹ Parliament has the liberty if it so desires, to amend the franchise laws of the Union, but no such amendment shall remove coloured electors from franchise eligibility unless two-thirds of the total number of both houses of parliament sitting together agree to the third reading of such amendment.² This safeguard is contained in section 35 of the South Africa Act.³

35 (1) Parliament may by law prescribe the qualifications which shall be necessary to entitle persons to vote at the election of members of the House of Assembly, but no such law shall disqualify any person in the province of the Cape of Good Hope who, under the laws existing in the Colony of the Cape of Good Hope at the establishment of the Union, is or may become capable of being registered as a voter from being so registered in the province of the Cape of Good Hope by reason of his race or colour only, unless the Bill be passed by both Houses of Parliament sitting together, and at the third reading be agreed to by not less than two-thirds of the total number of members of both Houses. A Bill so passed at such joint sitting shall be taken to have been duly passed by both Houses of Parliament.

¹ Section 36 of the South Africa Act.

² For a joint session of parliament under section 35, see *infra*, Chapter XI § (vi) (b).

³ For the effect of the Statute of Westminster, 1931, see Chapter III § (iii).

(2) No person who at the passing of any such law is registered as a voter in any province shall be removed from the register by reason only of any disqualification based on race or colour

The first sub-section specifically mentions the province of the Cape of Good Hope, and the second sub-section refers to 'any such law'. Consequently it has been held that an Asiatic who was on the Natal voters' roll at the establishment of Union might be removed from the roll by an ordinary majority in parliament because sub-section (2) refers only to an Act contemplated in sub-section (1) and removing coloured voters in the Cape.¹

The qualifications existing at the time of the establishment of the Union in each of the colonies are shown in the table on page 199.²

A person fully qualified on the grounds shown in that table may none the less be disqualified by any of the circumstances shown in the table on page 200.

Until the passing of Act No. 41 of 1931, the franchise regarding males remained the same in the four provinces as it was at the date of Union. By the last-mentioned act all European males over the age of twenty-one, who are Union nationals are entitled to be registered as voters. The qualifications of voters in the Union, therefore, are as follows:

(a) *European male franchise* All European male adults who are Union nationals are entitled to be registered as voters.

No person is, however, entitled to be registered as a voter under the provisions of the Electoral Act,³ or if so registered, to vote at any election in the Union or in the mandated territory of South West Africa, if he has been convicted—

- (1) of treason, if such conviction took place after the commencement of this Act, unless he has been granted a free pardon, or

(continue on page 201)

¹ See *In re Gabriel*, [1921] N P D 186.

² The laws regulating the franchise in the various provinces are to be found in the following statutes—

Cape Ordinance 9/1850, 9/1853, Act 39/1887, 9/1892, 48/1898, Union Act 24/1920

Natal The Charter of Natal, Law 2/1883, 11/1865, Act 8/1896, 10/1898, 14/1906

Transvaal Letters patent, 1906

Orange Free State Letters patent, 1907

³ Electoral Act, 1918, as amended in 1926, 1928, 1930, 1931

	<i>Cape of Good Hope</i>	<i>Natal</i>	<i>O R C and Transvaal</i>
1 Age	He must be 21 years of age	Same	Same
2 Nationality	He must be a British subject either born or naturalized	Same	Same
3 Education	He must be able to sign his name and write his address and occupation	No educational qualifications required	No educational qualifications required
4 Residence	No residential qualification required except as in 5 (b)	No residential qualification required except as in 5 (c)	Must have resided in (1) O F S (2) Transvaal six months before registration, or, as an alternative, have resided for six months in colony during last three years, even if he has been temporarily absent during six months previous to registration. Must be residing on date of registration in the division in which registration is demanded
5 Property	(a) He must have been occupier of property worth £75 within the electoral division for which he seeks registration for twelve months, or as an alternative, (b) He must have been in receipt of salary or wages at the rate of not less than £50 per annum for twelve months provided that the person claiming to vote shall have resided within the last three months within the electoral division for which he claims registration	(a) He must own immovable property worth £50 within the constituency or as an alternative, (b) He must rent immovable property worth £10 per annum within the constituency, or as an alternative, (c) He must have resided three years in the Colony, and have income worth £8 per month	No property qualification
6 Special	Persons on the register of voters in Griqualand West previous to its annexation to the Cape are qualified to vote even in the absence of the other qualifications	Persons on the Utrecht and Vryheid Burgher Roll of South African Republic qualified to vote in absence of other qualifications	

	<i>Cape of Good Hope</i>	<i>Natal</i>	<i>Orange Free State and Transvaal</i>
1 Sex	Female Sex	Female Sex	Female Sex
2 Colour	No disqualification based on colour	(a) Natives including coloured people. The definition in this case has never been decided by any appeal to the Courts. (b) Natives may not vote unless— (i) They have resided in the Colony for twelve years (ii) Have been exempted from operation of Ab native Law for seven years (iii) Have been recommended by three duly qualified European electors (iv) Have thereafter received a certificate from the Governor the grant or refusal of which lies in the discretion of the Governor in Council entitling them to be registered as a Coloured Voter (v) No persons may vote who are natives or descendants in the male line of natives or communities who have not hitherto possessed representative elective institutions founded on the Franchise unless they have obtained an order of exemption from the Governor in Council	Franchise confined to white persons
3 Military Employment	No disqualification based on military service [Altered by section 36 of the South Africa Act to fall into line with the Orange Free State and the Transvaal]	Same as Cape	Must not be a person on full pay belonging to the British Regular Forces maintained by annual vote of British Parliament
4 Incapacity	Lunacy	No disqualification on ground of Lunacy	No disqualification on ground of Lunacy
5 Pauperism	No disqualification based on pauperism	Same as Cape	Must not have received relief from public funds otherwise than by way of assistance under terms of pauper or in a public or semi-public hospital
6 Crime	(a) Conviction and sentence for murder and treason unless the pardon has been granted (b) Conviction and sentence for rape theft and perjury but by unknown offence unless the pardon is granted or unless the pardon is granted on the expiration of the term	(a) Same as Cape (b) Same as Cape except that the pardon is not essential. The pardon is not essential to remove the disability	(a) Same as Cape save that conviction for treason previous to June 1st, 1902 does not disqualify (b) Same as Cape except that applicant must not have been in prison with out legal authority during last three years

- (ii) of murder unless he has been granted a free pardon, or
- (iii) of any other offence and sentenced therefor to a period of imprisonment without the option of a fine and such period of imprisonment has not expired at least three years before the day of commencement of any registration, as defined in section four or section twenty-one of the Electoral Act¹ at which he claims to be registered as a voter unless he has been granted a free pardon

A person who is subject to an order of a court of law declaring him (or her) of unsound mind or mentally disordered or defective, or who is lawfully detained as a mentally disordered or defective person under the Mental Disorders Act No 38 of 1916, is disqualified from registration as a voter, or, if registered, is not entitled to vote

(b) *Coloured and native (i.e. non-white) franchise.* The following conditions apply to the exercise of the franchise by coloured and native persons resident in the provinces of the Cape of Good Hope and Natal. The conditions in regard to these races remain as they were at the time of union, and are not affected by Acts Nos 18 of 1930 and 41 of 1931. Only male non-white adults may be registered as voters and the disqualifications mentioned in (a) above refer equally to them

(1) *Cape of Good Hope Province*

(a) *Education.* Although qualified in every other respect, no non-white person may be registered as a voter, unless he is able to sign his name and write his address and occupation

(b) *Occupation, Property or Salary or Wages.* It is further necessary for a non-white person to possess either of the following qualifications

(1) *Occupation.* i.e. occupation within the Union or mandated territory of South West Africa (either solely or jointly with other persons) for not less than twelve months next before the day on which the registration commenced, and for the last three months of such period within the electoral division for which such person claims to be registered, of a house, warehouse, shop, office, or other building which, either separately or jointly with any land within the electoral division, is of the value of £75. If there is more than one joint

¹ Electoral Act, 1918 as amended in 1926, 1928, 1930, 1931

occupier, the share of each occupier claiming to vote must be of the value of £75 Or,

(2) *Salary or Wages*, i.e. real and bona fide receipt for not less than twelve months of salary or wages at the rate of not less than £50 per annum. In order to possess this qualification it is necessary that he shall have really and bona fide earned such salary or wages within the Union or the mandated territory of South West Africa for the space of twelve months next before the day on which the registration commenced, and in addition—

- (a) that for the last three months of such period he shall have earned such salary or wages within the electoral division for which he claims to be registered, or
- (b) that for the last three months of such period he shall have resided within the electoral division for which he claims to be registered

(3) *Special provisions in force in the former Province of Griqualand West* (comprising the fiscal divisions of Kimberley, Barkly West, Hay, and Herbert)

(a) *Occupation or salary or wages qualifications*. In the case of a non white person who at the date of the taking effect of Act No. 9 of 1892 was registered in any fiscal division formerly comprised in the Province of Griqualand West and who has continued to reside in the fiscal division in which he was registered when the Act took effect it is enough to show that—

- (i) for the space of six months immediately preceding the day when the registration of voters commenced he had occupied premises of the value of not less than £25, or
- (ii) for the space of six months immediately preceding that date he was in receipt of salary at the rate of not less than £100 a year, or £50 a year in addition to his board and lodging

(b) *Diggers' Qualification*. Every person not otherwise disqualified by law who, for the space of six months immediately preceding the day when any registration of voters commences, was the duly registered holder of a licence to dig and search for diamonds in any claim or portion of a claim

in the Province of the Cape of Good Hope shall be entitled to be registered as a voter in the division in which such claim or portion of a claim is situate, if he has actually resided in such division during the last three months of the aforementioned six months or if he has during these three months retained his home in that division and was absent therefrom merely for some temporary purpose ¹

(ii) *Natal Province*

Every male native resident in, or possessing the necessary qualification in, Natal is disqualified for registration as a voter under the provisions of the Natal Franchise Laws, unless he possesses a certificate from the Governor entitling him to be registered. In order to obtain such a certificate, a native must make written application to the governor-general through the native affairs department. His application must be supported by affidavits that the applicant possesses the property or income qualifications set out in (a) (i) and (ii) and (b) (Natal) of the table on page 200. He must also be recommended by three duly qualified European electors. There are less than 400 non-European electors on the voters' rolls in Natal.

Persons, who (not being of European origin) are natives or descendants in the male line of natives of countries, which had not, prior to May 23, 1896, possessed elective representative institutions founded upon the parliamentary franchise, are disqualified from being registered as voters unless possessed of certificates of exemption granted by the governor-general-in-council.

The qualifications for registration of non-white male persons (other than natives) as voters are (a) ownership of property, (b) income ²

(a) *Ownership* of immovable property of the value of £50 or the *renting* of such property of the yearly value of £10 within any electoral division in Natal. In the case of joint occupation, the value or the rent of the property if equally divided among the joint occupiers must be sufficient to entitle each of them to be registered.

(b) *Income*,³ inclusive of allowances equal to £8 per month

¹ See Act No. 23 of 1926.

² *Ibid.*

³ Only persons who do not possess the 'property' or 'rental' qualification may claim the 'income' qualification.

or £96 per annum, together with a total residence of three years in the Union and a residence of three months out of the last seven months in the electoral division

(iii) *Transvaal and Orange Free State Provinces*

The franchise is confined solely to Europeans or whites

(c) *The Women's Enfranchisement Act*, No 18 of 1930 enfranchised all white¹ women over the age of twenty-one years who are Union nationals, and qualified them to be members of either House of Parliament and of a provincial council. Women however, are not to be taken into account in the re-division of any province into electoral divisions by the delimitation commission

3. The Conduct of an Election

As this treatise is not a manual of election law, it is unnecessary to go into the subject in detail. It will be sufficient to describe the practice as laid down by the Electoral Act of 1918, as amended by the Acts of 1926, 1928, 1930, and 1931

(i) *Registration of voters* The registration of voters takes place biennially in the month of April. Every biennial registration of voters is in accordance with the last delimitation in respect of the division of constituencies. Supplementary voters' lists are prepared in October in the year in which there is a biennial registration and in February, June, and October in the year in which there is not a biennial registration, and these supplementary lists may be used for the purposes of an election as soon as they are complete. The biennially prepared lists come into operation on the first of August of that year. Provision is made to allow objections to be made to persons who wish to be registered as voters, and a revising officer sits to hear these objections.

There is appointed for the whole of the Union a chief electoral officer, who has electoral officers under him. In each division also, there is a registering officer, usually a magistrate resident in the district. The electoral officers are permanent members of the public service.

(ii) *The Regulation of an Election* The same day is fixed

¹ 'White' is defined as 'wholly of European parentage, extraction or descent. For a discussion on the legal meanings of the various terms used to define natives or non Europeans, see *infra*, Introduction to Part VII

throughout the Union (called nomination day) when a nomination court sits in each electoral division to receive nominations of candidates for election for the division.¹ Election day is fixed for a day usually four weeks after nomination day—election day may be not less than twenty-one and not more than thirty days after nomination day. In each division also a returning officer is appointed, a capacity usually filled by a magistrate. If, at the close of the sitting of the nomination court, only one person has been proposed and seconded the returning officer shall declare him to be duly elected, otherwise a poll must take place.

Polling booths, fixed at convenient places for the electors (in the outlying districts there are polling booths where as few as twenty electors vote and the ballot papers take two days to be returned to the returning officer) are under the control of a presiding officer. On election day the voters' list is conclusive evidence of the right of a person to vote. There is no other test—if a person is on the roll he may vote. But this conclusiveness remains of force only on election day. Thereafter, if there is an election petition, and a person unqualified to vote yet registered as a voter has voted his vote may be challenged.

¹ The form of proclamation used is the following:

PROCLAMATION

By His Excellency *etc*

WHEREAS by my Proclamation No. 94 of 1929 bearing date the thirtieth day of April, 1929, the House of Assembly of the Parliament of the Union of South Africa was dissolved under the provisions of section 20 of the South Africa Act 1909, and

WHEREAS it is expedient to proceed to the election of members of the said House,

Now, therefore, under and by virtue of the powers and authority vested in me by sub-section (2) of section 35 and by section 36 of the Electoral Act, 1918 (No. 12 of 1918) as amended by Act No. 11 of 1926, I do hereby proclaim, declare and make known as follows—

- i (date of nomination)
- ii (places of nomination as shown in the Schedule)
- iii (times that the nomination courts will sit)
- iv (polling day)
- v (return of officers—when to be made)

(Proclamation dated and signed by
the Governor General, and counter-
signed by the Minister of the Interior)

SCHEDULE

and struck out ¹ Nowhere in the Union may a person vote more than once there is no such thing as a double qualification or a double vote Even though a person's name appears by error or intention in more than one voters list, or more than once in the same list, he is not entitled to vote more than once and if he does so he becomes subject to the severest penalties

If an elector knows that he will be away from his constituency on election day, he may make an application for a ballot paper to enable him to send his vote by post There are complicated and strict regulations governing postal voting designed to prevent impersonation

The ballot is secret men and women voting in different booths Ballot boxes may be opened only with the consent of the supreme court, and even then the ballot papers which are examined are not made public

The candidate who heads the poll in a constituency shall be declared elected by the returning officer in that constituency and the minister of the interior, when he has received all the results, publishes the names of the elected candidates in the *Gazette* ²

When a by-election is caused through the death resignation or disqualification of a member of the assembly, the procedure outlined above is followed in respect of the constituency affected The speaker has to be informed of the death or disqualification or if a member resigns, he must send his resignation to the speaker ³ A question has arisen as to how long the government

¹ *Rustenburg Election Case* [1921] T P D 620

2

GOVERNMENT NOTICE

In accordance with sections 57 and 58 of the Electoral Act (No. 12 of 1918) it is hereby notified that on the day of , the persons named in the first column of the Schedule hereto were declared elected as members of the House of Assembly for the electoral divisions specified opposite their names in the second column of the said Schedule

(Dated)

SECRETARY OF THE INTERIOR

SCHEDULE

³ The speaker then publishes a proclamation as follows

PROCLAMATION

PARLIAMENT OF THE UNION OF SOUTH AFRICA HOUSE OF ASSEMBLY
Pursuant to sections 50 (1) and 49 (2) of the Electoral Act, 1918 Amendment Act, 1926, I hereby declare that a vacancy occurred in the representation in

can wait before a by-election is held. It seems that a fairly substantial time can elapse between the death, disqualification, or resignation of a member and the filling of the vacancy in the assembly. There is no procedure in the constitution to compel an immediate notification to the speaker, and then by the speaker to the governor-general, and then the issue of a proclamation by the governor-general declaring a by-election.

There is nothing to prevent any person duly qualified from contesting more than one constituency at a general election, and in fact this is often done. It may happen that party leaders consider that a seat may be won by a strong candidate. They therefore put up that good candidate in two seats, one a safe seat and one a seat which they hope may be won by the strong candidate. If the candidate is successful in both seats, he resigns the safe seat and allows another person to contest it at a by-election. A person may thus fight two adjoining constituencies, or one in the Transvaal and one in the Cape or any other province. Further a person who is already a member of parliament may contest a by-election, but if he is successful, he immediately resigns his former seat. A person who is elected for more than one constituency must decide within one week of the election which constituency he desires to represent. If he fails to give his decision within one week, the election in each constituency in which he has been elected will be declared void, if he decides within one week in favour of a particular constituency, there will have to be a by-election in the other constituency, for each electoral division in the Union must be represented by a different person.

The Electoral Act¹ lay down what expenses a candidate may incur during an election--restrictions which, in South Africa as perhaps elsewhere are somewhat more honoured in the breach than in the observance. Stationery, printing, advertisements, postages, telephones, the hiring of halls and committee rooms,

the House of Assembly of the electoral division of as from on account of (e.g.) the death on that day of (when there has been a resignation, add 'upon which date I received the resignation of as member for)

(Signed) SPEAKER

Speaker's Chambers,
House of Assembly
(Date)

¹ Electoral Act, 1918, as amended by Act 35 of 1931

one election agent, four sub-agents, polling agents, one clerk and one messenger for each committee room, and fuel for motor vehicles may be paid for in a total sum not exceeding £350 for 5,000 electors and five pounds for each additional hundred voters in the division. If a candidate loses the £50 deposit, which he is required to make, because he did not obtain one-fifth of the votes received by the successful candidate such loss must be included in the election expenses. A candidate is allowed £100 for strictly personal expenses, but this amount is also included in the total which a candidate may not exceed. There are strict provisions regarding making sworn returns of election expenses, which are published in the press, and a candidate may be unseated if he exceeds the total allowed under the act or makes false returns. There are numerous provisions against treating, bribing, unduly influencing, personation making payments in contravention of the act, publishing false statements that a candidate has withdrawn, and so on which if contravened by the candidate himself, may be grounds for his unseating.

When parliament is dissolved, or if a vacancy has arisen in any constituency, every newspaper proprietor who publishes any report, letter, article, or any person who publishes any bill poster, cartoon, or any printed matter which is intended or calculated to affect the result of an election, shall cause to be printed at the foot of every such article or printed matter the full name and address of the author of any such production or of any person who in any way contributed to it or who is responsible, one way or another, for its appearance in printed form.

4. Disputed Elections¹

If any person, who is enrolled as a voter in a particular constituency, or who was a candidate at the election, thinks that the successful candidate should not have been elected by reason of want of qualification, disqualification, corrupt or illegal practice, or some other irregularity, he may present a petition to the supreme court of the province in which the election took place to unseat the successful candidate. If any other person claims the right to be declared the elected candidate, such

¹ Sections 106-33 of the Electoral Act, 1918.

person must be a party to the petition as a co-petitioner. Such petition must generally be presented within forty-two days of the declaration of the result of the election. Security to an amount of not less than £500 must be deposited with the petition to meet the costs of the proceedings. The petition then goes to trial before three judges. The court may declare that the person challenged was duly elected, or that the challenger was duly elected, or that no person was duly elected, in which last case a vacancy is declared by the court. Corrupt or illegal practices are reported to the attorney-general. No petition may be withdrawn without the leave of the court, and when such leave is requested any other person may be proposed to be substituted as a petitioner on the same papers, and with the security as given by the original petitioner to remain. There is an appeal from the court's decision on the trial to the appellate division.

A successful candidate when challenged by his opponent in an endeavour to get himself declared elected, may lodge a petition against his challenger, called a recriminatory petition. Both petitions must then be heard in one trial, and the court must give one judgment on the whole case.¹

Section 37 of the South Africa Act provided that the laws of the former colonies regarding the regulation and conduct of elections should apply to elections for the parliament of the Union until repealed. They were repealed in 1918, and now the Electoral Act of that year, as amended from time to time, regulates the conduct of elections in the Union.²

¹ *De Villiers v. Louie* [1910] A.D. 426.

² Act 12 of 1918, as amended by Act 15 of 1922, Act 11 of 1926, Act 9 of 1927, Acts 24 and 30 of 1928, Acts 35 and 41 of 1931.

XI

PARLIAMENT AT WORK

IN order to study parliament at work, it is necessary that it be first assembled. We have already examined the constitution of the two houses of parliament and we know how the members of the two houses come to take their seats. We shall now bring them together in parliament, see how parliament is convened and opened by the governor-general, and how the speaker and the president of the senate are elected. We shall examine very shortly the organization of parliament, that is, the machinery of committees, and the officers who preside over the houses and those who attend to the routine work. We shall discuss the rules of procedure and debate. We shall then be in a position to follow a public bill and a private bill from the moment of introduction until the royal assent is given. Sometimes constitutional difficulties may be encountered. The senate may reject a bill which the assembly deems vital and a deadlock between the houses will be reached.¹ We shall deal with these difficulties. Sometimes more than an ordinary majority is required as well as a special procedure to pass a bill as for instance, when a bill affecting the entrenched clauses of the South Africa Act² is brought before parliament, we shall describe that special procedure. And finally having assembled parliament and having seen it in each stage of its legislative work, we shall show how it is prorogued and dissolved.

1 The Assembling of Parliament

The South Africa Act makes provision for the summoning of parliament

- 20 The Governor-General may appoint such times for holding the sessions of Parliament as he thinks fit
- 21 Parliament shall be summoned to meet not later than six months after the establishment of the Union
- 22 There shall be a session of Parliament once at least in every year, so that a period of twelve months shall not intervene between the

¹ Section 63 of the South Africa Act

² Sections 35, 152 of the South Africa Act

last sitting of Parliament in one session and its first sitting in the next session

23 Cape Town shall be the seat of the Legislature of the Union

It is the duty of the governor-general to summon parliament from time to time, he acts of course on the advice of the ministry. It is probably not possible to bring any legal machinery into action to compel a summoning of parliament should this duty be neglected, but there ought to be a very good reason for failing to summon parliament within a period of twelve months as directed by the South Africa Act otherwise the ministry, which after all is responsible for the duties of the governor-general, may be censured by parliament.

(1) *The Proclamation Summoning Parliament* Parliament is summoned, not by writ or summons, but by proclamation in the *Gazette*. The form of the proclamation is as follows

PROCLAMATION

BY MAJOR-GENERAL HIS EXCELLENCY THE RIGHT HONOURABLE THE
EARL OF ATHLONE, KNIGHT OF THE MOST NOBLE ORDER OF THE
GARTER (&c) HIGH COMMISSIONER FOR SOUTH AFRICA, AND
GOVERNOR-GENERAL AND COMMANDER IN CHIEF IN AND OVER THE
UNION OF SOUTH AFRICA

No 139, 1929

WHEREAS by section 20 of the South Africa Act, 1909, it is provided that the Governor General may appoint such times for holding the sessions of Parliament as he thinks fit,

AND WHEREAS it is expedient that Parliament should be summoned forthwith,

Now, THEREFORE, under and by virtue of the power and authority in me vested, I do by this my Proclamation declare, proclaim, and make known that the First Session of the Sixth Parliament of the Union of South Africa constituted as provided by the said South Africa Act, 1909, will be held at Cape Town at three o'clock in the afternoon of Friday, the nineteenth July, 1929, for the dispatch of business

GOD SAVE THE KING

Given under my hand and the Great Seal of the Union of South Africa at Pretoria this 22nd day of June, 1929

ATHLONE,
(Governor-General)

By Command of His Excellency the Governor-General-in Council

J B M HERTZOG
(Prime Minister)

This proclamation is signed by the governor-general, but it

is to be noticed especially that it is not the governor-general alone who commands, but the governor-general acting with the advice of his ministry, that is, the governor-general-in-council. Every executive document bears the counter-signature of a minister, the minister is responsible.

(ii) *The Opening of Parliament* Having summoned parliament by proclamation, the governor-general attends in person to open parliament. For the sake of historical interest, let us choose as our example the opening of the first parliament of the Union as reflected by the official debates of the Union Parliament.

THE SENATE

FIRST PARLIAMENT OF THE UNION FIRST SESSION MONDAY, 31ST OCTOBER, 1910

THE ACTING CLERK read prayers at 11 45 a.m.

THE ACTING CLERK read the proclamation summoning Parliament.

RETURN OF SENATORS

THE ACTING CLERK read a communication from the Secretary to the Prime Minister dated October 19th 1910 forwarding particulars regarding the election of Senators.¹

DECLARATION OF QUALIFICATION

The elected Senators present then made and subscribed to the declaration of qualification required by section 26 of the South Africa Act 1909.

THE GOVERNOR-GENERAL

His Excellency the Governor General and Staff arrived at 15 minutes after 12 o'clock.

His Excellency the Governor-General being seated upon the Throne commanded, through the Acting Clerk of the Senate, the Gentleman Usher of the Black Rod to deliver the following Message to the House of Assembly:

'Gentleman Usher of the Black Rod,—

His Excellency the Governor-General commands you to proceed to the House of Assembly and to acquaint that House that His Excellency desires their immediate attendance in the Senate House.'

¹ The names of the new senators were read. The nominated senators were appointed after the establishment of the Union, namely on October 15 1910. The elections for the remaining senators took place before the date of Union but after the passing of the South Africa Act (see section 24), namely by the Cape on April 8, 1910, Transvaal, April 22, Natal, February 2. Orange Free State, March 24, 1910.

The members of the House of Assembly having arrived and taken their places,

COMMISSION TO OPEN PARLIAMENT

HIS EXCELLENCY THE GOVERNOR-GENERAL said 'Gentlemen of the Senate and Gentlemen of the House of Assembly I give you welcome in this your attendance for the first session of the First Parliament of the Union of South Africa. I have to acquaint the honourable members of the Senate and the honourable members of the House of Assembly that His Majesty has been pleased to cause Letters Patent to be issued under the Great Seal empowering Field-Marshal His Royal Highness the Duke of Connaught to represent His Majesty in the opening of this Parliament. I direct the Acting Clerk of the Senate to read the Commission in English, and the Acting Clerk of the House of Assembly to read the Commission in Dutch. [Which was then done.]

The governor-general then announced that the Duke of Connaught would open the parliament of the Union on November 4 (The Duke attended in the house of assembly and there delivered a message from the King. His Majesty well knows that you have passed through the fire of sorrow and trouble, and that misunderstanding and conflict have brought calamity upon the land. But all this is now peacefully buried with the past. It is His Majesty's earnest prayer that this Union, so happily achieved, may, under God's guidance prove a lasting blessing to you all, and that it will tend to the ever-increasing advantage and prosperity of South Africa and the British Empire.) The governor-general delivered the speech from the throne in the house of assembly the only time this has ever been done in South Africa or in any part of the British Empire—due to the fact that the senate building was not quite ready to hold the large crowd that day assembled.

(iii) *The Administration of the Oath to Members*

To continue from the *Senate Debates* of October 31, 1910

ADMINISTRATION OF OATHS¹

HIS EXCELLENCY the Governor General then authorized Chief Justice

¹ It is usual to administer the oaths separately in each house. A member who does not take the oath at the first sitting by reason of absence or otherwise, may take it subsequently, but he may not in any case take his seat before subscribing to the oath. The president of the senate and the speaker of the assembly are commissioned under section 51 of the South Africa Act to administer the oath.

Lord de Villiers to administer the oath of Allegiance in the following terms Under section 51 of the South Africa Act I now authorize the Right Honourable Baron de Villiers, Chief Justice of the Union of South Africa, to administer forthwith the Oath or Affirmation of Allegiance to the members of both Houses And I direct that you shall subsequently repair to your respective Chambers and there proceed with the election of a Senator to be the President of the Senate, and of a member to be Speaker of the House of Assembly'

His Excellency then withdrew

THE CHIEF JUSTICE then administered the Oath or Affirmation of Allegiance, first to Senators and then to members of the House of Assembly

The Chief Justice and members of the House of Assembly then withdrew

The Senate adjourned at 1 15 p m

On the next day the senate elected one of its members to be the president of the senate ¹ The procedure is the same as in the house of assembly for the election of a speaker, and we may now proceed to the house of assembly on another and more recent occasion and follow the proceedings there

HOUSE OF ASSEMBLY DEBATES

FIRST SESSION, SIXTH PARLIAMENT

FRIDAY, 19TH JULY, 1929

MEETING OF PARLIAMENT

Pursuant to the Proclamation of His Excellency the Governor-General No 139 dated the 22nd of June 1929, the Members elected to serve in the House of Assembly met in the Assembly Chamber, Houses of Parliament, at 10 30 a m

THE CLERK read the Proclamation summoning Parliament

ELECTION OF MEMBERS

THE CLERK read the following communication

Letter dated 1st July 1929 from the Secretary for the Interior forwarding a copy of Gov Not No 1116, dated 19th June 1929 containing the names of the persons declared duly elected to the House of Assembly

ROLL OF MEMBERS

THE CLERK read the list of members and those present answered to their names

¹ Section 27 of the South Africa Act

OATH OR AFFIRMATION OF ALLEGIANCE

THE SERGEANT-AT-ARMS announced the Honourable Mr Justice Gardiner, Judge-President of the Cape Provincial Division of the Supreme Court of South Africa, who was received by the members standing

THE CLERK read a Commission from His Excellency the Governor-General, dated the 9th instant authorizing the Honourable Mr Justice Gardiner to administer the oath or affirmation of allegiance required to be taken and subscribed by members in conformity with the requirements of the 51st section of the South Africa Act

THE HONOURABLE MR JUSTICE GARDINER, having taken his seat at the Table of the House, administered the oath or affirmation to the members present, and then upon retired

(iv) *The Election of the Speaker*

ELECTION OF SPEAKER¹

THE CLERK Honourable members will now proceed to the election of a Speaker I am prepared to receive nominations

MR M L MALAN I move —

That Mr Jan Hendrik Hofmeyr De Waal do take the Chair of this House as Speaker [The member made a short speech in support, and was duly seconded]

There being no further nominations,

THE CLERK (to Mr De Waal) Does the Honourable member submit himself to the House?

MR DE WAAL I do [Thanks the House]²

THE CLERK Will the proposer and seconder kindly conduct the honourable member to the Chair?

MR DE WAAL was then upon conducted to the Chair by Mr Malan and Mr Veermooten [From the Chair the Speaker again thanked the House]

Business was suspended at 11 25 a.m. and resumed at 2 45 p.m.

MR SPEAKER'S REPORT

MR SPEAKER I have to report that after the House had suspended business this morning, I proceeded to Government House accompanied by the Prime Minister [other Ministers the proposer and seconder] and other honourable members of the House where we were received by His Excellency the Right Honourable the Earl of Athlone, Governor-General, and Mr Speaker said—

May it please Your Excellency, the House of Assembly, in the exercise of its undoubted rights and privileges, under the South Africa

¹ Section 46 of the South Africa Act

² 'Shall from his place express his sense of the honour conferred upon him' (Standing order, 7)

Act 1909,¹ has proceeded to the election of a Speaker. The choice having fallen upon me, I now present myself, in obedience to the Standing Orders of the House, to Your Excellency.

HIS EXCELLENCY replied—Mr. De Waal, I am very pleased to find that the House of Assembly has made so good a choice, and in His Majesty's name, as well as in my own, I desire to offer you my congratulations on your election to the office of Speaker.

Mr. Speaker and the members proceeded to the Senate House to attend the opening of Parliament, and on their return,

MR. SPEAKER took the Chair and read prayers.

The house then proceeds to its own business. The speaker informs the house what it already knows, that the governor-general has made a speech from the throne, 'of which for greater accuracy, I have obtained a copy, which is as follows.' The speech is usually taken as read, is discussed, and an address is made in answer to the speech.

We have now brought parliament to the stage at which it is fully constituted, opened, and ready to transact business. It will now be convenient to discuss the organization of the two houses of parliament, their officers, their rules of procedure and of debate, and the powers and privileges of parliament.

2 The Organization of Parliament

A committee of the whole house is appointed by resolution that the house resolve itself into a committee. When such resolution has been agreed to, or an order of the day is read for the house to resolve itself into committee, Mr. Speaker puts the question 'That I do now leave the chair', and, if agreed to, he leaves the chair accordingly. The rules as to procedure in committee have these differences from the ordinary rules, namely, that a motion need not be seconded and that a member may speak more than once to the same question. The committee of the whole house can consider only what has been referred to it by the house, and it must 'report progress' to the house. The usual stage for the house to go into committee is after the second reading of a bill, that is, when the principle of a bill has been agreed to and its details must be considered. The committee

¹ Note how closely the South African practice follows the practice of the United Kingdom. The phraseology is the same. In England 'the undoubted rights and privileges' are claimed by reason of ancient custom and not under statute as in South Africa.

of the whole house is, therefore, the house sitting without the speaker in a much more informal manner so that the details of legislation can be worked out thoroughly and quickly. It is in committee that the real work of legislation is done. This committee is presided over by a member called the chairman of committees of the whole house.

At the commencement of every session the speaker appoints a committee on standing rules and orders consisting of eleven members inclusive of the speaker who is *ex officio* chairman of the committee. This committee determines the number of and nominates the members who shall serve on select committees appointed by the house unless the house otherwise orders at the time of the appointment of a select committee. The purpose of a select committee is to make a full inquiry into the matter consigned to it by the house. It may take evidence and hear counsel and must draw up a report to the house. A select committee, therefore, is appointed when the house thinks it ought to have more information about the necessity of a bill generally or to assist it with the details of the bill.¹ Both houses work by means of committees in the manner described above. There are other committees which need not detain us, some of them, however, will be considered later.

3 The Officers of Parliament

The house of assembly is presided over by the speaker. He is elected by the house and may be dismissed by a resolution of the house. In the temporary absence of the speaker, the chairman of committees acts as speaker. He thus holds the position of deputy-speaker. If the speaker's absence is likely to be continued for some time through illness or otherwise, the house usually appoints the deputy chairman of committees to act as chairman of committees so that the chairman of committees may devote his energies to the office of speaker.²

The chairman of committees presides over the committee of the whole house, and is elected and dismissed by a resolution of the house. Both officers are usually appointed for the life of the parliament which elects them. The duties of the chairman of

¹ It is usual for the government to have a majority on all the more important select committees.

² Section 47 of the South Africa Act. For the senate see *ibid.*, section 28.

committees are chiefly to preside over the committee of the whole house and to bring up its reports to the house when ordered to do so

The speaker's position, on the other hand, is one of great dignity and of many important duties. He holds the title of 'Honourable', he represents the house at all important state functions, he presides over a joint sitting of both houses and he is placed high in the table of precedence

Whenever the speaker leaves the chair, the mace is removed from the table of the house to a bracket below the table. There is no equivalent to the mace in the senate. The mace is the symbol of the speaker's authority

The clerk of the house is also one of the most important officers of parliament. All the proceedings of the house, or of the committee of the whole house, are noted by him, and the printed minutes of the proceedings, after being revised and signed by him and perused by the speaker, constitute the journals of the house, the authentic and official record of the proceedings. The clerk of the house is the custodian of all the documents and papers of the house. He is responsible subject to the direction of the house or the speaker, for the regulation of all matters connected with the business of the house. He receives all notices of motion, bills, and other communications and deals with them as directed by the standing orders. In short, the clerk of the house manages the routine business of the house: he is in the position of a secretary to the house, he issues instructions to his assistants, but he takes his instructions from the speaker or from the house

The sergeant-at-arms acts as the policeman of the house. If any member receives the speaker's order to withdraw from the house because of some breach of the rules or on account of a contempt of the house, and refuses to do so, the sergeant-at-arms will remove him. He assists, by force if needs be, in maintaining order in the house. If there is disorder in the public gallery, the sergeant-at-arms will quickly restore order, either by word of mouth, or by the forcible removal of the offenders

The officers of the senate are the president, the chairman of committees, the clerk of the house, and the gentleman usher of the black rod. Their duties in their respective spheres are the same as those of their counterparts in the house of assembly

The salaries¹ of the officers of parliament are as follows

<i>House of Assembly</i>		<i>Senate</i>	
	<i>Per annum</i>		<i>Per annum</i>
Speaker	£2 000	President	£1,200
Chairman of Committees and Deputy Speaker	£500	Chairman of Committees and Deputy President	£300
Deputy Chairman of Committees	£200	Clerk of the House	£1,350-50-1 500
Clerk of the House	£1,400-40-1 600	Clerk Assistant Committee Clerk, and Accountant (one office)	£950-50-1,050
Clerk Assistant and Accountant	£950 35-1,300	Black Rod and Translator (one office)	£750-50-850
2nd Clerk Assistant	£800 30-950		
Chief Committee Clerk	£700-30-850		
Sergeant at-Arms	£700 30 850		
Chief Translator	£700-30-850		
1st Ass „	£600-25-800		
2nd „	£500 25 700		
Parliamentary Draftsman	£900		

These salaries appear in the estimates every year and are paid out of the consolidated revenue fund of the Union

4. The Rules of Procedure and of Debate^a

The South Africa Act made the following reference to rules of procedure and of debate in parliament

- 58 Each House of Parliament may make rules and orders with respect to the order and conduct of its business and proceedings. Until such rules and orders shall have been made, the rules and orders of the Legislative Council and House of Assembly of the Cape of Good Hope at the establishment of the Union shall *mutatis mutandis* apply to the Senate and House of Assembly respectively. If a joint sitting of both Houses of Parliament is required under the provisions of this Act it shall be convened by the Governor-General by message to both Houses. At any such joint sitting the Speaker of the House of Assembly shall preside and the rules of the House of Assembly shall, as far as practicable, apply.

This provision enabled the parliament of the Union to carry on the traditions established by the oldest parliament in Africa, and when parliament at last framed its own rules, it framed them on the Cape model, which in turn was based on the rules obtaining at Westminster.

The ordinary meeting time of the house is at quarter-past two in the afternoon. The Friday adjournment is usually until

¹ See section 35 of Act 19 of 1911

^a This section and the following are taken from the *Standing orders*

Monday If after the eleventh sitting of the session, business is not concluded at 6 p.m. on Mondays, Wednesdays, and Thursdays, the proceedings are resumed at eight o'clock and continue until eleven o'clock, unless the eleven o'clock rule is suspended, when business continues until the house adjourns itself to the next sitting. The adjournment of the house may be moved on a definite matter of urgent public importance when not less than fifteen members rise in their places to signify that they desire such a motion being heard.

(1) *Ordinary Business* The ordinary daily routine of business in the house is as follows: (i) petitions; (ii) notices of questions and motions; (iii) reports of select committees; (iv) other reports and papers; (v) order paper.

Notices for Tuesdays are set down on the order paper in the order in which they are given with precedence as follows: (i) questions; (ii) motions in the name of a minister relating to the business of the house; (iii) motions for the reading of petitions; (iv) motions for leave to introduce bills, whether public or private; (v) motions for reviving bills which lapsed during the previous session; (vi) motions for the appointment of select committees on private bills; (vii) motions for the appointment of members to serve on select committees when the house desires to appoint the members of the select committee; (viii) motions for instructions to committees on bills; (ix) other motions.

Government business has precedence on Mondays, Wednesdays, and Thursdays, the prime minister having the right to place government motions and orders on the order paper in the rotation in which they are to be taken. After the fifty-first sitting day the government has precedence on Fridays and the house may sit up to eleven o'clock or later. Subject to the above rules, private members have precedence on Tuesdays and on Fridays. Questions, and every motion require notice in writing delivered to the clerk, except motions by way of amendment to a question already put from the chair, motions for the adjournment of the house or of a debate, motions in committee of the whole house, motions raising a question of order or privilege, certain other matters, and where the house unanimously concurs with the putting of the motion without notice. An urgent motion of privilege takes precedence of all other business.

Members are not allowed to read their speeches and they must not read from a newspaper or book the speeches made in parliament during the same session. While a member is speaking no other member may interrupt him except to request that his words be taken down, to call attention to a point of order or privilege suddenly arising or to call attention to the want of a quorum of thirty members which is always necessary in the proceedings of the house or in committee of the whole house, to call attention to the presence of strangers or to move the closure.

When the speaker is in the chair members may not speak for more than forty minutes except ministers or members in charge of bills or motions, who have no time limit. No member may speak twice to a question except in explanation or in reply when he has moved the motion or introduced the bill, or in committee of the whole house. No member may use the name of the King or the name of the governor-general disrespectfully in debates, or for the purpose of influencing the house in its deliberations. Nor may any member be mentioned by name, but he shall be spoken of as 'The honourable member for (*naming the constituency he represents*)' or in the case of a minister by naming the portfolio which he holds.

After a question has been proposed from the chair, a member may claim to move 'That the question be now put', and, unless it appears to the chair that such a motion is an abuse of the standing orders of the house, or an infringement of the rights of the minority, the question may be put forthwith and decided without amendment or debate. If this is carried all further amendments on the motion or bill under discussion may be put without further amendment or debate. Similarly, when a debate is unusually protracted the committee on standing rules and orders may fix with the approval of the house, when such debate shall cease. All motions and amendments in connexion with the debate are, at the time so fixed, put without further discussion. The first of these methods of restriction is called the 'closure', the second is known in the United Kingdom as the 'guillotine', but is seldom, if ever, used in South Africa.

Respect and obedience must be rendered to the chair. A member who persists in irrelevant or tedious repetition may be ordered by the chair to discontinue his speech. Any member,

having used objectionable words and not retracting them and apologizing, may be censured or otherwise dealt with by the house. As soon as a member is called to order he must sit down unless permitted to explain. Any member may ask that objectionable matter be taken down. The chair may order a member guilty of disorderly conduct to withdraw, and if he refuses may order the sergeant-at-arms to remove the offending member. Or a member may be named. As soon as a member is named the senior member of the government present immediately puts the motion, 'That the member (*naming him*) be suspended from the service of the house'. If the offence has been committed in committee, the chairman immediately suspends proceedings and reports the matter to the speaker, who takes the chair for the purpose of naming. The suspension lasts, on the first occasion, for a week, on the second occasion, for a fortnight, on the third occasion, for a month. But a member, on apologizing in writing, may again be admitted to the house if the house so resolves.

If any member is guilty of wilful contempt, he is committed to the custody of the sergeant-at-arms by order of the speaker and dealt with as the house may direct. The house may fine him in an amount not exceeding £50, and he will have to pay commitment and discharge fees, and custody fees. These fines and fees are paid into the treasury.

Strangers may be present in the places allotted to them, but must withdraw when called upon to do so by the chair, or when a member cries 'strangers'.

(ii) *Financial Business* (a) *Appropriation and the committee of supply*. The house may not originate or pass any vote, motion, address, or bill (i) for the appropriation of any part of the public revenue or of any tax or impost, or (ii) for the release or compounding of any money due to the crown, or (iii) authorizing the making or raising of any loan, unless recommended by the governor-general during the session in which such proposal is made.¹

The speech from the throne always contains a request to the assembly for supply, and as soon as the assembly has agreed upon an address in reply to the speech, it passes a resolution to

¹ Section 62 of the South Africa Act. Cf. W. R. Anson, *Law of the Constitution* (Oxford, 1922), vol. 1, pp. 284 ff.

go into committee of supply. Estimates of the expenditure of the different departments are presented to the house in detail by the ministers responsible for those departments. The recommendation to supply is communicated by a minister in the following terms: 'His excellency the governor-general, having been informed of the subject matter of the proposed vote, motion, address or bill, recommends it to the consideration of the house.'

In South Africa there are in effect two budget speeches: the motion to go into committee of supply on the annual estimates of expenditure (i) from the consolidated revenue fund, and (ii) from the railway and harbour fund. The first speech is by the minister of finance, the second, on a different day, by the minister of railways and harbours. The debate on the motion is allowed five days. There is no time limit in the budget debate to speeches, but not more than ten minutes may be taken in the committees. When a minister's salary is specifically and bona fide challenged, and amendments moved in respect of it, the movers of such amendments may speak for forty minutes. When the committee has concluded the consideration of the estimates, the chairman reports that the committee has agreed to them with or without amendment, and the speaker appoints a committee to draft and bring up the necessary bill or bills to give effect thereto in the form of the appropriation bills.

(b) *Taxation and the Committee of Ways and Means*. When the committee of supply has determined what money shall be granted to the crown, the house goes into committee of ways and means to consider where or how to raise the money required. Every proposal to raise funds must originate from this committee on previous notice given by a minister, who states formally that the governor-general recommends the proposal. In this respect the South Africa Act provides:

60 (1) Bills appropriating revenue or moneys or imposing taxation shall originate only in the House of Assembly. But a Bill shall not be taken to appropriate revenue or moneys or to impose taxation by reason only of its containing provisions for the imposition or appropriation of fines or other pecuniary penalties.

(2) The Senate may not amend any Bills so far as they impose taxation or appropriate revenue or moneys for the services of the Government.

(3) The Senate may not amend any Bills so as to increase any proposed charges or burden on the people.

- 61 Any Bill which appropriates revenue or moneys for the ordinary annual services of the Government shall deal only with such appropriation
- 62 The House of Assembly shall not originate or pass any vote resolution, address, or Bill for the appropriation of any part of the public revenue or of any tax or impost to any purpose unless such appropriation has been recommended by message from the Governor-General during the session in which such vote resolution, address, or Bill is proposed

(iii) *The Procedure of the Senate* The procedure and the rules of debate are similar in both houses. The ordinary daily routine of business is as follows: (i) petitions, (ii) notices of question and of motion, (iii) reports of select committees, (iv) other reports and papers, (v) questions, (vi) motions in the name of a minister relating to the business of the house, (vii) motions for leave to introduce bills, whether public or private (viii) motions for the appointment of select committees on private bills, (ix) motions for the appointment of senators to serve on bills, (x) motions for the appointment of senators to serve on select committees already appointed, (xi) motions to go into committees on bills, (xii) all other motions, (xiii) orders of the day.

The only important difference from the procedure in the house of assembly that need call for attention is in regard to money bills. By sections 60 and 61 of the South Africa Act bills appropriating revenue or moneys or imposing taxation may originate only in the house of assembly. Such bills may not even be amended by the senate. It must either pass them or reject them. In the latter case a joint sitting is called in the same session.

One of the greatest defects in the South African parliamentary system is the waste of time in the passage of legislation. Nearly all the work is done by the assembly. For half the session the senate has practically nothing to do, and indeed does not meet, for it has to wait for bills which have been passed by the assembly, before it can consider them. All the work on these bills having been done in the assembly, there is often very little need for the senate to consider them at all. They are therefore rushed through the senate, often without a minister in charge of the bill even if it is a government measure, and if a minister does happen to take charge of the bill, he may show

impatience with the senate's deliberations, with the result that the senate is losing the status which it ought to have in the eyes of the public. The above shortcomings in human nature are probably inevitable when ministers take a large part in the debates of the assembly on the bills introduced by other ministers, and are so busily engaged in the general proceedings of the assembly that, when the end of the session approaches and bills have to be sent to the senate, they are tired out by their exertions and are bent only on passing the bills through the senate as quickly as possible. A bill is hardly ever originated in the senate. This is the cause of all the dissatisfaction which senators feel, the cause of all the wasting of time in legislation, and the cause of the senate losing the status which it ought to have. The obvious and only remedy for this state of affairs is that ministers should originate at least half the bills in the senate, so that the work be equally divided between both houses.

5. The Process of Legislation

(1) *Public Bills*

Every bill is printed in both official languages. A motion is made and a question is put that leave be given to bring in the bill, unless the bill be received from the senate or brought up by a committee appointed to draft a bill under a resolution of the house, in which cases such a bill is read a first time without amendment or debate. If leave is given to a member to bring in a bill, he must immediately bring a copy of it in English and Afrikaans to the clerk's table and move, without notice, that it be read a first time, such question being put without amendment or debate. When a future date has been fixed for the second reading of the bill (for not more than one stage may be taken on the same day without the consent of the whole House) the clerk delivers a copy of the bill to each member, and publishes a copy of it in the *Gazette*.

Motions may be made to amend the question for the second reading by moving that it should be read a second time this day, six months or a longer or shorter period ahead. Or any other motion may be made. When a bill has been read a second time, it may either be ordered to be considered in committee of the whole house on a day then named or be referred to some other committee.

At the second reading the house has a full-dress debate on the principle of the bill, therefore, when the bill has been sent to committee, that is, its principle having been approved, no amendment may be moved in committee which is in conflict with the principle of the bill as read a second time nor may its principle be again discussed—only the details, clause by clause. The chairman puts the question on each clause 'That such clause (or clause as amended) stand part of the bill.' The title and other matters connected with a bill are considered after the sections and schedules have been dealt with. A bill's progress may be 'reported' from time to time, with a request for leave to sit again, and when finally reported, the amendments are considered by the house, and the bill is either 'committed' to committee again, or set down for the third reading. At the third reading no amendments except those which might have been offered at the second reading, or an amendment to the title may be made. After the third reading, the bill is deemed to have passed the house, and it is sent to the senate.

Section 64 of the South Africa Act provides that the governor-general may return to the house any bill which originated there, with any amendments which he may recommend. The governor-general's pleasure, either in assenting to a bill, or recommending amendments (a very rare occurrence) is conveyed by message. The business of the house is immediately suspended and the bearer of the message introduced in order that he may deliver it to the speaker. The speaker immediately reads the message to the house, and the bearer of the message withdraws. A time is fixed for taking the message into consideration and it is acknowledged by an address. All things which the house has to offer to His Majesty or to the governor-general are offered by way of respectful address, signed by the speaker and the clerk, and presented or forwarded by the speaker. When an address is ordered to be presented by the whole house the speaker, with the members, proceeds to such place as the governor-general may appoint. There the speaker reads the address to him and receives his reply. When the governor-general has recommended an amendment, and the house cannot agree to it, the bill is sent back to his excellency, if the recommendation is persisted in, the bill is again sent back, and this procedure may be repeated until an arrangement is arrived at.

or the bill dropped. The amendments, of course, would be advised by ministers, and failure to carry them would be a government defeat.

(1) *Private Bills*

A private bill is a bill for the interest or benefit of a particular person or persons or institutions or bodies as distinguished from a measure of general public policy. Such a bill commences in parliament by petition for leave to introduce the bill.

Before the petition can be presented, certain steps must be taken by the promoters. Notice must be published in the *Gazette* in both official languages once a week for four consecutive weeks either in October or November, or in April or May immediately preceding the filing of the petition. This notice must also be published in a newspaper circulating in the district affected by the bill, and must be given to all persons and authorities whose interests are likely to be affected by the bill. The notice must contain a true statement of the objects of the bill, together with an intimation that copies of the bill will be deposited with the administrators of the provinces affected by the bill and with the clerk of the house of assembly not later than the last day of November or May, as the case may be, preceding the presentation of the petition.

Complicated provisions govern the deposit of documents, books and plans, and as soon as these are deposited, notice is given in the *Gazette* by the clerk of the assembly. The speaker then appoints a competent person to examine the plans and documents and to report whether the standing orders in regard to their preparation have been complied with, and whether the plans agree with the bill. After leave to bring in the petition is granted, examiners on the petition (the chairman of committees and the parliamentary draftsman) are appointed, and they, with all convenient speed, examine whether the allegations in the petition are correct and whether the standing orders have been complied with, and they report accordingly to the speaker, who lays the report on the table of the house. If the examiners' report is to the effect that the standing orders have been complied with, the bill is ready for introduction. If the report is adverse, the report is referred to the committee on standing orders, which makes a further report to the house, and the house

may then condone any want of compliance with the standing orders. Notice of motion to introduce the bill is then given, it is printed in both languages, with all references in the bill in any way affecting the public revenue or the prerogative of the crown printed in italics. When so introduced, it is read a first time. It is then referred to a select committee on the bill.

Persons who wish to oppose the bill must present a petition in opposition within three days after the first reading, setting out the grounds of opposition. This petition is referred to the select committee. Before the select committee evidence may be given, counsel may be heard, and all the proceedings are taken down and reported to the house. The second reading then takes place, the house goes into committee, and the course followed in regard to public bills is now pursued.

At any time after the first reading the house may refer a private bill to a provincial council for inquiry under the Private Bill Procedure Act, 1912, and section 88 of the South Africa Act, 1909. The promoters of the bill may during the parliamentary recess apply to the speaker for such inquiry, and he in his discretion may grant the request, in which case no petition for leave to introduce in the assembly is required and the bill can go to the first reading as soon as it is received from the provincial council. If the bill is to be sent to a provincial council for inquiry, it is forwarded by the speaker to the administrator of the province affected by the bill and the bill is laid by him on the table of the council. The examiners' report is also sent up with the bill. In the council the bill goes before a select committee governed by the council's own rules, and new advertisements are published in the *Provincial Gazette*. Where a private bill affects more than one province, it must go to each of the provincial councils concerned.

The report of the provincial select committee (each party having been heard by counsel or parliamentary agent before the select committee) is laid before the provincial council, and it makes a report to the speaker. Unfortunately, the assistance of the provincial councils is hardly ever invoked for private bills.

Consideration of the bill by the house of assembly is then resumed at the stage at which it was referred to the provincial council, or, if the bill was first referred to the provincial council by the speaker, the bill may be introduced into the house for its

first reading without a petition. In either case there may be a select committee of the assembly or the bill can go on as an ordinary public bill would, according to the wishes of the house.

When a private bill is brought from the senate, having originated there, the select committee may hear further evidence if it so desires, or the bill may go on through each stage as a public bill would do. The procedure in the senate is the same, *mutatis mutandis*, as in the house of assembly.

The Passage of a Private Bill through the House of Assembly
(From the Official Debates of the Assembly, abbreviated)

MONDAY, 25TH FEBRUARY 1929

PRETORIA WATERWORKS (PRIVATE) BILL

Bill laid on the Table—

Report of the Examiners of the Petition for leave to introduce the Pretoria Waterworks (Private) Bill, as follows:

[Report that Standing Order No. 28 has not been complied with.]
Examiners respectfully recommend that indulgence be granted.
Indulgence granted.

WEDNESDAY, 27TH FEBRUARY 1929

Leave was granted to Mr. Te Water to introduce the Pretoria Waterworks (Private) Bill.

Bill brought up and read a first time.

THURSDAY, 28TH FEBRUARY 1929

Bill sent to a Select Committee, the Committee to have power to take evidence and call for papers.

WEDNESDAY, 6TH MARCH 1929

MR. SPEAKER stated that owing to a petition in opposition to the Pretoria Waterworks (Private) Bill having been referred to the Select Committee on the Bill, the Committee would meet as on an opposed private bill.

MONDAY, 11TH MARCH 1929

THE CHAIRMAN OF THE SELECT COMMITTEE on the Pretoria Waterworks (Private) Bill brought up a special report on the Bill as follows:
[desiring leave to amend the title and preamble of the Bill.]

(Report considered.)
Chairman moves—

That leave be granted to amend the title and preamble in accordance with the report.

Seconded

(Discussion.)

Motion put and agreed to.

THURSDAY, 14TH MARCH 1929

CHAIRMAN OF SELECT COMMITTEE brought up Bill as amended
House orders report and evidence to be printed, and Bill to be read a second time on 20th March

WEDNESDAY, 20TH MARCH 1929

Bill read a second time House to go into Committee to-morrow

THURSDAY, 21ST MARCH 1929

MR TE WATER I move—

That the House do now resolve itself into Committee and that Mr Speaker leave the Chair

Motion put and agreed to

HOUSE IN COMMITTEE

On clause 1 (Discussion)

„ &c (Discussion)

FRIDAY, 22ND MARCH 1929

PRETORIA WATERWORKS (PRIVATE) BILL as amended in Committee, to be considered

Amendments considered and agreed to, and Bill as amended adopted
Third reading March 25th

MONDAY, 25TH MARCH 1929

Bill read a third time

(Bill sent to the Senate in the usual manner Bill passes the Senate and receives the Royal Assent, and becomes law)

(iii) *Exchange of Bills between the Houses*

There are four methods of communication between the houses according to the standing orders Each of these methods of communication or intercourse is designed for a particular purpose—either for the direct purpose of legislation, or in order to consider matters such as the internal arrangements of the houses or the relationship between them There may be a conference between the houses carried out through managers appointed by each house, or each house may appoint a select committee to discuss the matter at issue, or there may be a joint sitting of the two houses under sections 58 and 63 of the South Africa Act, a procedure which is described in the next section of this chapter, or, finally, there may be the procedure of exchanging messages By this last method the houses deal with the bills which have passed through them

When a bill passed by the senate is received by the assembly (which, as pointed out, is too rare an occurrence) the bill is read a first time without amendment or debate. It then proceeds in the same manner as bills originating in the assembly, but it is headed 'Bill received from the Senate', and in the order paper it is referred to as 'S B'. In case the assembly finds it necessary to make amendments, the bill as amended is returned to the senate with a message desiring the senate's concurrence in the amendments. If the senate disagrees with the amendments made by the assembly or makes further amendments to the amendments of the assembly, the assembly may insist or not insist on its amendments, or make further amendments, or agree to the senate's amendments and make further amendments, and bills are sent to and fro with written reasons stating why the amendments cannot be accepted.¹ If agreement is reached, the speaker certifies the bill as finally passed, and signed by the president of the senate, it is transmitted to the governor-general for assent in His Majesty's name. A bill which has originated in the assembly (where nearly every bill does originate) is sent to the bar of the senate by the hand of the clerk or one of his assistants, and is headed 'A B' (Assembly Bill). The procedure outlined above is followed if the senate proposes amendments.²

¹ These written 'reasons' take the form 'that the amendment proposed is not in the public interest'. Sometimes a specific reason is given. A member of the assembly once asked, 'Who is the judge of what is in the public interest?'

² The *Standing orders* of the assembly on the exchange of bills provide

185 When any public bill passed by the Senate shall be received by this House for concurrence, such bill shall be read a first time, without amendment or debate, and shall thereafter be proceeded with in the same manner as public bills originating in this House.

186 (2) In case this House shall find it necessary to make any amendments in such a bill it shall, as passed by this House, be returned to the Senate with a message desiring the concurrence of the Senate in the amendments.

190 As often as this House shall agree to all the amendments of the Senate Mr. Speaker shall direct the Clerk to write upon the top of such bill 'The House of Assembly agrees to the amendments of the Senate', and to sign the endorsement, and such bill, so endorsed, shall be transmitted by message to the Senate.

191 In cases where the Senate (1) disagrees to amendments made by this House, or (2) agrees to amendments made by this House with amendments, this House may as to (1) insist or not insist on its amendments, or make further amendments to the bill consequent upon the rejection of its amendments, and may as to (2) agree to the Senate's amendments.

(iv) *Disagreement between the Two Houses*

The South Africa Act contains a ready and efficient machinery to overcome parliamentary deadlocks. If the two houses disagree over proposed legislation, a joint sitting is convened. This type of joint sitting must be distinguished from the joint sitting required to amend the entrenched clauses of the South Africa Act under section 152. On a disagreement between the two houses ending in deadlock, the procedure to be followed is set out in the following section of the South Africa Act

- 63 If the House of Assembly passes any Bill and the Senate rejects or fails to pass it or passes it with amendments to which the House of Assembly will not agree, and if the House of Assembly in the next session again passes the Bill with or without any amendments which have been made or agreed to by the Senate and the Senate rejects or fails to pass it or passes it with amendments to which the House of Assembly will not agree, the Governor-General may during that session convene a joint sitting of the members of the Senate and House of Assembly. The members present at any such joint sitting may deliberate and shall vote together upon the Bill as last proposed by the House of Assembly and upon amendments, if any, which have been made therein by one House of Parliament and not agreed to by the other, and any such amendments which are affirmed by a majority of the total number of members of the Senate and the House of Assembly present at such sitting shall be taken to have been carried, and if the Bill with the amendments, if any, is affirmed by a majority of the members of the Senate and the House of Assembly present at such sitting, it shall be taken to have been duly passed by both Houses of Parliament. Provided that, if the Senate shall reject or fail to pass any Bill dealing with the appropriation of revenue or moneys for the public service, such joint sitting may be convened during the same session in which the Senate so rejects or fails to pass such Bill.

It is to be noticed that the section refers to bills which have been passed by the assembly and rejected wholly or partly by the senate. Joint sittings of both houses cannot be called on bills which have originated in the senate. A bill may be rejected by the senate in one of three ways. It may be wholly rejected, i.e. fail to pass the second reading, or important clauses of the

on its own amendments or may disagree thereto and may insist on its own amendments

- 192 such bill shall also contain written reasons for this House not agreeing to the amendments proposed by the Senate

- 193 in all such cases, if agreement is not arrived at, then the Governor General may in the next session convene a joint sitting

bill may be rejected *in toto*, or it may be accepted subject to amendments to which the assembly refuses to agree, i.e. the assembly's bill is rejected. The last eventuality has produced a device called 'the bracket', which is used also in monetary bills. A disputed amendment is placed in brackets with a footnote to the effect that it does not form part of the bill, if the assembly insists upon rejecting the proposed amendment, or it is an amendment which the senate has no power to make, the assembly may delete the brackets or delete the clause as it pleases, and in either case the bill is not rejected by the senate.

If a bill is rejected it may be introduced in the assembly in the following session and if it is again rejected by the senate, the provisions of the section regarding a joint sitting may be put into operation.

A joint sitting under the deadlock clause (section 63) must be distinguished from a joint sitting under section 152 of the Constitution Act. The latter is held without the houses having previously considered the bill at all. Section 152 provides the only machinery whereby bills dealing with the entrenched clauses may be considered by parliament at all, namely, by both houses sitting together in the first instance. But a joint sitting under the deadlock clause takes place as a kind of appeal after the bill has been previously considered in all its detail by the two houses and a deadlock arrived at. Under section 152 the agreement of two-thirds of the members of parliament whether present or not must be shown on the voting, under section 63 a bare majority of members present is sufficient.

The procedure is very simple and works easily and smoothly. A joint sitting is convened by message of the governor-general, a specimen of which is given in section vi of this chapter. The bill as last introduced in the assembly is submitted to the joint sitting together with all the amendments which have been agreed to by both houses. The contentious clauses are then taken, each in turn, with the amendments of the senate, and put to the vote. The clauses are passed or rejected according to whether they receive ordinary majorities or not. There can be no question of further disagreement. The disputed clauses are brought to a final determination, and the bill with those clauses accepted or rejected or amended in the same way as if it had

been passed by both houses sitting separately under ordinary circumstances

The procedure leading up to a joint sitting and the procedure at a joint sitting is shown in the following sections of this chapter

(v) *Passage of a 'Deadlock' Bill through the House of Assembly, showing ordinary routine of the House, and eventual 'Deadlock'*

THE PRECIOUS STONES BILL

(From Official Debates of the Assembly, abbreviated)

FRIDAY, 1ST APRIL 1927

MR SPEAKER took the Chair at 2 20 p m

SELECT COMMITTEE ON RAILWAYS AND HARBOURS

CHAIRMAN OF SELECT COMMITTEE brought up the Second Report of the Select Committee on Railways and Harbours

Report and evidence to be printed and considered on 12th April

QUESTIONS

[Questions having been answered, the House considered]

THE PRECIOUS STONES BILL

THE MINISTER OF MINES AND INDUSTRIES asked leave to introduce the Bill Leave granted to the Minister of Mines and Industries to introduce the Precious Stones Bill

Bill brought up and read a first time, Second reading 11th April (Bill not reached on 11th, set down for 25th)

MONDAY, 25TH APRIL 1927

First Order read

Second „

Third „

Fourth „ Second reading, PRECIOUS STONES BILL

THE MINISTER OF MINES AND INDUSTRIES I move—

That the Bill be now read a second time

(General principles of Bill explained by Minister, and debate thereon by the House Debate adjourned)

TUESDAY, 26TH APRIL 1927

QUESTIONS (having been answered)

First Order read Adjourned Debate on motion for second reading Precious Stones Bill, to be resumed

(Debate resumed)

WEDNESDAY, 27TH APRIL 1927

BUSINESS OF THE HOUSE (TUESDAYS)

THE PRIME MINISTER I move—

That after Tuesday the 17th May, Government business have precedence on Tuesday's, after notices of questions have been disposed of (Seconded and agreed to Order paper read Adjourned Debate on Precious Stones Bill resumed and adjourned to—)

THURSDAY, 28TH APRIL 1927

MOTION That the Bill be now read a second time, put and agreed to Bill read a second time, House to go into Committee on 6th May (Not reached till 20th May)

FRIDAY, 20TH MAY 1927

First order read House to go into Committee on Precious Stones Bill

PRECIOUS STONES BILL

House in Committee

On clause 1

„ 2

„ 3 &c

Discussion on each clause until whole Bill agreed to in Committee)

SATURDAY, 25TH JUNE 1927

Bill reported with amendments

Amendments considered by House and agreed to

Bill amended, adopted, and read a third time

(Bill sent to the Senate, where it goes through a similar procedure)

WEDNESDAY, 29TH JUNE 1927

Message received from the Senate, returning the Precious Stones Bill with amendments

On the motion of the Minister of Mines and Industries—Amendments considered

On amendments in clause 20

THE MINISTER OF MINES AND INDUSTRIES I cannot agree to these amendments Motion that the House reject the amendments in clause 20

(Discussion, motion put to the House,)

Upon which the House divided

Ayes—36

Noes—15

[All names printed here]

Amendment rejected

On amendments (in other clauses, same procedure some accepted, some rejected After all Senate's amendments considered,)

THE FOLLOWING MESSAGE was sent to the SENATE

The House of Assembly transmits to the honourable the Senate the Precious Stones Bill in which the honourable the Senate has made certain amendments [here state amendments] The House of Assembly regrets that it is unable to agree to the amendments in clauses [here state the clauses] as in the opinion of this House these amendments are not in the public interest

The House of Assembly concurs in the remaining amendments in clauses [here state the clauses] and trusts the honourable the Senate will not insist upon those amendments which this House is unable to accept

THE FOLLOWING MESSAGE was received from the SENATE

The Senate transmits to the honourable the House of Assembly the Precious Stones Bill in which the Senate has made certain amendments, namely in which amendments the House of Assembly has concurred with the exception of the amendments in

The Senate has further considered these amendments together with the reasons for the honourable the House of Assembly's disagreement with the Senate, submitted in the message of to day's date

The Senate regrets, however, that it must insist on its amendments. It has consented to the drastic provisions of clauses but considers it against all principles of justice that those provisions should be made retrospective to a date further than that of the introduction of the Bill. On the motion of the Minister of Mines and Industries, the message considered

THE MINISTER OF MINES AND INDUSTRIES I move—

That this House insists upon its decision on the amendments

(Seconded)

Upon which the House divided

Ayes—33

Noes—12

[All names printed here]

Motion accordingly agreed to

THE FOLLOWING MESSAGE was sent to the SENATE

The House of Assembly transmits to the honourable the Senate the Precious Stones Bill, in which the Senate has made amendments in clauses to which the House of Assembly was unable to agree

The House of Assembly regrets that the honourable the Senate insists upon these amendments, and, after taking the reasons of the honourable the Senate into consideration, the House of Assembly is constrained to insist upon the decision previously communicated by it to the honourable the Senate

The House of Assembly, therefore, in returning the Bill, trusts that the honourable the Senate will further consider its decision and not insist upon the amendments

(This is where the matter is left for the session. The form of the Assembly's last message shows that the Bill will be introduced next session)

NEXT SESSION, COMMENCING FRIDAY, 14TH OCTOBER 1927

PRECIOUS STONES BILL

(Passed through Assembly, and rejected by Senate Deadlock again To solve the deadlock it is necessary to convene a joint sitting)

(vi) *Joint Sitzings*

(a) *Joint Sitting by reason of Disagreement between the Houses*
(Sec 63 of S A Act)

JOINT SITTING OF BOTH HOUSES OF PARLIAMENT

Convened in accordance with section 63 of the South Africa Act, to consider the *Precious Stones Bill*
(From Official Debates for Joint Sitting, 1927)

WEDNESDAY, 9TH NOVEMBER 1927

Members of the Senate and the House of Assembly met in the Assembly Chamber of the House of Assembly, Parliament Houses, Cape Town, and the Speaker of the House of Assembly (the Hon E G Jansson) took the Chair at 10 5 a m

MESSAGE FROM HIS EXCELLENCY THE GOVERNOR-GENERAL TO BOTH HOUSES OF PARLIAMENT

THE CLERK of the House of Assembly read the message from His Excellency the Governor-General convening the joint sitting as follows

His Excellency the Governor-General having been informed by his Ministers that the House of Assembly passed the Precious Stones Bill during the fourth session of the fifth Parliament, that the Senate during that session passed it with amendments to which the House of Assembly did not agree, that during the present session of Parliament the House of Assembly again passed the Bill, and that the Senate passed it with amendments to which the House of Assembly did not agree, hereby, under and by virtue of the provisions of Sections 58 and 63 of the South Africa Act 1909, convened a joint sitting of the members of both Houses of Parliament, to be held on Wednesday, the ninth day of November, 1927, at 10 a m, for the purpose of the members present at such joint sitting deliberating and voting together upon the said Bill as last proposed by the House of Assembly and upon amendments which have been made therein by the Senate and not agreed upon by the Assembly —ATHLONE, Governor-General

THE CLERK then read the list of members when those present answered to their names

RULES FOR THE JOINT SITTING OF BOTH HOUSES OF PARLIAMENT

MR SPEAKER submitted the following rules for the regulation of the proceedings of the joint sitting viz —[These rules are specially drawn

up for each joint sitting, and in this case refer merely to the times of meeting and adjournment, the assembly rules otherwise applying]

THE PRIME MINISTER I move, as an unopposed motion—That the rules now be considered

MR VERMOOTEN seconded

Agreed to

THE PRIME MINISTER I move—That the rules be adopted

MR HEYNS seconded

Motion put and agreed to

MR SPEAKER I submit the Precious Stones Bill including the amendments in Clauses 26, 33, 50, 59, 68, 78, 96 and 116, which have been agreed to by both Houses of Parliament

[The joint sitting then considered the contentions clauses]

On Clause 2. (Discussion of unaccepted amendment by Senate—Question put) The Clause, as printed, then put and the joint sitting divided

(Until all the contentions were agreed to)

THE MINISTER OF MINES AND INDUSTRIES I move—

That the Bill, as amended, do now pass

MR VERMOOTEN seconded

Motion put and the joint sitting divided

Ayes—78

Noes—68

[All names printed]

Motion accordingly agreed to

MR SPEAKER I now declare the Precious Stones Bill, as amended, has been duly passed by both Houses of Parliament in accordance with the requirements of Section 63 of the South Africa Act

THE MINISTER OF MINES AND INDUSTRIES I move—

That His Excellency the Governor-General be informed by respectful address that the joint sitting of both Houses of Parliament convened by his Excellency for the purpose of considering the Precious Stones Bill, duly met and deliberated upon the Bill and upon the amendments which have been made therein by the Senate and not agreed to by the House of Assembly, and that the Bill, as amended was passed by a majority of the total number of members of the Senate and House of Assembly at such sitting

MR B J PRENAAR seconded

Agreed to

(Adjournment)

(b) Joint Sitting under Section 152 of the South Africa Act

This kind of joint sitting must be distinguished from the joint sitting following a deadlock. It differs from the latter in two important respects (i) the bill *originates* in a joint sitting, (ii) to become law the bill must receive the assent of two-thirds of the total number of all the members of both houses whether present

at the joint sitting or not. This requirement applies only to the third reading of the bill.¹

JOINT SITTING OF BOTH HOUSES OF PARLIAMENT

Convened to consider the *Natives' Parliamentary Representation Bill* and the *Coloured Persons' Rights Bill*

TUESDAY, 12TH FEBRUARY 1929

Members of the Senate and the House of Assembly met in the Assembly Chamber of the House of Assembly, Parliament Houses, Cape Town, and the Speaker of the House of Assembly (the Hon. E. G. Jansen) took the Chair at 10.35 a.m.

MESSAGE FROM HIS EXCELLENCY THE GOVERNOR-GENERAL TO BOTH HOUSES OF PARLIAMENT

THE CLERK of the House of Assembly read the message from His Excellency the Governor-General concerning the joint sitting, as follows—

His Excellency the Governor-General having considered the provisions of two Bills which his Ministers desire to submit to Parliament, viz. [the nature of the Bills is here set out], and having been advised by his Ministers that the said Bills fall within the provisions of sections 35 and 152 of the South Africa Act, 1909, hereby, under section 58 of that Act, convenes a joint sitting of both Houses of Parliament for the purpose of considering the said Bills. This joint sitting shall be held on Tuesday, the 12th day of February, 1929, at 10.30 a.m.

The Governor-General transmits herewith copies of each of the two Bills—*ATHELONF*, Governor-General.

THE CLERK then read the lists of members, when those present answered to their names.

RULES FOR THE JOINT SITTING OF BOTH HOUSES OF PARLIAMENT

MR. SPEAKER submitted the following rules for the regulation of the proceedings of the joint sitting, viz.—[the substance of these rules is set out in the footnote below].²

¹ Section 152 of the South Africa Act. Provided that no repeal or alteration of the provisions contained in this section or in sections 35 and 137, shall be valid unless the Bill embodying such repeal or alteration shall be passed by both Houses of Parliament sitting together and at the third reading be agreed to by not less than two thirds of the total number of members of both Houses. A Bill so passed at such joint sitting shall be taken to have been duly passed by both Houses of Parliament.

² 5 (1) On the conclusion of debate on the motion. That the Bill be now read a third time, and after the disposal of amendments to that motion, if any, the Sergeant at Arms shall cause the division bells to be rung for two minutes, and thereafter the doors shall be locked as soon as Mr. Speaker shall direct. After the doors have been locked no member shall be allowed to enter or leave the chamber until after the vote upon the

THE PRIME MINISTER I move, as an unopposed motion—That the rules be now considered

MR W B DE VILLIERS seconded

Agreed to

THE PRIME MINISTER I move—That the rules be adopted

MR BRINK seconded

Motion put and agreed to

The joint meeting adjourned at 10 55 a m

WEDNESDAY, 13TH FEBRUARY 1920

MR SPEAKER took the Chair at 10 3 a m

THE PRIME MINISTER I move—

For leave to introduce a Bill to make special provision for the representation of natives in Parliament and in the Provincial Councils and for that purpose to alter certain provisions of the laws governing voters' rolls and parliamentary and provincial council elections

(Seconded. Discussion Adjournment)

third reading has been declared by Mr Speaker, and every member present in the chamber will be required to vote

(2) When the doors have been locked, Mr Speaker shall call for the 'Ayes' and 'Noes', and if there is no voice for the 'Noes' he shall appoint two tellers to count the members present in the chamber. The tellers shall, for that purpose, use a division list for the 'Ayes' specially printed for the joint sitting. If, however, on Mr Speaker calling for the 'Ayes' and 'Noes' he shall direct the 'Ayes' to the right of the Chair and the 'Noes' to the left, and he shall appoint two tellers for each side who shall similarly use specially printed division lists for the 'Ayes' and 'Noes' respectively. In case there should not be two tellers for the 'Noes' the member voting in the minority shall be appointed as teller and act accordingly

(3) The tellers shall in either case sign the division lists and hand them to Mr Speaker, who shall thereupon declare the numbers to the joint sitting and intimate whether he votes with the 'Ayes' or the 'Noes', and the Clerk shall make entry accordingly. If it be found that two-thirds of the total number of the members of both Houses have agreed to the third reading, Mr Speaker shall instruct the Clerk to read the Bill a third time and thereupon declare the Bill to have been duly passed in accordance with the requirements of section 152 of the South Africa Act. If the motion for the third reading of the Bill be agreed to by less than two-thirds of the total number of the members of both Houses Mr Speaker shall declare that the Bill has failed to pass in accordance with the requirements of section 152 of the South Africa Act

(4) In any case entry shall be made in the minutes of proceedings of the joint sitting of the names of those voting, showing whether they voted for or against the third reading of the Bill

- 6 After the Bills have been disposed of, a motion shall be proposed by a Minister that an address be presented to His Excellency the Governor-General by Mr Speaker, acquainting His Excellency with the result of the joint sitting, and the question on such motion having been decided, Mr Speaker shall declare the joint sitting ended

THURSDAY, 14TH FEBRUARY 1929

MR SPEAKER took the Chair at 3 6 p m

Order of the day read Adjourned debate on motion for leave to introduce [above] Bill to be resumed

(Debate resumed, and after discussion,)

Motion put and the joint sitting divided

Ayes—79 Noes—71

[All names printed]

Motion accordingly agreed to

Bill brought up and read a first time

(Adjournment)

MONDAY, 18TH FEBRUARY 1929

MR SPEAKER took the Chair at 2 50 p m

THE PRIME MINISTER laid upon the Table—

Recommendations of the Native Affairs Commission in regard to the [above] Bill

First Order read Second reading [above] Bill

THE PRIME MINISTER I move—

That the Bill be now read a second time (Discussion)

GEN SMUTS [moves]—

To omit all the words after 'That' and to substitute 'this joint sitting of both Houses of Parliament is of opinion that the question of political representation to be accorded to natives should be considered as part of a general inquiry into the economic and other relations of the European, coloured, and native populations of the Union to be undertaken by a national commission or convention on which the views of the different sections of the people should be represented and that this Bill should therefore not be further proceeded with

(Discussion)

Question put That all the words after 'That', proposed to be omitted, stand part of the motion,

Upon which the joint sitting divided

Ayes—80 Noes—68

[All names printed]

Question accordingly affirmed and the amendment proposed by Gen Smuts dropped

Motion for the second reading then put and agreed to

Bill read a second time, joint sitting to go into committee on—

WEDNESDAY, 20TH FEBRUARY 1929

MR SPEAKER took the Chair at 2 30 p.m

First Order read Joint sitting to go into committee on the [above] Bill

JOINT SITTING IN COMMITTEE

On Clause 1

(Discussion Amendments Question put)

The Clause, as printed, then put and the Committee divided
(Each of 14 Clauses having been carried by ordinary majorities)

JOINT SITTING OF BOTH HOUSES RESUMED

Bill reported without amendment

(Adjournment)

MONDAY, 25TH FEBRUARY 1929

MR SPEAKER took the Chair at 10 5 a m

First Order read

Second Order read Third reading [above] Bill

THE PRIME MINISTER I move—

That the Bill be now read a third time.

Mr Speaker ordered the division bells to be rung for two minutes and thereafter directed the doors to be locked

Mr Speaker then called for the 'Ayes' and 'Noes' on the third reading of the Bill and the joint sitting divided

Ayes—74

Noes—69.

[All names printed]

MR SPEAKER The division lists show that 74 votes have been recorded in favour of the third reading of the Bill, and 69 votes against the third reading I desire my vote to be recorded with the 'ayes' and direct the Clerk to make the entry accordingly

By direction of Mr Speaker, his name was recorded as having voted with the 'ayes'

MR SPEAKER Section 152 of the South Africa Act, 1909, provides that in order to be valid this Bill must be agreed to at the third reading by not less than two thirds of the total number of members of both Houses The total number of members of both Houses is 175, and a full two-thirds of that number is 117 As 75 votes have been cast in favour of the third reading, I declare that the Natives' Parliamentary Representation Bill has failed to pass in accordance with the requirements of Section 152 of the South Africa Act

THE PRIME MINISTER I move—

That His Excellency the Governor-General be informed by respectful address that the joint sitting of both Houses of Parliament convened by his Excellency for the purpose of considering the Natives' Parliamentary Representation Bill and the Coloured Persons' Rights Bill, duly met and deliberated and that the Natives' Parliamentary Representation Bill failed to pass as less than two-thirds of the total number of members of both Houses of Parliament voted in favour of the third reading

(Seconded)

Agreed to

COLOURED PERSONS' RIGHTS BILL

(Having been considered on the same days as the other Bill and reported with amendments)

THE PRIME MINISTER As the Coloured Persons' Rights Bill is dependent on the Natives' Parliamentary Representation Bill, which has been

rejected, I wish to announce that I do not intend to proceed with the Coloured Persons' Rights Bill ¹

(Adjournment)

(vii) *The Assent to Bills*

SOUTH AFRICA ACT, 1909

- 64 When a Bill is presented to the Governor General for the King's assent, he shall declare according to his discretion, but subject to the provisions of this Act, and to such instructions as may from time to time be given in that behalf by the King, that he assents in the King's name, or that he withholds assent. The Governor-General may return to the House in which it originated any Bill so presented to him, and may transmit therewith any amendments which he may recommend, and the House may deal with the recommendation ¹

Royal Instructions to the Governor-General, 1909

- VIII The Governor-General is to take care that all laws assented to by him in Our name, or reserved for the signification of Our pleasure thereon, shall, when transmitted by him, be fairly abstracted in the margins, and be accompanied, in such cases as may seem to him necessary, with such explanatory observations as may be required to exhibit the reasons and occasions for proposing such laws, and he shall also transmit fair copies of the Journals and Minutes of the proceedings of the Parliament of the Union, which he is to require from the clerks or other proper officers in that behalf, of the said Parliament

The question of reservation of bills was dealt with in Chapter

¹ The government did not resign after the rejection of these bills, even though the bills represented a cardinal point in the government's policy. Parliament was dissolved by effluxion of time soon afterwards and a general election took place on June 12, 1929, when the native question was discussed and formed the main platform of the Nationalist party which was returned again to power. The government again did not obtain the required two-thirds majority, and the bills were not reintroduced. It is not a constitutional rule in South Africa that the government should resign if bills introduced by it requiring a two-thirds majority are rejected, as the government is still able to carry on the administration of affairs and it may still carry out its policy on all matters except those referring to the amendment of the entrenched clauses. The government endeavoured to deal with the above questions by means of consultations and negotiations with the opposition, but these were unsuccessful. A native economic commission was appointed and issued its report in May 1932.

² As amended by Section 8 of the Status of the Union Act, 1934. Section 64 of the South Africa Act shall be repealed as from a date to be fixed by the governor-general by proclamation in the *Gazette* (section 11, which repeals section 66 of the South Africa Act). These sections are printed in Appendix IV for the information of the reader.

IV 3 (vii) With the passing of the Status of the Union Act, 1934, the governor-general's discretion as to reservation falls away,¹ he must either assent or withhold assent to bills, in the King's name, and he is compelled to reserve bills —²

(i) under section 106 of the South Africa Act, limiting the right to petition the King in council for leave to appeal

(ii) amending or altering the provisions of the Schedule to the South Africa Act, by virtue of clause 25 of the Schedule, if and when any of the territories are included in the Union³

6. Signature and Enrolment of Acts

As soon as an act receives the signature of the governor-general, and as soon as it is published in the *Gazette* it becomes law,⁴ unless the act mentions some other day on which it shall come into force. Regarding signature and enrolment of acts the South Africa Act provides

67 As soon as may be after any law shall have been assented to in the King's name by the Governor-General, the Clerk of the House of Assembly shall cause two fair copies of such law, one being in the English and the other in the Dutch language (one of which copies shall be signed by the Governor General), to be enrolled of record in the office of the Registrar of the Appellate Division of the Supreme Court of South Africa, and such copies shall be conclusive evidence as to the provisions of every such law, and in case of conflict between the two copies thus deposited that signed by the Governor-General shall prevail.⁵

Though the signed copy of an act when clear must prevail, whenever there is any doubt as to the meaning of an act, the court is entitled to look at the copy in the other language.⁶ When the copy of the statute which has been signed by the governor-general is capable of two meanings, and the unsigned copy is capable of only one meaning, the court will apply the construction of the latter version.⁷

¹ Section 8

² Section 10

³ Schedule 25 of the South Africa Act 'All Bills to amend or alter the provisions of this schedule shall be reserved for the signification of His Majesty's pleasure' See sections 150 and 151 of the Act

⁴ Section 14 of Interpretation Act, No. 5 of 1910

⁵ As amended by section 9 of the Status of the Union Act, 1934

⁶ *Magdiana v. Boag Motor Company*, [1927] C P D 189, at p. 192

⁷ *Orkin v. Pretoria Municipality*, [1927] T P D 536 at p. 553, *Jaffer v. Parow Village Management Board*, [1920] C P D 267, at p. 272, *Rez v. McKenzie*, [1925] E D L 128, at p. 134

7 The Dissolution of Parliament

Having brought parliament together and seen the course which legislation takes, we may now consider how parliament is prorogued and dissolved. The conventions which govern these matters are the same as the conventions which govern the prorogation and dissolution of parliament in the United Kingdom. The South Africa Act contains the bare outline of these conventions.

- 20 The Governor-General may appoint such times for holding the sessions of Parliament as he thinks fit, and may also from time to time by proclamation or otherwise prorogue Parliament, and may in like manner dissolve the Senate and the House of Assembly simultaneously, or the House of Assembly alone provided that the Senate shall not be dissolved within a period of ten years after the establishment of the Union and provided further that the dissolution of the Senate shall not affect any senators nominated by the Governor-General in Council.

The letters patent contain a reference to the conventions which govern the summoning, proroguing, or dissolving of parliament in the United Kingdom.

- III The Governor-General may on Our behalf exercise all powers under the South Africa Act 1909 or otherwise in respect of the summoning, proroguing, or dissolving the Parliament of the Union.

The South Africa Act has been amended in respect of the dissolution of the senate by the Senate Act, 1926. In order to emphasize the details regarding signature and commencement of statutes, we may print here exactly as it appears in the official statutes of the Union the whole of this act.

Act No 54
of 1926

Date of Commencement¹—16th June 1926

ACT

To amend the South Africa Act, 1909, by making further provision relating to the dissolution of the Senate
(Assented to 9th June 1926)
(Signed by the Governor General in English)

¹ 'This Act was first published in Gazette Extraordinary No 1562 of 16 June, 1926' (Note in Statute book)

PARLIAMENT

BE IT ENACTED by the King's Most Excellent Majesty, the Senate and the House of Assembly of the Union of South Africa, as follows

Dissolution of
Senate and
vacation of seats
by nominated
members.

1 Notwithstanding anything contained in sections *twenty*, *twenty-four*, and *twenty-five* of the South Africa Act, 1909, or in any other law—

- (a) the Governor-General may within one hundred and twenty days of any dissolution of the House of Assembly dissolve the Senate,
- (b) upon any dissolution of the Senate, whether under section *twenty* of the South Africa Act, 1909, or in terms of paragraph (a) of this section—
 - (i) those members of the Senate who were nominated by the Governor-General shall vacate their seats,
 - (ii) the persons nominated to fill the seats so vacated shall, subject to the provisions of the South Africa Act, 1909, or of any other law, hold their seats for a period of ten years from the date of their nomination or until the next succeeding dissolution of the Senate or until a change of Government has occurred, whichever be the shortest period

A change of Government shall be considered to have occurred whenever another person than the Prime Minister for the time being becomes Prime Minister and when the Governor-General has published a notice in the *Gazette*, that such change of Government has occurred

Short title

2 This Act may be cited as the Senate Act, 1926

The reference to the South Africa Act in section 1 (b) (ii) is to section 24 (ii) of that act, which makes provision for the nomination of another senator should the seat of a nominated senator become vacant by reason of his death, resignation, or otherwise. The effect of the amendment to the South Africa Act by the Senate Act, 1926, is as follows

- (i) Within one hundred and twenty days of the dissolution of the house of assembly, the whole senate may be dissolved,
- (ii) When the senate is dissolved, the nominated senators vacate their seats also,
- (iii) When a change of government occurs, the nominated senators must also vacate their seats, even though the whole senate is not dissolved.

The object of the last provision of the act requiring nominated senators to vacate their seats on a change of government even though the senate or the assembly is not dissolved, is to enable the government which commands the confidence of the assembly, including, presumably, its confidence on matters of native policy, to nominate senators who will act in accord with the government's policy in native affairs or, perhaps, to enable a government which has the confidence of the assembly to carry its measures through a senate which, but for the change of nominated senators, would otherwise have had a small majority hostile to the government. This provision, in other words, enables the new government to obtain a working majority in the senate without dissolving the senate.

The form used for proroguing parliament is the following

PROCLAMATION

BY MAJOR-GENERAL HIS EXCELLENCY THE RIGHT HONOURABLE THE
EARL OF ATHLONE (&c)

WHEREAS by section twenty of the South Africa Act, 1909, it is provided that the Governor General may from time to time, by Proclamation or otherwise, prorogue the Parliament of the Union,
AND WHEREAS it is expedient that Parliament should be prorogued,
Now, therefore, under and by virtue of the power and authority in me vested, I do by this my Proclamation prorogue the said Parliament of the Union until Thursday, the Thirteenth day of May, 1929

GOD SAVE THE KING.

Given under my Hand and the Great Seal of the Union of South Africa, at Pretoria, on this the 27th day of March, 1929

ATHLONE,

Governor-General

By Command of His Excellency the Governor General-in-Council

J B M HERTZOG

It should be noticed that parliament is always prorogued until a specified and definite date. If parliament cannot meet on that date, a new proclamation is necessary extending the date when parliament is to meet. And whereas it is expedient that parliament should be prorogued for a further period, Now therefore,

I do by this my Proclamation further prorogue the said Parliament until

The form of proclamation for a dissolution of the house of assembly is the following

PARLIAMENT
PROCLAMATION

BY (THE GOVERNOR-GENERAL)

WHEREAS by section twenty of the South Africa Act, 1909, it is provided that the Governor-General may, whenever he shall see fit to do so, dissolve the House of Assembly,

AND WHEREAS I deem it expedient, for divers good and sufficient reasons, to dissolve, at this time, the said House of Assembly,

Now, therefore, under and by virtue of the power and authority in me vested, I do by this my Proclamation, dissolve the House of Assembly, and the said House of Assembly is hereby dissolved accordingly

GOD SAVE THE KING

(Usual ending and signatures 30th April 1929)

There has only been one dissolution of the senate since the Senate Act, 1926, came into force. The following is a copy of the

PROCLAMATION

BY (THE GOVERNOR-GENERAL)

WHEREAS by section 1 of the Senate Act, 1926, it is provided that the Governor General may, within one hundred and twenty days of any dissolution of the House of Assembly, dissolve the Senate,

AND WHEREAS the House of Assembly was dissolved by Proclamation No 94 of 1929, dated the 30th April 1929,

AND WHEREAS I deem it expedient, for divers good and sufficient reasons, to dissolve at this time the Second Senate of the Union Parliament,

Now, therefore, under and by virtue of the power and authority in me vested, I do by this my Proclamation dissolve the Second Senate of the Union Parliament, and the said Senate is hereby dissolved accordingly

(Usual ending 19th August 1929)

XII

THE POWERS AND PRIVILEGES OF PARLIAMENT

PARLIAMENT has not only legislative powers,¹ it has also coercive powers to maintain its dignity and its authority. It is essential for a legislature to possess inquisitorial powers to protect itself from obstruction, resistance or contempt, and coercive powers to enforce every lawful discharge of its appropriate functions.

The powers and privileges of parliament may be classified as those which are inherent and those which are granted to it by statute. This classification coincides, roughly, with a division of the powers which parliament possesses over proceedings which take place within the houses of parliament and those which take place outside its four walls, or, more precisely, those powers which are necessary for the maintenance of its independence, and those powers which are necessary in order to maintain the dignity and respect of parliament.

In the United Kingdom parliament has from ancient times enjoyed certain privileges and powers. These privileges and powers are founded mainly upon the law and custom of parliament, the *lex et consuetudo parliamenti*. This *lex et consuetudo* is nothing more than ancient usage. Each house adjudges whether any breach of privilege has been committed, and punishes offenders by censure or commitment. This right of commitment is incontestably established and it extends to the protection of the officers of parliament, lawfully and properly executing the orders of either house. The causes of such commitments cannot be inquired into by the courts of law. Breaches of privilege may be described as disobedience to any orders or rules of the house, indignities offered to its character or proceedings, assaults, insults, or libels upon members, or interference with officers of the house in discharge of their duty, or tampering with witnesses. Such offences are dealt with as *contempts*.

Freedom of speech has been one of the most cherished privileges of parliament from early times. Constantly asserted, it was finally declared by the bill of rights 'that the freedom of

¹ For the legislative powers of parliament, see *supra*, Chapter III.

speech and debates and proceedings in parliament, ought not to be impeached or questioned in any court or place out of parliament. Such a privilege is essential to the independence of parliament, and to the protection of members in the discharge of their duties. Of equal antiquity is freedom of members of parliament from arrest. If arrested, the court on motion will immediately discharge them. This privilege extends to members only at certain times, that is, during and just before and after the sitting of parliament.

Most of the powers and privileges of parliament have been confirmed or narrowed by statute, and the law on the subject is fairly definite and precise, so that conflicts of jurisdiction between the courts and parliament are now a thing of the past. It is therefore unnecessary for our purpose to examine in detail the leading cases which have established the powers and privileges of the parliament of the United Kingdom. These powers and privileges extend to proceedings both inside and outside of parliament. All contempts, inside and outside the house are within the jurisdiction of the house, for the *lex et consuetudo parliamenti* drew no distinction between the two kinds of contempt. Parliament from ancient times was intent upon protecting itself against all abuse and obstruction, therefore through the peculiarities of historical development there grew up a body of usage or custom which has always been and remains peculiar to the parliament of the United Kingdom and inherent in it.

Because this body of custom is peculiar to the parliament of the United Kingdom, it cannot be inferred that the like powers belong to the legislative assemblies of comparatively recent creation in the dependencies of the crown.¹ When a legislature is created in a colony, and no special statutory powers are granted to it, it possesses only such powers as are reasonably necessary for the proper exercise of its functions and duties as a local legislature.² Thus, the power of arrest with a view to punish for an alleged contempt committed beyond its own precincts has been held not incident to a colonial legislative chamber.³ And the power to commit a member or others for

¹ *Per cur*, in *Doyle v Falconer*, 4 Moo PC NS 203, 36 LJPC 33, 16 ER 293.

² *Kidley v Carson*, (1842) 4 Moo PC 63, 4 St Tr NS 669, 19 ER 225.

³ *Fenton v Hampton*, (1858) 11 Moo PC 347, 8 St Tr NS 873, 14 JR 727.

contempt committed even in the presence of the house has been held not to be inherent in the very nature of a legislative body, for such a power is neither essential to its existence nor to the proper discharge of its functions. The defining line is to be found in the distinction between the power to punish for a contempt, which is a judicial power and the power to remove any obstruction offered to the deliberations or proper action of a legislative body during its sitting which last power is necessary for self-preservation. If a member of an assembly is guilty of disorderly conduct in the house whilst it is sitting, he may be removed or excluded for a time, or even expelled so that the house may proceed with its deliberations but there is a great difference between such powers and the judicial power of inflicting a penal sentence for the offence. The right to remove for self-security is one thing the right to inflict punishment is another. The former is all that is warranted by the legal maxim, *Quando lex aliquid concedit concedere videtur et illud sine quo res ipsa esse non potest*¹ but the latter is not its legitimate consequence².

It has therefore been thought necessary specially to grant the Union parliament such powers and privileges as the parliament of a great dominion should have. The South Africa Act was careful to provide even temporary powers until parliament was able to draw up its own code. The act declared

- 57 The powers, privileges and immunities of the Senate and of the House of Assembly and of the members and committees of each House shall, subject to the provisions of this Act, be such as are declared by Parliament, and until declared shall be those of the House of Assembly of the Cape of Good Hope and of its members and committees at the establishment of the Union

This provision defines with sufficient accuracy what the powers and privileges of the Union parliament were until the Powers and Privileges of Parliament Act, No 19 of 1911, was passed

¹ 'When the law gives a man anything, it gives him that without which it cannot exist'

² *Doyle v Falconer*, *supra*. A member, therefore, could not be suspended indefinitely or unconditionally. *Barton v Taylor*, (1886) 11 AC 197, 55 LJPC 1, 55 LT 158, 2 TLR 182. For the *lex et consuetudo* see Sir T E May, *The Law Privileges Proceedings and Usages of Parliament* (13th ed. London 1924) pp 70 ff

The Powers and Privileges of Parliament Act is a comprehensive statutory code defining the privileges of parliament and of its members and officers, and contempt of parliament, and it regulates the methods in which contempt of parliament may be punished

The act provides that there shall be freedom of speech and debate in parliament, and such freedom of speech and debate may not be questioned in any court or place outside parliament (2) ¹ Nor may any member of parliament be made liable in civil or criminal proceedings, whether by means of arrest and imprisonment or by the payment of damages, by reason of his introducing any petition, bill, resolution, or motion before parliament (8) These privileges are essential to the very existence of parliament as a free and independent institution Without these privileges there would be none of the open and untrammelled criticism of public affairs which is so necessary to preserve the efficiency and sometimes the integrity, of a government from its highest to its lowest member

In order that members and officers of parliament may if they so desire or are so commanded, give their whole time and attention to their duties in parliament they may not be compelled to serve on any jury, or while in attendance on parliament to attend as a witness in any court outside Capetown nor may a civil case against a member or officer of parliament be set down for trial at a time when parliament is in session, unless the action is heard in Capetown (7)

Parliament, or a committee of parliament, may require to examine books, documents, or witnesses in its investigations into the necessity of passing certain laws, or in its inquiries into any complaints or contempts Parliament is therefore given power to send for persons and documents or papers within the control or possession of such persons (17) An order to attend or to produce documents, is notified to the required person by summons issued under the hand of the clerk of the house by direction of the speaker or president of the senate (18) Witnesses may be required to give evidence under oath or affirmation (19), and if they refuse to answer questions or produce documents, such refusal is a contempt of parliament (10), unless the house

¹ Numbers in parentheses refer to the sections of the Powers and Privileges of Parliament Act, No 19 of 1911

considers such refusal justified on the ground that the question or document is of a private nature and does not concern the subject of inquiry (20) A false answer is punishable under the ordinary provisions of the law relating to perjury (21) Witnesses, however, are given the same protection and privileges as they would ordinarily receive in a court of law if giving evidence there (22) And if a witness before parliament makes a full and faithful disclosure when asked questions he may not be prosecuted or sued in any court on matters revealed by his evidence before parliament, and any court before which such matters are brought shall stay proceedings on the production of the certificate of the speaker, president, or chairman of the committee concerned, stating that the witness was required to answer certain specified questions before parliament and did answer them (23) Any evidence given before parliament may not be given elsewhere by a member or officer or shorthand writer of parliament without the special leave of the house concerned (24)

Contempt of parliament is defined as (i) disobedience to an order requiring the attendance of a person or the production of books, documents, or papers before parliament or a committee, (ii) refusing to answer relevant questions put by parliament or a committee (iii) wilfully failing or refusing to obey any rule, order, or resolution of parliament, (iv) the offering to or acceptance by any member or officer of a bribe to influence him in his conduct as such member or officer, or the offering to or acceptance by any member or officer of any fee, compensation, gift, or reward for or in respect of the promotion of or opposition to any bill, resolution or other matter submitted or intended to be submitted to parliament, (v) the assaulting, obstructing or insulting of any member coming to or going from parliament, or on account of his conduct in parliament or endeavouring to compel any member by force insult or menace to declare himself in favour of or against any proposition or matter depending or expected to be brought before parliament, (vi) the interference in any manner with any officer of parliament while in the execution of his duty (vii) the sending of a threatening letter to a member or challenging a member to fight on account of his conduct in parliament (viii) the creation of any disturbance in parliament or joining in a disturbance in parliament, or in the vicinity of parliament while it is sitting so that the proceedings

of parliament are or are likely to be interrupted, (ix) the tampering with witnesses before parliament, (x) attempting to deceive parliament with false or fabricated documents, (xi) prevaricating before parliament by a witness, or any other misconduct by a witness before parliament, (xii) the publication of any false or scandalous libel on any member touching his conduct as a member, (xiii) voting or taking part in a discussion in parliament by a member when he has a direct pecuniary interest in the matter under discussion, (xiv) any contempt from time to time set forth and declared to be such in any standing order of parliament

These contempts are dealt with by the house against which the contempt is committed. Each house, and both houses sitting jointly possess all such powers and jurisdiction as are necessary for inquiring into, judging, and pronouncing upon contraventions of the Powers and Privileges of Parliament Act and punishing for those contraventions (3). Each house, or the houses sitting jointly, have all the rights and privileges of a court of record, and may summarily inquire into and punish contraventions of the act (4). The courts of law may inquire into contraventions of the act on the summons of an attorney-general on request from parliament, and the minister of justice may recover the fines and penalties for the consolidated revenue fund (33), but any proceedings in the courts, whether civil or criminal, may be stopped by the production of the certificate of the president of the senate or the speaker that the matter in question concerns the privilege of parliament (5). Each house is very jealous of its own privileges, so much so that the officers or members of one house need not and may not attend before the other house without the consent of the house of which they are members or officers (6).

For the purpose of punishing any of the contempts in this act, the president or the speaker is empowered upon a resolution of parliament, to issue warrants for the arrest or imprisonment of persons sentenced to imprisonment or to the payment of fines in default of the payment of such fines (12). Some of the contempts of parliament, however, may be dealt with in a much more stringent manner. If any person creates a disturbance in parliament during its actual sitting, he may be arrested without a warrant on the verbal order of the president or speaker, and may be kept in the custody of an officer of the house until a

warrant can be made out for the imprisonment of such person (14) All persons, police and citizens, have to assist to carry out orders and warrants (15), and doors may be broken open in the execution of warrants (16)

The act contains other provisions making certain conduct punishable, even though such conduct is not defined as a contempt of parliament For example, no member of parliament, and no attorney or parliamentary agent who, in the practice of his profession, is a partner or in the service of any member may accept or receive either directly or indirectly any fee, compensation gift, or reward for or in respect of the promotion of or opposition to any bill resolution or other matter submitted or intended to be submitted to parliament If he does so he may be fined a thousand pounds and ordered to return the fee or reward accepted by him (26) If any person prints copies of laws, reports or proceedings in parliament giving out that they are printed by the government or parliamentary printer or under authority of parliament or of the president or speaker, without that being the case he may be imprisoned for three years with hard labour there being no fine for this offence (28)

Parliament may itself punish every offender by imprisoning him until the end of the session then being held (32), or parliament may by resolution request the attorney-general of any province to conduct a preparatory examination before a proper court with a view to a prosecution before the supreme court, or in the offences which are not contempts of parliament, the offender may be prosecuted in the ordinary course of the administration of justice for an offence against the law of the land in addition to punishment by parliament (32)

Whenever the act is silent as to the powers and privileges of parliament, the powers and privileges of the house of commons of the United Kingdom in force at the time of the promulgation of the South Africa Act 1909, shall apply to the Union parliament and its members (36)

The powers, privileges, and immunities outlined in this chapter are declared to be part of the general and public law of the Union and are to be judicially noticed in every court of the Union (37) Copies of the journals printed by the order of the Union (27) or the parliament of the United Kingdom (38) are admitted as evidence of such journals in all courts without and

proof being given that such copies were printed by the order of parliament

The proceedings of parliament, speeches, votes, and minutes, or fair extracts from them, may be published by any person, even though such publication contains defamatory matter. As long as the publication is bona fide and without malice, the publisher cannot be made to suffer either civilly or criminally

(30)

PART IV
THE PROVINCES

XIII

THE LEGISLATIVE POWERS OF THE PROVINCIAL COUNCILS

THE provincial organs of government consist of an administrator, an executive committee, and a legislative council. For the passing of laws an ordinance must be introduced into and passed by the council, and the assent of the governor-general-in-council obtained. Once an ordinance has been passed and the governor-general-in-council's assent obtained and it has been duly promulgated, it becomes law provided that it is an ordinance which the provincial council had power to pass. In order to ascertain this, it is necessary to examine the nature of the powers of the provincial council. In this chapter we shall examine the powers of the provincial councils generally. In the next chapter we shall examine the powers of the provincial councils in detail, and then we shall be in a position to discuss the various organs of provincial government and their working.

The provincial council is a legislative body created by a statute of the parliament of the United Kingdom, with its powers laid down by that statute or by subsequent legislation of the Union parliament. We propose to deal with the general powers of the provincial councils in a series of propositions.

(1) *The provincial councils are not delegates or agents of the Union parliament but they are original legislative bodies.* The authority of provincial councils is an original authority drawn from the South Africa Act and not delegated by the Union parliament. Two cases are sufficient to illustrate this principle. In the case of *Middelburg Municipality v Gertzen*,¹ Innes C.J. said

'Restricted though the authority of our councils may be, it is an original authority drawn from the South Africa Act, and not delegated by the Union legislature. The constitutional position thus created is, in some respects, unique, but I entertain no doubt that a provincial council is a deliberative legislative body, and that its ordinances duly passed and assented to must be classed under the category of statutes, and not of

¹ [1914] A.D. 544, at p. 551. See also *Johannesburg Consolidated Investment Company Limited v Marshall's Township Syndicate Limited*, [1917] A.D. 562, at p. 666, *Rex v Anderson*, [1930] T.P.D. 443, *Williams and Adendorff v Johannesburg Municipality*, [1915] T.P.D. 106.

mere bye-laws or regulations. They have full force of law within the province, so long as they are not repugnant to an act of the Union parliament. Indeed, if it were otherwise, the council would have no right to repeal or even to amend laws passed prior to Union, and the powers conferred upon it by section 85, extensive though they purport to be, would be largely nugatory.

The other case is that of *Williams and Adendorff v Johannesburg Municipality*¹. There the late Mr Justice Bristowe stated

'The status of provincial councils under the South Africa Act is analogous to that of the Canadian provincial legislatures under the British North America Act, 1867. There are no doubt differences between them of which the most important is that in Canada the provincial legislative powers are throughout exclusive while here they are not. But these differences are of degree rather than of kind. The fact that under the South Africa Act provincial statutes may be overridden by a Union statute does not make the provincial councils *subordinate legislatures* to the Union parliament. Within the scope of their authority their powers are as plenary as those of the Dominion provincial legislatures. They do not exercise a delegated authority and they are only subordinate legislatures in the same sense in which the Union parliament itself is a subordinate legislature.'²

Their status is not analogous to that of municipal institutions whose powers are delegated powers.³ Their ordinances are laws, i.e. statutes, and not the by-laws or regulations of a body having delegated powers. Their powers of legislation are as plenary and as ample within the limits prescribed by the South Africa Act or acts of the Union parliament as the parliament of the United Kingdom or the Union parliament in the plenitude of their powers possess or can bestow. Within their limits of subject and areas they have an independent power and not the power of an agent acting on behalf of a principal.⁴

¹ [1915] T P D 106.

² 'Delegates of' might be better than the words in italics.

³ The following cases were cited: *Hodge v The Queen*, 9 A C 117, *Pouell v Apollo Candle Company*, 10 A C 282, *Phillips v Eyre*, L R 6 Q B 1.

⁴ See *infra*, Chapter XIV (vi) (b), also *Williams and Adendorff's Case*, [1915] T P D, at pp 110, 120, *Liquidators Maritime Bank Canada v Receiver-General New Brunswick*, [1892] A C, at p 442.

⁵ Wossels J A in *Gertzen's Case*, [1914] A D, at p 567, stated 'If the provincial council acts under powers specially delegated to it by virtue of sec 85, its relationship to the Union parliament is analogous to the relationship of principal and agent. I am aware that the relationship is not one of principal and agent, but it seems to me that if we wish to apply principles derived from the civil law to that relationship then the principles relating to delegated authority are the nearest analogous principles which can help us to solve our

(n) *The powers of the provincial councils are positive, defined, precise, and limited*. The powers of provincial councils flow from the words of section 85 of the South Africa Act. Subject to the provisions of this Act and the assent of the governor-general-in-council as hereinafter provided the provincial council may make ordinances in relation to matters coming within the following classes of subjects (that is to say) Then follow eleven heads of power and two potential groups of powers provided for by the following words: "Generally all matters which, in the opinion of the governor-general-in-council, are of a merely local or private nature in the province and all other subjects in respect of which parliament shall by any law delegate¹ the power of making ordinances to the provincial council".

"The provincial council," declared Innes C. J. in *Middelburg Municipality v. Geitzen*,² is a subordinate body to whom, under the South Africa Act, the right to make ordinances (with the consent of the governor-general-in-council) upon certain definite subjects has been entrusted. The 85th section confers direct jurisdiction under a number of enumerated heads, and it provides for an expansion of the list in respect of any subject upon which the Union parliament may in the future delegate authority to legislate. In accordance with that provision certain matters have been scheduled in the Financial Relations Act, 1913, as falling within the legislative ambit of the provincial body if and when the governor-general-in-council may so decide and proclaim.³ So that the power to make ordinances may in regard to different

difficulties . . . for though in this case there is no actual delegation by the Union parliament yet the acts are those of a subordinate legislative body entirely under the control of a superior legislative body whose directions it would have to follow even in those matters entrusted to its care by the South Africa Act. When one legislative body is entirely under the control of another, then if the subordinate legislature acts either by virtue of an original power or by virtue of a delegated power it seems to me that the connection between them can be most conveniently expressed by saying that they stand towards one another in a relationship analogous to that of principal (the authoriser and controller) and agent (the authorised and controlled). It is probably because the South Africa Act conceived some such relationship that the word "delegated" was used in section 85 (namely

¹ See *infra*, p. 308.

- [1914] A.D. 544, at p. 549.

² The Financial Relations Act No. 10 of 1913, section 12 (1), declares: "When and so often as it may be deemed desirable to add to the matters entrusted to any Province by the South Africa Act, 1909, or by this Act, any additional matter may be entrusted to that Province subject to the following provisions, that is to say: (a) If it be a matter specified in the 2nd Schedule to this Act, the Governor-General, with the concurrence of the executive committee of the Province, may determine whether the additional matter shall be so entrusted (b) If it be any other matter, an Act of Parliament, shall, in accordance with

subjects flow along different channels. It may come directly from the South Africa Act or through a special Union statute or (within the limits of the Dominion Relations Act) by way of government proclamation. It is clear, however, that the extent of the legislative authority was intended to be the same in each case. Such authority is in reality always derived from the South Africa Act even where it is the result of machinery which though created by the statute has been extraneously set in motion.

Again in the same judgment² the chief justice proceeds:

'In deciding upon the validity of a provincial ordinance regard must be had to the terms in which the grant of jurisdiction over the relevant subject matter has been expressed. In some instances the language is definite and precise occasionally it may be so stated as merely to prohibit legislation in certain directions. An example of the latter will be found in *Illingworth v. The Queen* where it was held that an authority could lawfully for the regulation of betting implied the absence of authority totally to suppress it.

The powers of the provincial council therefore depend upon the terms of the South Africa Act or on a Union statute giving the council power to legislate on some definite subject matter or for some definite purpose. It does not matter whether parliament has given such power directly to the council, or has enabled some other authority, as e.g. the governor general in council, to make the grant of power at discretion that is to say and when it is thought fit to do so the power in every case flows originally from the South Africa Act.

Every dispute as to the validity of a provincial ordinance is in its essence a dispute which turns on the answer to two questions. In the first place the question must be 'Has the provincial council been given a power which covers entirely the ordinance in dispute?' If the council has been given a precise definite and limited power to legislate on the subject in question and its legislation on that given subject does not go beyond the limit of the power so given a second question arises. Is there any British statute directly applying to South Africa like the

sec. 85 (cui) of the South Africa Act 1909, be necessary. (In the case of (1) above, notice of the matter entrusted shall be given by proclamation in the *Gazette*.)

² Or any other act.

³ At p. 31.

⁴ [1914] A.D. 400.

⁵ See effect of Statute of Westminster 1931 Chapter III (The only British statute that can now be included in the context is the South Africa Act.)

South Africa Act, or any Union statute, promulgated either previous to, or since the ordinance in dispute was passed, and which is still in operation, which is in conflict with that ordinance? If there is no such statute, then the ordinance in dispute is valid.

The first question is dealt with by Mr Justice Wessels in *Gertzen's Case*¹ as follows: 'So long as the provisions in an ordinance are confined to the matters entrusted to it *ab initio* or delegated to it subsequently, and so long as it has received the consent of the governor-general-in-council, it has the force of law, but as soon as it deals, either directly or indirectly, with a matter outside of the subject matters enumerated in section 85, or delegated to it, then it no longer speaks with authority upon that particular point.' The second question, as far as a statute of the United Kingdom is concerned, has been the subject of direct decision only once, namely in *Morgan v Orange Free State Provincial Administration*,² when the judge-president dealt with it shortly in the following words: 'Apart from questions of powers delegated by the Union parliament an ordinance repugnant to the South Africa Act is *ultra vires* of the provincial council.' The South Africa Act is a statute of the United Kingdom.³ The provincial councils derive their powers from section 85 of the South Africa Act, and their legislation is 'subject to the provisions of this Act'. Their legislation, therefore, must not be repugnant to the Colonial Laws Validity Act, 1865.⁴

Legislation by a provincial council is further subject to the provisions of section 86 of the South Africa Act: 'Any ordinance made by a provincial council shall have effect in and for the province as long as and as far only as it is not repugnant to any act of parliament.' The word 'parliament' in this section refers to the parliament of the Union.⁵ From this section 86 there appears a further limitation on the powers of a provincial

¹ [1914] A D, at p. 563.

² [1925] O P D 287, at p. 290.

³ A doubt was expressed in *Bignani v Rustenburg Municipality*, [1927] T P D 615, whether the South Africa Act was an 'Act of Parliament' within the meaning of section 86 of that act.

⁴ See *supra*, Chapter III (8) (iii), for effect of Statute of Westminster, 1931.

⁵ *Gertzen's Case*, [1914] A D 543, at p. 550, *McLoughlin v Turner*, [1921] A D 537, at p. 540, *Abraham v Durban Corporation*, [1926] N P D 356, at p. 359, and see *Bignani's Case*, [1927] T P D 615.

council. Their legislation 'shall have effect in and for the province' only. The South Africa Act, therefore, as well as the common law, lays down a territorial limitation on provincial legislation.¹

(iii) *Within their limits of jurisdiction, the powers of the provincial councils are as plenary, as absolute,² and as discretionary as those of the Union parliament and include all the powers reasonably ancillary to those expressly conferred.* The words used to describe the powers of the Canadian provincial legislatures in *Hodge v The Queen*,³ may be applied to the South African provincial councils. 'Within their limits of subjects and areas the local legislature is supreme.' In *Rex v Anderson*⁴ Mr Justice Greenberg used equally emphatic words. 'Within the limits imposed, the provincial councils may make ordinances as freely and as effectively as the parliament of the Union.' A statement of another kind by the late chief justice adds further emphasis to the above statements.

'Except in two directions there is no limit whatever to the power of the provincial council to legislate fully and effectively upon any subject within its jurisdiction. In the first place the ordinance has to receive the assent of the governor-general in-council and in the second place it must not be repugnant to any act of parliament. These are the only two limitations upon the power of a provincial council. Where therefore an ordinance of a provincial council, on any subject assigned to it, has duly received the assent of the governor-general in-council, and there is no act of the Union parliament repugnant to it, it has when promulgated the same force of law as an act of parliament. While the provincial council, as a legislature, is subordinate to parliament, it exercises its legislative functions not as an agent or delegate of parliament, but exercises original jurisdiction deriving its authority as it does from the South Africa Act which has conferred plenary powers of legislation upon it on the subjects mentioned in section 85. It therefore has power to legislate on these subjects as fully and effectively as parliament itself.'⁵

The powers which are granted must not be so construed as to limit them to the express words used in the grant. 'Whenever

¹ See *supra*, Chapter III (6) (ii).

² The word 'absolute' is used in *Regina v Burah*, 3 A C 889, at p. 906.

³ 9 A C 117, at p. 132, quoted *supra*, in Chapter III (iv).

⁴ [1930] T P D., at p. 444.

⁵ Section 86 of the South Africa Act.

⁶ *Per de Villiers CJ in Bloemfontein Municipality v Boschrand Quarries Limited*, [1930] A D., at p. 378.

any such power is given, there is given with it, by implication, every auxiliary power that is necessary for the proper exercise of the direct power it is intended to execute.¹ Chief Justice Innes declared in *Gertzen's Case* ²

'No department of human activity is entirely insulated. It ramifies into other departments affecting, and being in turn affected by them. And therefore no general subject matter can be fully regulated without incidentally dealing with matters which, strictly speaking lie beyond it. When legislative jurisdiction is conferred upon a provincial council in respect of some special subject matter it follows, in the absence of any indication to the contrary that it is intended to empower the council to deal fully with that matter, in accordance with the conditions and requirements prevailing at the time of legislation. And yet it will be found, generally speaking, impossible to do this without trenching upon other matters not included within the limits of the subject assigned. In the case before us, authority is given to make laws relating to "municipal institutions"'.³ The due exercise of that authority involves something much more than the mere creation of a municipal council. The corporation called into being must have extensive powers to control the actions of individuals in the interests of the community, it must also be placed in the possession of funds to enable it to exercise its functions. That involves interference by way of taxation and otherwise, with the freedom and rights ordinarily enjoyed under the common law, in other words it necessitates an intrusion by the council into matters not specifically assigned to it. But the true nature of the consequent statutory provisions would not be altered nor would they necessarily be held to exceed the assigned authority, because of their incidental operation upon outside matters. This doctrine however sound though it be within due limits, must not be pushed too far, lest the council should trespass upon ground which it never was intended to occupy. The question is where to draw the line, and we shall best answer it, as it seems to me, by bearing in mind the general principle which underlies the position of the council. As already pointed out that body possesses under the South Africa Act legislative authority within its province but in respect of certain defined subjects only. And in deciding whether or not there has, in any particular instance, been an excess of that authority, regard must be had to the maxim *Quando lex atiquid aliud concedit, concedere videtur id sine quo res ipsa esse non potest*. The principle therein embodied is of wide application, and bearing in mind the aim and scope of the South Africa

¹ *Per Isaacs J in Rer v Kidman*, (1915) C L R (Australia) 425, at p 440. For the question of 'ancillary' 'auxiliary', or 'necessarily incidental' powers in Canada, see the summary (with references) in E R Cameron, *The Canadian Constitution and the Judicial Committee* (Toronto, 1915), vol 1, pp 78 ff. Cf A H F Lefroy and W P M Kennedy, *Short Treatise on Canadian Constitutional Law* (Toronto, 1918), pp 93 ff.

² [1914] A D., at p 551.

³ Section 85 (1) of the South Africa Act.

Act, I think we may say that the legislative authority committed to the council must (in the absence of manifest intent to the contrary) be taken to include all powers properly required to effect the purpose for which it was conferred. That would seem to be substantially the view taken by Canadian Courts. In Lefroy's *Federal System of Canada*¹ a dictum of the chief justice of Ontario is quoted as of unquestionable authority to the effect that where a provincial legislature "has the right to legislate on a named subject, it must by necessary implication be held that all powers are given fully to carry out the object of the enactment although subjects such as civil rights and procedure civil or criminal may be apparently interfered with." I take it, however, that no powers would be implied which were not properly or reasonably ancillary to those expressly conferred. And it seems to me therefore that authority given to a provincial council to make ordinances in regard to any specified subject must (in the absence of clear intent to the contrary) be taken to include such legislative powers as are reasonably required to carry out the objects of the enactment, that is to deal fully and effectively with the subject assigned. The limits of such reasonable requirements would, of course, fall to be decided by the court in each particular case.

Once it has been ascertained that provincial legislation falls within the limits of the powers granted to the councils, no court of law can declare such legislation invalid. The fact that the legislation in question is unwise, or unjust or unreasonable or discriminates between classes of the community does not matter by themselves these are not good grounds of objection to the legality of the legislation. This was made quite clear in *Gurtzen's Case*.²

The point is whether this court is justified in further examining the provisions which the council in the exercise of the authority bestowed upon it has enacted with a view to deciding whether they are reasonable or impolitic, or constitute an undue interference with the common law right of the persons affected. Now, if the council were not a legislative body, and if its ordinances stood in the same position in this respect as bye-laws, then the question referred to might be answered in the affirmative. That, however, as I have endeavoured to show, is not the position. And a court of law has in my opinion no jurisdiction to enquire into the reasonableness, the wisdom or the policy of a provincial ordinance or of any of its provisions when once it is clear that the council was acting within its express or implied powers in enacting those provisions. It is for the governor-general-in-council to refuse his assent, or for parliament to repeal or amend unreasonable ordinances. The functions of a court are to decide the limits of authority, not the manner of its exercise. The question for us is not whether the legislation challenged is reasonable, but whether the council had authority, express or implied, to legis-

¹ At p. 183

² [1914] A.D., at p. 556

late on that particular point. If it had, then, as far as the court is concerned, there is an end of the question.¹

It follows from these statements of the full power of the provincial councils within their given sphere of jurisdiction that they have very great power of inflicting injustice and of discriminating unfairly against different sections of the community.

In the case of *Abraham v. Durban Corporation*,² an ordinance of the Natal provincial council enacting that the municipal franchise shall be granted only to those entitled to be registered as parliamentary voters was challenged because its effect was to deprive the Indian community of Natal of the vote in municipal matters. Solomon C.J. stated

'Once granted that a provincial council may at any time alter the qualifications for the municipal franchise which cannot be denied, it follows that it may take away the vote from those who had previously been entitled to it. The mere raising of the property qualification would in some instances have the same effect and it would be hopeless to suggest that this could not be done. Moreover, having full legislative power in relation to municipal institutions it follows that a provincial council can add a new qualification for the vote. The fact that the effect of such a provision is to exclude Indians from the burgess roll and so to discriminate between one race and another, is immaterial. There is no such limit placed in the South Africa Act upon the powers of the provincial councils in making ordinances and as that Act has given them full legislative powers in relation to municipal institutions no court of law can impose such a limit. Nor are we concerned with the propriety or expediency of such legislation. Parliament has the power to repeal or modify the section, if it considers it desirable to do so and the governor general-in-council could have refused his assent to the ordinance with such a provision included. But while the ordinance stands we are bound to recognise it as law.'

Whatever sympathy for the coloured races of South Africa the learned judge may have felt yet he found it impossible to go beyond the words of an ordinance the undoubted effect of which was to disenfranchise large numbers of the Indian community in Natal. All that the judges can do is to 'trust that the

¹ See also *Johannesburg Consolidated Investment Company v. Marshall's Syndicate*, [1917] A.D. 862, 10 p. 671 per Innes C.J. 'The clause may not realise expectations, it may prove to be impolitic as it certainly is harsh. But it is not merely on that account invalid', and at p. 163, per Solomon J.A. 'The problem, however, which confronts us is a very different one, for we are not at all concerned with the reasonableness or otherwise of a provision of this nature but merely with the question whether it falls within the powers of the provincial council.'

² [1927] A.D. 441 at p. 448.

members of local bodies will act conscientiously and will not use their powers for the purpose of discriminating unfairly on grounds of colour or class'¹

(iv) *The powers of the provincial councils are not immutably fixed, but may at any time be repealed or amended by the Union parliament* Section 86 of the South Africa Act provides that provincial legislation shall have force and effect only so long as it is not repugnant to an act of parliament. It follows that as soon as parliament passes an act which has the effect of being repugnant to existing provincial legislation all such legislation becomes void. It follows also that the powers of the provincial councils may in this manner be changed at any time. Any act of parliament upon a particular subject which falls within the powers granted to provincial councils limits all future provincial legislation to the necessity of not being repugnant to that act of the Union parliament. The powers of the provincial councils may thus be limited by the mere passing of a Union statute which does not as much as mention the provincial councils.

'It was probably the intention of the framers of the act', Innes C.J. stated in *Gertzen's Case*,² 'that parliament should be relieved of the labour of dealing with the matters enumerated in section 85, and that the task of making laws in regard to them should devolve in practice upon the council alone. But parliament has not parted with its powers, its authority over the whole domain of legislation remains unimpaired. It may repeal, directly or by implication, any ordinance passed by the council and it may by statute deal with any matter falling within the restricted authority of that body. In this respect the relation between council and parliament is very different from that which exists between the provincial and the Dominion legislatures of Canada. The British North America Act enumerated certain subjects in relation to which the exclusive right of making laws was given to the provincial legislatures. In regard to all other subjects, general powers of legislation were conferred upon the Dominion parliament. The result of the creation of two bodies, dividing almost equally between them the field of legislative activity was an ever present danger of intrusion by the one upon the proper domain of the other. Hence the necessity for a careful and rigid examination in each case in which the validity of a Canadian statute is challenged. Under the South Africa Act no question of legislative competition can arise. The power of parliament is never in doubt.'

(v) *The control of the provinces by the Union* 'A province',

¹ Per Tindall J. in *Lambert v Receiver of Revenue*, [1928] T.P.D., at p. 526. For a discussion of the case of *George v. Pretoria Municipality*, [1918] T.P.D. 501, see *infra*, Chapter XIV § 6 (a).
² [1914] A.D., at p. 550.

wrote Dr Nathan,¹ 'cannot be regarded as a separate entity for administrative or legislative purposes, so far as all its internal affairs are concerned' This statement is true in more senses than one We may leave out of consideration in this place the general administration of the Union, and concern ourselves specifically with the control which is exercised by the Union government and that which is exercised by the Union parliament over the legislation of the provincial councils

(a) *Control by the Union government* This method of control may be either by the refusal of assent to legislation or by the refusal of financial assistance The latter is dealt with in another chapter,² the former is to be found in the South Africa Act

90 When a proposed ordinance has been passed by a provincial council it shall be presented by the administrator to the Governor-General-in-Council for his assent The Governor-General-in-Council shall declare within one month from the presentation to him of the proposed ordinance that he assents thereto, or that he withholds assent, or that he reserves the proposed ordinance for further consideration A proposed ordinance so reserved shall not have any force unless and until within one year from the day on which it was presented to the Governor-General-in-Council, he makes known by proclamation that it has received his assent

This is the section that is referred to when a judge states that matters of good government or of wise policy are not for the courts to consider, but for the governor-general-in-council, who may refuse assent to an ordinance that the government considers to be bad policy or against good government³

Once an ordinance has received the governor-general-in-council's assent, and subject to the ordinance falling within the legislative powers of the provincial council as provided by section 85 of the South Africa Act or any amendment thereof, it becomes law

91 An ordinance assented to by the Governor-General-in-Council and promulgated by the administrator⁴ shall, subject to the provisions of this act, have the force of law within the province The administrator shall cause two fair copies of every such ordinance, one being in the English and the other in the Dutch language (one of which copies shall be signed by the Governor-General), to be enrolled

¹ M Nathan, *South African Commonwealth* (Johannesburg, 1910), p 125

² *Infra*, Chapter XVI

³ *Supra*, section (iii) of this chapter

⁴ This is the only reference in the South Africa Act to promulgation of an ordinance by the administrator

of record in the office of the registrar of the appellate division of the supreme court of South Africa, and such copies shall be conclusive evidence as to the provisions of such ordinance, and, in case of conflict between the two copies thus deposited, that signed by the Governor-General shall prevail

(b) *Control by the Union parliament* We have seen that the provincial councils are entirely subordinate to the Union parliament¹ The Union parliament may at any time, therefore, pass legislation overriding a provincial ordinance which already has the assent of the governor-general-in-council Such an act of parliament has its overriding force by virtue of the following important provision of the South Africa Act

86 Any ordinance made by a provincial council shall have effect in and for the province as long and as far only as it is not repugnant to any act of parliament

Each of these two methods of control is looked upon differently by the provincial councils It should be mentioned in parenthesis that the population of the provinces takes but little interest in the greater part of provincial legislation Yet the central government endeavours, if it can, to keep the goodwill of the provincial councils There may be considerable friction if the governor-general-in-council refuses to give his assent to provincial legislation, for a legislative body always dislikes control by an external authority It is widely assumed that the central government's right of veto is a dead letter, that it should never be exercised as long as the provincial councils keep strictly within the limits of their powers allowed by the strict letter of the law This claim was made by the Transvaal provincial council and was acknowledged on behalf of the existing government by the minister of mines and industries on June 9, 1916 But this attitude is clearly wrong and is fraught with the danger of confusing the whole field of legislation within the provinces, for then the councils may quite easily pass legislation which may be in conflict with the trend of legislation and the fixed policy of successive Union governments The judges have also expressed a view from which it can be inferred that this power of veto is one which should be exercised more frequently by the central government At the same time, and notwithstanding the admission by the central government in 1916, the power of veto

¹ See *supra*, section III of this chapter

is frequently exercised. In the period 1921 to 1923, a Natal ordinance passed in three successive sessions by the Natal council was as frequently and consistently vetoed by the governor-general-in-council.

The control by legislation is not attended with so much resentment as is the control by veto, for the provincial councils feel that this kind of control is applied to each province without distinction. Often it is desired by both the councils and the people. Before 1925 there was so much trouble and discontent caused by the different laws in each province concerning occupational licences that the Union government in that year passed a consolidating act which completely eased the situation. This method of control has the great advantage of unifying the laws of the country.¹

¹ For 'resentment' and political difficulties raised in Canada over the disallowance there of provincial statutes, see W. P. M. Kennedy in *Journal of Comparative Legislation*, ser. 3, vol. vi, pp. 81 ff.

XIV

AN EXAMINATION OF PROVINCIAL POWERS IN DETAIL

THE powers of the provincial councils are to be found in section 85 of the South Africa Act under thirteen heads 'Subject to the provisions of this act and the assent of the governor-general-in-council as hereafter provided, the provincial council may make ordinances in relation to matters coming with the following classes of subjects (that is to say) ' Then follow certain positive powers We shall discuss each of these powers under the heads given them in the South Africa Act and in that order, referring, as we proceed, to the amendments which have been made since the South Africa Act was passed Under the first head there have been a great number of amendments, and the law is somewhat confused on the topic of taxation We have, however, endeavoured to clarify the subject by consolidating the various amendments in statute form In order to appreciate the reason for the amendments and their nature, it is important to bear in mind some of the principles we have already discussed It will be remembered that we stated that the powers of the provincial councils were positive powers The South Africa Act did not define the powers of the provincial councils by a process of exclusion, that is to say, by stating what powers the provincial councils did not possess Section 85 contains a positive statement of the powers which the provincial councils do possess The powers which were thus given were wide powers. In areas so large as the provinces, wide powers of local government were essential At the same time, however, in order to prevent any abuse of those wide powers, a paramount or supreme power over the whole of the Union, over every institution, and over the whole field of local legislation, was preserved to the Union parliament It must be remembered that though a province has a wide and full legislative power, all its legislation may be overridden or repealed by an act of the Union parliament dealing with matters with which a province has dealt There are two masters over the same area, the Union parliament and the provincial council, and it has been

found that in such circumstances the stronger master always asserts its power sooner or later. From the first it was seen that the powers of the provincial council were not likely to be extended, and ever since union the whole tendency has been strongly in favour of centralization. The evolution of the provincial system has been in the direction of extending the authority of the provincial councils in matters of purely local concern, while limiting more strictly the scope of their activities in directions bordering on wider national issues. In no sphere of government has this tendency been more apparent than in the sphere of finance and taxation. Without bearing this in mind, it is very difficult to follow the reasons for the multifarious amendments which have been made in the taxing and financial powers of the provincial councils.

1 Taxing Powers

Direct taxation within the province in order to raise a revenue for provincial purposes—Sec 85 (1) S A Act

The first subsection of section 85 gives a very wide power indeed—the power of direct taxation. This power is not limited as to its subject. Everything and everybody may be taxed. Nor is the power limited in practice in regard to its purpose, for the last phrase in the subsection has little if any legal or practical effect. The only limitation is that of area, which, it has been seen in an earlier chapter¹ would have been effective under the common law had it not been made so by statute.

It would serve no good purpose to discuss the meaning of the words 'direct taxation' apart from discussing the state of the law as it is at present. The meaning of these words as interpreted judicially will have to be considered when we come to discuss the effect of the various amendments of this subsection. Nor will any good purpose be served by setting out in detail all the amendments which have been passed. It will be sufficient if we are able to set out clearly and without confusion the effect of all the acts which have amended and re-amended section 85 (1) of the South Africa Act, using the exact words of the amending statutes, so as to present for the first time a complete

¹ See *supra*, Chapter XIII (iii) and also Chapter III 6 (ii)

statutory form of all those bewildering amendments 'What indeed are all the repealing, explaining, and amending laws which fill and disgrace our voluminous codes but so many monuments of deficient wisdom, so many impeachments exhibited by each succeeding against each preceding session?'¹

As a result of the labours of the first Financial Relations Commission appointed under section 118 of the South Africa Act, the Financial Relations Act of 1913 was passed. This act forms the basis of all the financial and taxing powers of the provincial council, and on it are based all the amendments which have been made in subsequent acts.

The present existing statute law governing the taxing powers of the provincial council and amending section 85 (1) of the South Africa Act is

FINANCIAL RELATIONS ACT

(No 10 OF 1913)

Sec 11
as amended
by sec 9
of the
Provincial
Subsidies
and
Taxation
Powers
(Amendment)
Act (No 46
of 1925)

11 (2) Unless and until Parliament by law otherwise provides, a provincial council shall have power to raise revenue by way of taxation through the sources specified in the first schedule² to this Act and through no other source whatever anything to the contrary notwithstanding in sections eighty-one and eighty-five of the South Africa Act, 1909

(3) The said revenues shall, for the purpose of those sections of the South Africa Act, 1909, as hereby modified, be deemed to be matters in respect of which a provincial council is competent to make ordinances, and any law which the provincial council was competent to make and which is in force in any province on the first day of April, 1925, providing for the raising or management of any such revenues shall be a law which it shall be competent for the provincial council of that province by ordinance to repeal or amend so far as it relates to such a source of revenue

as amended
by sec 1
of the
Provincial
Powers
(Amendment)
Act (No 30
of 1927)

(4) Any tax imposed by a province under an ordinance as in subsection (3) described shall be limited to the extent hereunder set forth—

(a) (1) in the case of a tax on persons other than companies, the tax shall be levied only on persons who have been resident within the province for not less than ninety consecutive days during the period of twelve months ending upon the date

¹ *The Federalist*, No 62

² See p 277 *infra*

as amended
by sec. 1
of the
Provincial
Powers
(Amendment)
Act (No. 39
of 1927)

- upon which the tax becomes due in any year, and shall not exceed five pounds in respect of any one person,
- (ii) in the case of a tax upon the incomes of persons other than companies, the tax shall be levied only on persons who have been resident within the province for not less than ninety consecutive days during the period of twelve months ending upon the date upon which the tax becomes due in any year and shall not exceed twenty per centum, or if any such person is unmarried, thirty per centum, of the amount payable by any such person in respect of normal and super taxes under the Income Tax Acts of the Union in respect of the year of assessment which forms the basis of the levy, and such tax may be imposed in addition to any tax on persons which the province may impose,
 - (iii) no tax upon persons or the income of persons shall be levied by any province upon any person who has become liable to a tax upon persons or the income of persons in respect of the same year under the law of another province by reason of residence within that province for a prior period of not less than ninety consecutive days,
 - (iv) for the purpose of any taxation levied by a province in accordance with the provisions of this subsection, a period of residence by any taxpayer in any province shall be deemed to have been for a number of consecutive days notwithstanding the temporary absence of such taxpayer from that province during any portion of that period and to have been continuous during that period,
 - (b) in the case of a tax in respect of any company, the tax shall not exceed sixpence for each pound of such portion of its taxable income for the year of assessment which forms the basis of the levy as the Commissioner for Inland Revenue or any officer acting on his behalf determines to have been derived from sources within the province. Provided that a minimum tax not exceeding five pounds may be imposed in respect of any such company. Provided further that a non-mutual life insurance company shall not be taxed on any portion of its taxable income which is credited to or distributed amongst its policy holders by way of bonus or reduction of premiums

PROVINCIAL TAXATION POWERS ACT, 1933

Provincial
Taxation
Powers Act
(No 27 of
1933)

1 It is hereby declared, in so far as it may be necessary, that the power conferred on provincial councils by the Financial Relations Act, 1913, as amended from time to time, to impose a tax on incomes of persons other than companies includes, subject to the limits imposed by the said Act, as so amended, the power to impose a tax based on the super tax payable by any person under any law relating to income tax, notwithstanding that such super tax may be levied in whole or in part upon—

(a) amounts which do not fall within the definition of 'income' contained in section seven of the Income Tax Act, 1925, or

(b) dividends distributed by companies deriving income from mining operations

2 The ordinances mentioned in the Schedule to this Act shall, as far as may be necessary, be deemed to have been enacted under the power conferred by the Financial Relations Act, 1913, as amended from time to time and as interpreted by section one of this Act. Provided that the liability of any person to pay any tax imposed by any of the said ordinances or by any other ordinance passed by any provincial council in respect of any period prior to the first day of July, 1932, shall be adjudicated upon as if this Act had not been passed

SCHEDULE

<i>Province</i>	<i>Number of Ordinance</i>
Cape of Good Hope	Ordinance No 31 of 1932, and any amendment thereof
Natal	Ordinance No. 17 of 1928, as amended by Ordinance No 17 of 1931
Transvaal	Ordinance No 10 of 1928 as amended by Ordinance No 20 of 1930
Orange Free State	Ordinance No 4 of 1928

FINANCIAL RELATIONS ACTS FURTHER EXTENSION ACT

(No 5 of 1921)

3 (1) Anything to the contrary notwithstanding in the South Africa Act, 1909, or in Act No 10 of 1913, a provincial council shall not have power to make an ordinance which imposes direct taxation in respect of the product of, or the income or profits derived from any

EXAMINATION OF PROVINCIAL POWERS IN DETAIL 277

mining operations or in respect of rights in or to mines or minerals,

as amended
by sec 9
of the
Financial
Relations
Further
Extension
Act (No 5
of 1922)

(2) Anything to the contrary notwithstanding in the South Africa Act, 1909, or in the principal Act (*Act No 10 of 1913*), a provincial council shall not have the power to make an ordinance imposing direct taxation upon the persons, lands, habitations or incomes of natives, and whenever any ordinance of a provincial council imposes direct taxation upon persons, lands, habitations or incomes, natives and their lands, habitations and incomes shall be exempt from the provisions thereof

FIRST SCHEDULE¹

(This Schedule appears at the end of Act No 46 of 1925 and is printed as amended by section 7 of Act No 31 of 1926)

SOURCES AND MATTERS FROM WHICH A PROVINCIAL COUNCIL MAY RAISE REVENUE TOGETHER WITH THE POWER TO LEGISLATE IN RESPECT THEREOF

- 1 Hospital fees and fees received in respect of such education as under section *eighty five* (iii) of the South Africa Act read with section 11 of Act No 5 of 1922 and any amendment thereof, is within the jurisdiction of a provincial council
- 2 Licences required for dogs outside urban areas, licences to take, catch or kill game, fish or other animals, licences to sell game, licences to pick or sell wild flowers
- 3 Licences to own or drive any motor vehicle or other vehicle propelled by mechanical power
- 4 Wheel tax or tax on vehicles including motor and other mechanical vehicles
- 5 Amusement or entertainment tax
- 6 Auction dues
- 7 Licensing of totalisators and the imposition on the licensees of a duty in respect of the takings thereof, and licences, taxes and fees in connexion with horse and other racing, betting and wagering, and the dissemination of information as to betting and wagering
- 8 Subject to the provisions of subsection (2) of section 3 of Act No 5 of 1921 as amended by section 9 of Act No 5 of 1922—(a) a tax on adult persons other than companies, which may be graduated according to income or otherwise but which may not exceed five pounds in respect of any person, (b) a tax on the income of persons other than companies, subject to the limits specified in subsection (4) of section 11 of this Act
- 9 A tax on companies other than mutual life insurance companies subject to the limits specified in subsection (4) of section 11 of this Act and any amendment thereof and subject also to the provisions of subsection (1) of section 3 of Act No 5 of 1921

¹ See section 11 (2) on p 274 *supra*

- 10 Tax on the ownership of immovable property but not on transfer or sales thereof otherwise than in the form of auction dues under paragraph (6) of this Schedule
- 11 Licences in respect of the importation for sale within the province of goods from beyond the borders of the Union subject to a maximum licence duty of £310 in respect of any one importer in the province concerned
- 12 Receipts of a miscellaneous nature connected with matters entrusted to a province

It has been extraordinarily difficult to understand the exact effect of the mass of statutory enactment which thus 'disgraces our voluminous codes'. The courts have on more than one occasion expressed their difficulty in interpreting the meaning of these Financial Relations Acts. 'I am not at all sure' said Mr Justice Bristowe, 'that I understand the exact meaning of this section'.¹ Mr Justice Gregorowski said, 'The Financial Relations Act is rather difficult to construe'.² Acting Chief Justice Solomon said, 'The drafting of this portion of the Act may not be all that could be desired'.³ These difficulties of construction make one hesitate to say whether a subsequent act repeals, amends, or even affects a prior act. But there can be no doubt that section 85 (1) of the South Africa Act has been materially amended, whether the effect of subsequent legislation has repealed that subsection is still doubtful, at least it can be said that the subsection is for all practical purposes of no constructional utility. The problem is worth examining.

The effect of the amending acts is to narrow down the very wide powers of taxation originally given to the provincial councils. Instead of the wide power of direct taxation in an unlimited field, provincial councils have been given certain positive powers of taxation in certain defined matters. The field is very much smaller than it was. Let us call this first method of granting powers of taxation the method of positive definition. Together with this method there is a second method superimposed upon the first, which we may call the method of exclusion. In other words, though the provinces have been given a taxing power in relation to certain definite classes of

¹ Section 11 of Act 10 of 1913, *New Modderfontein Gold Mining Company Limited v Transvaal Provincial Administration*, [1919] A D 367, at p 372

² *Ibid*, at p 373

³ *Ibid*, at p 384 referring to sections 11-15

subjects which they may tax, yet within those classes there are certain sources of revenue which are closed to the provinces

By positive definition are included (i) sources specified in the First Schedule of Act No 10 of 1913. These sources are hospital and certain education fees, a limited number of licences, leaving the real power of taxation by means of licensing to the Union parliament,¹ taxes on vehicles, amusements, and auctions, fixed property rates, taxes on companies, an importers' tax, and a personal tax on persons. This personal tax is a survival of a power of taxation granted by the South Africa Act, limited by the Financial Relations Act, 1913, and further limited by the Act of 1927, (ii) the sources already taxed prior to the first day of April, 1925, and on that day still in force. These include the personal income tax on persons resident in the province and on companies. Both these taxes are mentioned in the First Schedule to Act No 10 of 1913, but both are limited in their amount by the Act of 1927.

By the method of exclusion the provinces were, by the Act of 1921, deprived of any right to tax mines and mining profits, and by the Act of 1922 they were deprived of their taxing power over natives or over their lands, habitations, or incomes. In 1921 the provinces were given the power to tax natives provided that such a tax fell with equal incidence upon persons other than natives, but this power was taken away in the following year.

It is to be noted that none of the amending acts uses the words 'direct taxation' which are used in section 85 of the South Africa Act. The word 'taxation' is used in the subsequent Acts, and this expression is very much wider than the previous expression. Taxation means the enforcement of a contribution of a sum of money from persons within the enforcing authority's jurisdiction for the purposes of government.² The word 'taxation',

¹ See Licences Consolidation Act, 1925.

² D. Kerr, *Law of the Australian Constitution* (Sydney, 1925), p. 269. 'Quick and Garran define taxation as being any exaction of money or revenue by the authority of a State, from its subjects or citizens and others within its jurisdiction, for the purpose of defraying the cost of government, promoting the common welfare and defending it from aggression from without. Prof. Moore defines a tax as "a compulsory contribution imposed upon a subject to meet the services of Government", whilst the High Court's definition of taxation is "The primary meaning of taxation is raising money for the purposes of government by means of contributions from individual persons"'—(*The King v. Barger*, (1908) 6 C L R 41, at p. 48)'

therefore, may include both direct and indirect taxation. The most familiar division of taxation to English readers is that given by J. S. Mill: 'Taxes are either direct or indirect. A direct tax is one which is demanded from the very persons who, it is intended or desired, should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another'.¹ The latter part of this definition is unsatisfactory. 'The difference', says Bastable, 'is here made to turn on the mode of incidence, a matter often very difficult to determine, and changing with the special circumstances of each case. Whatever be its economical importance, it is evidently useless for administrative purposes'.² But it is the only definition that has been accepted in the South African courts³ and has the merit of being easily applicable in the practical legal issues raised. There is, therefore, a great distinction between direct taxation and indirect taxation, and it follows, also, that there is a distinction between 'direct taxation' and taxation generally. The latter term includes both the former. When the South Africa Act used the words 'direct taxation' it used a narrower term than 'taxation'. The latter includes both direct and 'indirect taxation'. The amending legislation is therefore inconsistent with section 85 (1) of the South Africa Act. Further, the Financial Relations Acts as amended by the Act of 1925 purport to deal fully and effectively with provincial powers of taxation.⁴ In view of the effect of the amending legislation it can truly be said that the amending acts repeal section 85 (1) of the South Africa Act. In that subsection the word *direct* no longer applies because the First Schedule contains sources of revenue which are both direct and indirect. The phrase 'within the Province' would be included by common law implication.⁵ And the phrase 'in order to raise a revenue for provincial purposes' must be implied in all provincial taxation because that

¹ *Principles of Political Economy*, Book V, Chapter 2.

² *Public Finance*, Book III, Chapter 1.

³ *De Waal, N O v North Bay Canning Company*, [1921] A D 521, *McLoughlin v Turner*, [1921] A D 537, *Clarke and Company v de Waal*, [1922] A D 264, *Natal Provincial Administration v Cartledge*, [1925] A D 62, *Commissioners of Inland Revenue v Royal Exchange Assurance Company*, [1925] A D 222.

⁴ For repeal by inconsistent new legislation, see *supra*, Chapter III (7), and Chapter XIII (1) (b).

⁵ See *supra*, Chapter III 6 (1).

can be the only purpose of provincial taxation. Nothing, therefore, remains of subsection (1) of section 85 of the South Africa Act. But if it is considered that only the word 'direct' is repealed, the subsection remains of force in a narrowed and limited form which has no meaning when all the amending legislation is read with it.¹

2. Borrowing Powers

The borrowing of money on the sole credit of the province with the consent of the governor-general-in-council and in accordance with regulations to be framed by parliament—Sec 85 (u) S A Act

No regulations have ever been made under this subsection, but the matter has been dealt with from time to time in acts of parliament. The state of the law is as follows. The provinces are required to classify their expenditure in their annual budgets as normal or recurrent expenditure, and capital or non-recurrent expenditure.² Normal or recurrent expenditure is deemed to comprise the cost of general administration in the province, interest and sinking-fund payments, the cost of construction and maintenance of roads, though certain road construction costs come under capital expenditure when so authorized by the treasury. Capital or non-recurrent expenditure is deemed to comprise expenditure (whether directly by the province or by loan to local bodies) upon the erection, construction, acquisition, improvement, or extension of any building, bridge, or work of a permanent nature, provided that such expenditure exceeds the sum of £500 on any one building, bridge, or other public work or undertaking. The moneys which may from time to time be required by any province for the purpose of meeting any capital or non-recurrent expenditure shall be advanced to the province by the treasury on loan in such amounts as parliament

¹ As the British North America Act, 1867, section 92 (2), defines the taxing powers of the Canadian provinces in the same words as section 85 (1) of the South Africa Act defines the taxing powers of the South African provinces, it is interesting to study the effect of Mill's definition of 'direct taxation', of the words 'within the province' in the multitude of Canadian cases. See W. P. M. Kennedy, *The Law of the Taxing Power in Canada* (Toronto 1931).

² Section 6 of Act 10 of 1913, as amended by section 5 of Act 3 of 1922 and section 1 of Act 21 of 1924.

by annual appropriation may authorize ¹ Such advances shall bear interest at a rate not exceeding 5 per cent per annum and shall be repaid by the province to the treasury in equal half-yearly instalments so calculated that the whole advance and the interest thereon will be repaid over a period that is not less than fifteen years and not more than forty years, the length of time being determined by the treasury according to the nature of the work for which such advance is to be made. Monies may be advanced to the provinces on the same terms for the purpose of providing capital for provincial requisites and provincial stores and materials for the public services and works of the provinces, though these amounts are limited to five hundred pounds' worth of stores and requisites of a particular nature. Further, the treasury is authorized within its discretion to make good temporary annual provincial deficits by means of loans repayable as the treasury pleases. The administrators may incur overdrafts with the banks for a period not exceeding a year to meet these deficits or in order to carry on the provincial services until the next provincial budget. If the province cannot repay the overdrafts the treasury must inevitably step in and make good the deficiency by means of the above-mentioned loans. It seems superfluous to remark that the treasury is always being called upon for assistance, for the provinces are in a state approaching bankruptcy ² It is a good thing for the credit of the Union overseas that the law has prevented the provinces from going elsewhere than to the treasury for their loans. From the first, the financial system of the provinces has been in doubt. Municipalities may invite the public to subscribe loans, but the provinces were too much of an experiment even to permit that.

The Financial System of the Provinces

The two sections of the South Africa Act which deal directly with provincial finances are

- 89 A provincial revenue fund shall be formed in every province, into which shall be paid all revenues raised by or accruing to the provincial council and all moneys paid over by the Governor-General-in-Council to the provincial council. Such fund shall be

¹ Section 9 of Act 10 of 1913, as amended by section 5 of Act 46 of 1925

² See *infra*, Chapter XVI

appropriated by the provincial council by ordinance for the purposes of the provincial administration generally or, in the case of moneys paid over by the Governor-General-in-Council for particular purposes then for such purposes but no such ordinance shall be passed by the provincial council unless the administrator shall have first recommended to the council to make provision for the specific service for which the appropriation is to be made. No money shall be issued from the provincial revenue fund except in accordance with such appropriation and under warrant signed by the administrator. Provided that until after the first meeting of the provincial council the administrator may expend such moneys as may be necessary for the services of the province.

92 (1) In each province there shall be an auditor of accounts to be appointed by the Governor-General-in-Council.

(2) No such auditor shall be removed from office except by the Governor-General-in-Council for cause assigned, which shall be communicated by message to both Houses of Parliament within one week after the removal if Parliament be then sitting, and, if Parliament be not sitting then within one week after the commencement of the next ensuing session.

(3) Each such auditor shall receive out of the Consolidated Revenue Fund such salary as the Governor-General-in-Council, with the approval of Parliament shall determine.

(4) Each such auditor shall examine and audit the accounts of the province to which he is assigned subject to such regulations and orders as may be framed by the Governor-General-in-Council and approved by Parliament, and no warrant signed by the administrators authorizing the issuing of money shall have effect unless countersigned by such auditor.

The salient points about these provisions are that into the provincial revenue fund must be paid the revenues raised by or accruing to the province as well as the revenues paid over by the governor-general-in-council to the province, and that none of this money may be spent without the administrator first recommending to the council to make provision by appropriation ordinance. Further the provincial auditors are appointed and removable by the Union government, and to that extent the Union government has a certain measure of control over provincial finances.

Section 118 of the South Africa Act made provision for a commission of inquiry into the future financial relations between the provinces and the Union. This commission reported in 1913, and as a result of its report the Financial Relations Act, No. 10 of 1913 was passed. This Act was originally temporary in its

nature, a kind of financial experiment, and it was extended and modified from time to time by Acts No 9 of 1917, No 6 of 1920, No 5 of 1921, No 5 of 1922, No 21 of 1924, No 46 of 1925, No 31 of 1926, and No 39 of 1927, and a great portion of it is now permanent (as far as legislation affecting the provinces can be permanent) and forms the basis of the financial system of the provinces. The relevant statutory provision relating to the financial system of the provinces is to be found in the following section of the Financial Relations Act, 1913

- 4 The funds required by a province to meet its normal or recurrent expenditure (as hereinafter defined) upon matters entrusted to it shall be derived from—
- (a) moneys appropriated by Parliament by way of subsidy or additional subsidy to the province as in the next succeeding section provided,
 - (b) the sources of revenue transferred under section *eleven* and the revenues assigned under section *thirteen* to the province,
 - (c) such other revenues as may be raised by the province under the authority of law,
- and a province shall not apply its funds to any purposes other than the matters entrusted to it

It appears from this enactment that there are four sources of provincial revenues, namely, subsidies from the Union government, revenues transferred by the Union government, revenues assigned by the Union government, and revenues obtained by ordinary provincial taxation

Subsidies Under the Financial Relations Acts the Union government, from April 1, 1913, until March 31, 1925, contributed an annual subsidy amounting, broadly speaking, to one-half of the ordinary expenditure of a province for the year though the grant was curtailed from 1921. The two smaller provinces received an additional grant of £100,000 a year. Under the Provincial Subsidies and Taxation Powers (Amendment) Act of 1925 the subsidy from the Union government was based on the number of pupils and students in average attendance at educational institutions within the province

Transferred Revenues This phrase has its origin in the heading of Chapter II of the Financial Relations Act of 1913, 'Transfer of Revenue and Functions from the Union to the Provinces'. Up to 1913 the provinces had no powers of taxation and all their financial requirements were met by the Union government

under section 118 of the South Africa Act. When the Act of 1913 was passed certain sources of revenue were given to the provinces, *i.e.* these sources were transferred to the provinces. When we examine section 11 (1) of the Financial Relations Act, 1913, as originally passed we shall see that these transferred revenues were nothing but certain powers of taxation granted to the provinces, and could be classified under section 4 (c) of the Act quoted above as 'revenues raised by the province under the authority of law'. The original section 11 (1) of the 1913 Act read as follows:

'The revenues derived from the fees, dues, licences and other sources, specified in the First Schedule to this Act which, immediately prior to the commencement thereof, were raised or received by the Governor-General and, in accordance with the South Africa Act, 1909, were paid into the Consolidated Revenue Fund shall, from and after such commencement, be raised and received by the province wherein any such revenues arise and shall be paid into the provincial revenue fund.'

The substituted section enacted by the Act of 1925 states that 'a provincial council shall have power to raise revenue by way of taxation through the sources specified in the First Schedule to this Act and through no other source whatever'.¹ It is clear therefore that this source of revenue is and never has been other than the revenue collected by the provinces themselves as taxes 'under the authority of law'. It means that a source of revenue previously exploited by the Union has now been transferred to the provinces. 'Transferred revenue' does not mean revenues levied and collected by the Union treasury and then paid over or transferred to the provinces—a meaning often and erroneously given to these revenues even in official government publications.² The proper term for such latter revenues is *assigned revenues*, a topic dealt with hereunder.

Assigned Revenues. It is convenient to quote portions of the relevant statutes relating to assigned revenues to show their exact nature.

Act No. 10 of 1913 section 13 (1) The revenues derived in any province—

- (a) under any law specified in the Third Schedule to this Act in respect of transfers of or successions to immovable property or fixed property or under any amendment of such law,

¹ For the wording of the whole section, see *supra*, this chapter, section 1.

² See, e.g., *Official Year Book of the Union*, Chapter XXII (c) (2).

- (b) under any law governing licences for the sale or supply of in intoxicating liquor, which, immediately prior to the commencement of this Act, were raised or received by the Governor General and, in accordance with the South Africa Act, 1909, were paid into the Consolidated Revenue Fund, shall continue to be raised and received by the Governor-General, but the proceeds of such revenues shall, instead of being paid into the Consolidated Revenue Fund, be paid over by the Treasury (without deduction for the cost of collection) to the province from which such proceeds have been raised or received, in such manner as the Treasury may approve
- (2) The system in vogue at the commencement of this Act of collecting revenue derived from the sources mentioned in subsection (1) shall continue until lawfully varied by the Treasury
- (3) Nothing in this section contained shall be construed as conferring upon a provincial council the power to make ordinances in regard to the matters mentioned in subsection (1) or as depriving Parliament of the right to repeal or amend any law affecting such matters
- Act No 46 of 1925, section 11 (2) On and after the first day of January, 1926, the licence duties payable in respect of licences issued for the sale of intoxicating liquors in any borough or township in the province of Natal shall be payable to the Receiver of Revenue for the district in which the licence is issued for the benefit of the Provincial Revenue Fund of Natal¹
- 12 (1) The proceeds of any licence duties in respect of any trade, profession, or occupation imposed for the benefit of the provinces under the Licences Consolidation Act (No 32 of) 1925 shall be paid over to the province in which the trade, profession, or occupation licence is carried on

Revenues Derived from Ordinary Taxation This subject has been dealt with in section (1) of this chapter

Summary of Provincial Sources of Revenue

(1) The annual subsidy to the provinces is based on the number of European pupils in average attendance at primary and secondary schools, from December 1, 1931, the grants are £16 7s 6d per head in respect of the first 30,000 pupils in each province and £14 per head in respect of pupils in excess of 30,000. There are other grants in respect of various other educational activities,

¹ Until 1913 liquor licence revenues in Natal were paid to local authorities, in the other provinces liquor licence revenues were received by the Union government, and after 1913 were paid over to the provincial treasuries. Now all liquor licence revenue goes to the provincial councils, and by Act No 45 of 1931, section 1, the provinces have power to increase or reduce the amount of liquor licences

such as the training of teachers, native education, &c. A special additional subsidy of £75 000 each is given to Natal and the Orange Free State.

(2) The general power of the provinces granted under section 85 of the South Africa Act to impose direct taxation has been withdrawn,¹ and the sources from which alone they may raise revenue by means of taxation are set out under twelve headings in a schedule called the First Schedule to the Provincial Subsidies and Taxation Powers Amendment Act, No. 46 of 1925, as amended.²

(3) The power to fix the licence fees in respect of trades, professions, and occupations has been taken over by the Union under the Licences Consolidation Act, No. 32 of 1925, but the revenues derived from the licences specified in the Second Schedule to that act have been assigned to the provinces in which they are collected. Other assigned revenues, i.e. revenues levied and collected by the Union government and paid over to the provinces, are transfer duties, liquor licence revenues, and Native pass fees in the Transvaal, under Acts No. 21 of 1923 and No. 41 of 1925.

These three sources of revenue are those termed revenues by way of subsidy, revenues from taxation, and assigned revenues. Transferred revenues, as stated above, really mean revenue raised by taxation by the provinces themselves from sources which were at one time exploited by the Union government but which were, in 1913 or 1925, transferred to the provinces for exploitation.

3 Education

Education, other than higher education for a period of five years and thereafter until parliament otherwise provides—Sec. 85 (iii) S.A. Act

The expression 'higher education' has been defined to mean '*inter alia*—(a) education provided by universities and university colleges incorporated by law, (b) education provided by the South African Native College, (c) education provided by such technical institutions (including schools of art, music, commerce, technology, agriculture, mining, and domestic science) as the

¹ See this chapter, section 1 *supra*.

² For this schedule, see this chapter, section 1 *supra*.

minister of education may declare to be places of higher education (d) such part of the education provided by other technical institutions as the minister of education may, after consultation with the provincial administration concerned, declare to be higher education,¹ any other education which with the consent of the provincial administration concerned the minister of education may declare to be higher education'.² All other education is under the control of the provincial councils.

Each of the four provinces has its own system and its own policy of education. Thus four systems of state or state-aided education exist, which though akin in some respects are entirely dissimilar in others. There are of course many independent or private educational institutions in the Union. The central direction of public education in each province is exercised by the provincial education department, subject to the final control of the provincial councils exercising the power granted them under this subsection of section 85 of the South Africa Act. The permanent heads of the provincial education departments are, in the Cape the superintendent-general of education, in Natal the superintendent of education, in the Transvaal and the Orange Free State the director of education. Each province has a staff adapted to its own requirements and entirely independent of one another. Native education is under the control of denominational bodies and is dealt with elsewhere.³

In the *Cape of Good Hope* the majority of schools for European pupils are controlled by one hundred and ten school boards with statutory powers. The various acts and ordinances dealing with education in this province have been co-ordinated in the Consolidated Education Ordinance, 1921. Schools are classified as training colleges, training schools, high schools, secondary schools, primary schools, farm schools, and special schools. In nearly all the schools, the exceptions being certain high schools, the payment of school fees up to and including standard VI was abolished in 1920.

In *Natal* the department maintains primary schools and also has power to make grants in aid to private schools. It has

¹ Section 11 of Act No. 5 of 1921.

² Section 14 of Act No. 46 of 1925.

³ A certain amount of state aid is granted to native schools. There is hardly any higher native education. For further reference to the topic of native education, see *infra*, Chapter XXVII (1).

direct management of certain secondary schools, and the power to make grants to other secondary schools which agree to maintain the same standard of education as the government schools. In some districts advisory school committees exist, but there is no system of local administration by school boards as in the Cape. The administration of education is centralized in the education department, local power being limited much more than in the other provinces. Most critics consider the Natal system of education one of the best in the world, its administration *per capita* certainly costing less than the cost *per capita* in the other provinces—effects, it is maintained, of centralization. Primary education is entirely free in this province. The government schools are divided into primary, intermediate, and secondary schools. After a pupil has passed through the primary schools, he has to pay for all his education unless he has obtained a bursary.

In the *Transvaal* the establishment and maintenance of schools for European children form the bulk of the education department's work, but it also has power to establish schools for non-European pupils. Grants in aid are made to private farm schools and various other institutions which do not form part of the ordinary school system. The province is divided into thirty-two school districts, for each of which there is an advisory body called a school board consisting partly of elected, partly of nominated members. Primary and secondary school education is entirely free, the cost being met from the general revenue of the province.

In the *Orange Free State* the department has power to establish and maintain various types of public schools and allied institutions, as well as to make grants in aid to private schools which comply with certain conditions. The province is divided into sixty-one school districts for each of which there is a school board consisting of elected members having a certain measure of supervision. Education in this province is also free, as in the *Transvaal*, but certain schools may with the approval of the department, charge tuition fees.

Religious instruction consists of bible classes subject to conscientious objection, no sectarian or doctrinal teaching is allowed, except in the Cape province under certain conditions.

Provincial revenues are augmented by annual subsidies paid

by the Union government. These subsidies are based on the average attendance of European pupils at primary and secondary schools.

4. Agriculture

Agriculture to the extent and subject to the conditions to be defined by parliament —Sec 85 (w) S A Act

There has been no legislation granting any province power in agricultural matters.¹ Agriculture is considered a national industry best dealt with by the central government of the Union.

5. Hospitals and Charitable Institutions

The establishment, maintenance, and management of hospitals and charitable institutions —Sec 85 (v) S A Act

Charitable work in the Union is assisted very greatly by the grants in aid made by the provincial administrations to such institutions as orphanages, children's homes, homes for the aged or infirm, rescue homes, and certain sanatoria, maternity homes, and hospitals for infectious diseases.

Nearly all the hospitals in the Union are state-aided and controlled either directly or indirectly by the provincial administration. Each hospital has a hospital board, which usually consists of both elected members and nominees of the provincial administration, and sometimes of other bodies such as municipal councils. These hospital boards supervise the management of the hospitals, though whether they are able to do so successfully it is difficult to say. Their chief assistance seems to be in the very excellent work they do in raising funds. They are, however, bodies corporate, capable of holding immovable property. They may, in some cases, make regulations for the better management and control of the hospital. All the hospitals and their boards are governed by special provincial legislation. These boards receive subsidies from the provincial administrations, and these subsidies are so calculated as to encourage both generous public contributions to hospital funds and as cheap a service as possible to patients, at no time withholding medical assistance and treatment to the needy. The hospitals receive from the provincial administrations as much as they receive in hospital fees from patients, but they also receive a generous

¹ See items 1, 2, and 3 of the second schedule at the end of this chapter.

subsidy for the free patients whom they treat, and they are entitled to receive about 50 per cent more from the provincial administration than they obtain from the public in subscriptions, donations, and bequests

All hospitals for mental patients are under the control of the Union government

6. Local Government

Municipal institutions, divisional councils, and other local institutions of a similar nature—Sec 85 (vi) S A Act

In consequence of decisions of the supreme court¹ that health committees were not local government institutions, parliament has substituted² for the phrase 'of a similar nature' a definition which includes health committees among local institutions

The system of local government is very important in the general conception of constitutional law in the Union, not so much on account of what it is now, but because with what it might be is bound up the future of the provincial council system in South Africa. The alternative to the provincial council system is an extension of the present system of local government. Provincial councils are not local government institutions. They are something between a more or less sovereign body like the Union parliament and an entirely local subordinate body with delegated powers like a municipal council. In law they approximate rather to the Union parliament, for they have a plenary power within their sphere of jurisdiction, whereas municipal councils have a delegated power which they must exercise reasonably and fairly. In their field of practical administration they concern themselves with matters that are not always far removed from the details of municipal administration. If provincial councils are to be abolished in South Africa, their functions will have to be divided between the central administration and local government bodies. The larger and wider national functions which they perform will have to be transferred to the central government; the more detailed administration will have to be performed by local bodies. It is necessary, therefore, to discuss with more detail than might otherwise have

¹ *Isipingo Public Health Committee v. Judwar*, [1926] A D 113, *Said & Company v. Receiver of Revenue*, [1926] T P D 302

² By section 1 of Act 1 of 1926

been necessary, the system of local government in South Africa. In doing so we shall not take into account the system of local government which has been applied in some instances to the natives, for we shall discuss that more conveniently elsewhere.¹

(A) Local Government Institutions

(1) Cape of Good Hope

Local government in the Province of the Cape of Good Hope is administered primarily by divisional councils, municipal councils, and village management boards.*

(a) *Divisional Councils* The powers and functions of divisional councils as most recently defined are chiefly embodied in Ordinance No. 13 of 1917 and Act No. 36 of 1919, and relate to the maintenance of roads, bridges, pontoons, and ferries, and the control of outspans and tickpaths, the destruction of noxious weeds, local rating, vehicle taxation, and public health. Divisional councils were first established in the year 1855.*

Under the ordinance of 1917, divisions are subdivided into six divisional council districts. Each of these districts forms an electoral ward, and each elects one, two, or three councillors, according to the rateable value of the property in each district, to the divisional council.

The divisional councils obtain their revenue (i) by levying rates, (ii) by provincial council subsidies in the following manner. The provincial council pays the divisional council one-half of the latter's expenditure from ordinary revenue upon road construction, and one-half of the interest and redemption charges on permanent loans for the construction of roads. The provincial council also pays to the divisional council a *pro rata* share of the taxes levied on motor cars, the proportion being fixed in the ratio of the various councils' expenditure on road maintenance. A third source of divisional council revenue is a tax on vehicles. A fourth source is the charge made for each of the services rendered in respect of water supply, sanitation, &c. The councils also have certain limited borrowing powers which are subject to the approval of the administrator or of the electors.

The ordinance lays down the duties of divisional councils in regard to road construction and maintenance. Main roads are left to the care of the provincial council, local roads to divisional councils, but everything is done to encourage co-operation between the two bodies.

(b) *Municipal Councils* Municipal councils are empowered to act under Ordinance No. 10 of 1921 and amending ordinances. Their functions comprise the rating of immovable property, the control of drainage, water supply and sanitation, the upkeep of burial grounds, botanical gardens, and municipal roads, streets, and bridges, the control of recreation grounds, &c.*

¹ Chapter XXIV.

* These paragraphs are taken from the *Official Year Book of the Union*, Chapter III. 1.

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(c) *Village Management Boards* These are empowered under Ordinance No. 10 of 1921 to carry on the administration of villages, and they are given powers similar to those of municipal bodies though their powers are more limited, their spheres of action are actually much narrower than those of municipal councils.

(d) *Local Board Areas* Local boards are constituted under Ordinance No. 11 of 1921. They are constituted either in localities adjacent to large municipalities where by reason of their proximity to such bodies, it is not considered advisable to establish village management boards, or they are constituted over small communities which require some form of local government rather wider in scope than the 'local areas' established under the control of divisional councils and not sufficiently advanced for the establishment of village management boards. Nevertheless their functions are very similar to those of village management boards. They consist of three members, two being appointed by the administrator and one being elected.*

(ii) Natal*

(a) *Municipal Councils* In Natal the municipalities are governed by the Boroughs Ordinance No. 19 of 1924. Each borough has certain powers of sale on freehold or leasehold of its town lands, subject in most instances to the consent of the administrator. They may also lease town lands for periods not exceeding ninety-nine years. Each borough is divided into not fewer than four wards, each ward returning two town councillors, who are elected by the burgesses for a period of two years, one-half of the councillors returning annually. Durban has six wards, each ward returning three members.

(b) *Town Boards* These boards are governed by the Townships Ordinance, No. 11 of 1926, and have powers similar in nature to those conferred upon municipalities.

(c) *Villages* A village may, at the instance of its householders, be brought by proclamation in the provincial *Gazette* under the provisions of Act No. 19 of 1897. Under this act the administrator may authorize the construction of works for the supply of water. The capital cost of the scheme is met out of provincial funds and rates are imposed to cover the interest charges and costs of maintenance.

(d) *Local Administration and Health Boards* These have been constituted under Ordinance No. 4 of 1926 mainly for certain areas adjacent to large municipalities. Within its area each board exercises the powers of a local authority and carries out the duties conferred or imposed upon local authorities under the Public Health Act, No. 36 of 1919. The ordinance empowers them to levy rates and to impose fees and charges for services rendered.

(iii) Transvaal

The Local Government Ordinance, No. 11 of 1926, as amended, consolidated the law relating to municipal government in the Transvaal.

* Ibid.

This ordinance provides for three grades of such authorities—town councils, village councils, and health committees.

(a) *Town Councils* The administrator may declare any area to be a municipality under the jurisdiction of a town council. These town councils have nearly all the powers usually possessed by municipalities in other parts of the British Empire. The ordinance sets out the powers and duties of town councils in great detail. Johannesburg and Pretoria have been given city councils.

(b) *Village Councils and Health Committees* These may be described as miniature municipalities having less power than municipalities because they have so much less to do. For example, village councils cannot establish tramways, nor is it considered that the expense of sewerage and drainage should be undertaken by village councils. Otherwise they have powers very similar to those of a municipality. Health committees are a lower grade of village councils.

(iv) *Orange Free State*

The system of local government in the Orange Free State embraces municipalities and village boards of management.

(a) *Municipalities* These are similar to municipalities elsewhere.

(b) *Village Boards of Management* These boards are given power to regulate sanitation, pounds, grazing, and may raise loans not exceeding £1,000 for public works. Their rating powers are limited. They may make their own regulations and by laws, which, however, are subject to the approval of the administrator.

(B) *Legislative Powers of Local Government Institutions*

In order to appreciate the differences between provincial councils and local government authorities, a few of the principles which apply to the exercise of legislative power by municipalities, &c., may be given.

We have already stated¹ that when the provincial councils were given the power to legislate with regard to municipalities, they were given with it, by implication, every auxiliary power that is necessary for the proper exercise of the direct power it is intended to execute.² So also, when a provincial council, having the power to do so, delegates certain powers to a municipal council, it grants with those powers incidental powers necessary for the fulfilment of the powers which it was its main purpose to grant. A provincial council may create a new municipality or a new class of local government authority, when it does so it impliedly endows the newly created body with all such incidental powers as may be necessary for the working of municipal or other local institutions in accordance with modern social and economic conditions.³ It cannot ordinarily delegate powers which are not necessary for the carrying on of municipal government, even though it possess those

¹ *Supra*, Chapter XIII (iii)

² *Gertzen's Case*, [1914] A D 544

³ *Groenewoud & Colyn v Innesdale Municipality*, [1915] T P D 413 *Heul & Company v Johannesburg Municipality*, [1914] T P D 521

powers itself¹ On the other hand, the incidental powers referred to as accompanying the powers actually delegated, as being necessary for the proper working of the local institution, may, as it were, come from nowhere—certainly not from powers possessed by a provincial council For the provincial council may not have power to deal directly with traffic, yet this power is a necessary implication in a grant of powers to any municipality²

It is not conceivable that a municipal council could do its work satisfactorily without being able to levy rates and taxes,³ for revenue is the first requirement of government of any kind in modern conditions It is necessary to regulate traffic or the distribution of milk and meat,⁴ or the erection of advertising hoardings,⁵ or the manner in which building operations may be carried on With this power of making regulations, there flows an auxiliary power of enforcing these regulations, and the by-laws may authorize the mayor or the town clerk to prosecute for a breach of them⁶ The by-laws however, are subject to certain wide restrictions, some of which distinguish the powers of a municipality from those of a provincial council, while others apply equally to a provincial council

The main differences between the exercise of legislative powers by the two bodies are as follows A provincial council is not bound by the necessity to legislate fairly, reasonably, justly and without class or colour discrimination A municipal council unless it is given powers by the provincial council which would enable it to legislate in a manner discriminating between classes or in a manner which can be fairly described as unreasonable or unjust, is bound to legislate in a fair and reasonable manner Indeed, all municipal legislation is subject to the tests of 'reasonableness' and 'justice' It will be found that the various illustrations given hereunder are but different examples of 'unreasonableness' or 'unjustness'

A municipal by law provided that 'no native shall walk on any foot-path save when crossing between any street and the entrance to any private property' This by law was held to be *ultra vires*⁷ It was unreasonable for the municipal council to make such a by law, based as it is entirely upon a discrimination of colour and on no other reason whatsoever The power to make by-laws for municipal good government is not wide enough of itself to allow a municipal council to discriminate between classes⁸ It would have been different if the provincial council had

¹ *Maserowitz v Johannesburg Municipality*, [1914] W L D 130

² *Williams v Johannesburg Municipality*, [1915] T P D 362, *Gertzen's Case*, [1914] A D 544

³ *Marshall's Syndicate Case*, [1917] A D 662, [1920] A C 420

⁴ *Cooper v Johannesburg Municipality*, [1916] T P D 601, 604

⁵ *Head & Company v Johannesburg Municipality*, [1914] T P D 521, 525

⁶ *Tsheleza v Brakpan Municipality*, [1920] T P D 613, *Groenewoud & Colyn v Innesdale Municipality*, [1915] T P D 413

⁷ *Mphahlele v Springs Municipality*, [1928] T P D 50

⁸ *Swartz v Pretoria Municipality*, [1920] T P D 187, *Benoni Municipality v Schumbr*, [1923] T P D 289

expressly given the municipal council the power to discriminate, because, as we have seen, a provincial council has a full and discretionary power within its sphere of legislative jurisdiction and it is not restricted by rules requiring fairness or wisdom in its legislation. The case of *George v Pretoria Municipality*¹ well illustrates the difference between the powers of the two institutions. An ordinance passed by the Transvaal provincial council in 1912 provided that a town council might make by-laws for appointing separate tramcars for the use of white persons and of coloured persons. Tramcars might be restricted to each of such classes. Under this power the municipal council of Pretoria passed a by-law providing that cars bearing no distinctive mark were reserved for the use of white persons only, and cars marked 'for coloured persons only' were reserved for the use of coloured persons only, making it an offence for the one class to travel in a car reserved for the other. It was held that the by-law was *intra vires*, notwithstanding that no separate cars had yet been provided for coloured persons. 'A by-law passed in pursuance of this section', said Mr Justice Wessels, 'cannot be impeached as invalid because it might otherwise have been regarded as invalid if it had been passed under the general or incidental powers of the municipality. The court cannot declare the by-law unreasonable if the legislature distinctly confers upon the corporation the power of passing such a by-law.' In another case,² de Villiers J.P. said: 'The magistrate's reasons are based upon the ground that it is advisable, having regard to the well known habits of coloured people, that a discrimination should be made. If that be so, it is a matter for the legislature. If the legislature considered it advisable to discriminate between white and coloured persons it could have said so, and enabled the municipality so to discriminate, but it has not done so.'

It is not in every case that the provincial council can give a municipality the power to discriminate between classes. It was pointed out that though a provincial council has no power to deal with traffic yet when it creates a municipal council, this power is granted by implication to the municipal council because the power to deal with traffic conditions is an essential one for carrying on municipal government. On the other hand, a provincial council may itself have power to deal with a problem by discriminating between classes, yet it may not be able to give a municipality a similar power. The example given above with regard to setting aside separate tramcars for each class of the population shows merely that when a municipality is given the power to discriminate, it may do so. This grant of power is valid because 'having regard to the well-known habits of coloured people', it was considered both advisable and *necessary* in order effectively to deal with traffic and tramway problems that discrimination between classes should be exercised. As a municipality requires all powers to deal effectively with municipal problems, and as a provincial council has 'power to make ordinances in relation to municipal institutions', a provincial council may grant all such *necessary*

¹ [1916] T.P.D. 501

² *Voess v Boksburg Municipality*, [1912] T.P.D. 659, at p. 662

powers Where a power required is an extraordinary one, like the power of discrimination, not falling under a grant of general powers, it is necessary to have a special grant of power, as in the case of the separate tramcars mentioned previously But where such an extraordinary power is not necessary for purposes of municipal government, the provincial council, even though it may possess itself the power to legislate for its own purposes in that regard, cannot grant such a power to a municipal council To take an example provincial councils have the power to manage hospitals, they may set aside hospitals for whites exclusively, or for coloured persons exclusively They need not do so fairly or give any reason for their discriminatory legislation They have a full, unrestricted discretionary power in their management of hospitals Now, to maintain and manage a hospital is (let us assume) quite unnecessary for municipal purposes Our assumption is probably correct in view of the fact that provincial councils were given the power to maintain and manage hospitals and not municipal councils If such a power is quite unnecessary for municipal purposes, it cannot be delegated to a municipality, because provincial councils have power to delegate to municipal councils only the powers necessary for carrying on municipal government There is no case on record of a provincial council attempting to delegate to a municipality powers which it possesses itself but which are not necessary for municipal purposes, but there are a number of cases which show that a provincial council cannot endow municipalities with powers which are unnecessary for municipal purposes, i.e. cannot endow them with unnecessary powers A Transvaal provincial ordinance of 1912 proposed to grant municipal councils the power to make by-laws for regulating and licensing cycle dealers, and to refuse licences where the applicant was not a person of good character In a case¹ dealing with the validity of this legislation, Mason J. stated 'Is it competent for this regulating and licensing power to be conferred upon municipalities as an incidental or a necessary element of municipal institutions? It is not, of course, easy to specify the powers which are necessary or incidental to municipal government which varies so much with both place and time but they may be grouped generally under the heads of public health and sanitation the control of streets, traffic and public places, the regulation of buildings the provision of public amenities, and the establishment, management and control of what are known as the public service utilities such as water and lighting the prevention of fires and similar objects in which public combination is necessary for effective results or individual activities require local supervision But the business of cycle dealing does not fall under any of these heads, but resembles any other ordinary trade such as that of ironmongers, drapers, and grocers It is quite true that any business may be so conducted as to create a nuisance and the abatement of nuisance is admittedly a usual and beneficial municipal function but it does not seem to me either a necessary or incidental function of municipal government that the town council should control local trade commerce and industries apart from

¹ *Maseroutz v Johannesburg Municipality*, [1914] W L D 139, at p 145

questions of public health or other objects to which I have referred. The provision, for instance, that a cycle dealer should be of good character is probably an excellent means of checking cycle thefts, but that is not an ordinary municipal function. To hold that such powers as are claimed in this case may be conferred on municipalities would be to authorize provincial councils to hand over to municipalities the complete control within urban districts of commercial and industrial legislation which provincial councils themselves have no power to impose in the province generally. I have therefore come to the conclusion that the enactment so far as it relates to cycle dealers, was not within the competence of the provincial council.¹

In the case of *Germiston Municipality v. Anghern & Piel*,² the court dealt with the validity of a provincial enactment requiring magistrates in cases of municipal prosecutions, to state special cases for the decision of the supreme court. It was held that provincial legislation affecting the administration of justice and criminal procedure is *ultra vires*. It is not apparent', said de Villiers J P, that municipal institutions will be less effectively administered if the ordinary procedure be followed instead of the procedure proposed to be adopted'. Curlew J said 'though a provincial council has power to impose a penalty for a contravention of a by-law or regulation, that penalty can only be enforced according to the procedure and within the jurisdiction of the courts as established. It was urged on behalf of the prosecuting municipality that the power which a provincial council has to legislate generally with regard to municipal institutions must imply the power to legislate for extra jurisdiction for the courts for the purpose of giving effect to any municipal legislation. No such power appears to me to be necessary. The legislation of a provincial council, whereby offences are created and penalties imposed, can, and must only, be given effect to by means of the machinery and according to the procedure as they exist for the prosecution of criminal offences.'

It is under this heading of not being able to grant municipal institutions powers which are not necessary for municipal government that an unnecessary grant of discriminatory powers falls. In the case of *Sidumba v. Benoni Municipality*,³ Mr. Justice Tindall dealt succinctly with the matter. Has the provincial council the power', his lordship asks 'to make an ordinance authorizing a municipal council to lay out locations for natives and to compel all natives residing in the municipality

¹ In *Johannesburg Municipality v. Davies*, [1925] A D 395, Davies applied to court by petition for an interdict to restrain the municipal council from carrying on the business of manufacture and vendor of ice on the ground that such manufacture and sale were *ultra vires* of the council. A Transvaal ordinance of 1912 empowered municipal councils to 'establish and carry on cold storage works and sell all by products resulting from the carrying on of any works'. It was held that the manufacture of ice for sale and the sale of ice was *ultra vires* of the council because authority to sell ice could not be implied as reasonably incidental to the powers granted. See also *Blomfontein Quarries Case*, [1930] A D 370.

² [1913] T P D 135

³ [1923] T P D 359

to reside in such locations and nowhere else in the municipality? If the provincial council has that power it must be derived from section 85 (vi) of the Act which empowers the council to make ordinances 'in relation to matters coming within municipal institutions'. The scope of this legislative authority has been considered in a number of cases. It must be taken to include all powers properly required to effect the purpose for which it was conferred and authorizes the council to legislate on any subject assigned to it fully and effectively, regard being had to the condition and requirements of the time.¹ Or, as it was put in *Groeneuoud & Colyn v Innesdale Municipality*² 'provincial councils may endow municipal corporations with all such powers as might enable them to deal fully and effectively with reasonable municipal requirements in accordance with the social and economic conditions of the present time'. But 'only such powers will be implied as are reasonably ancillary to the main purpose'.³ Applying the principles enunciated in the decisions mentioned, I have come to the conclusion that the provincial council has not the power to endow a municipal council with the power of compelling natives residing in the municipality to reside in a certain locality. The argument against this view would have to go so far as to contend that all natives in the municipality might be compelled to live in locations. And if the argument be carried to its logical conclusion, it would not stop there, the power would have to include the right to say that no natives may reside within the municipality. Moreover, as the power is a power to segregate a whole section of the community, the contention would have to go the length of supporting the view that the provincial council can authorize a municipal council to restrict similarly some other section of the community. The provincial council may empower a municipality to compel individuals living within its jurisdiction to observe requirements necessary for safeguarding public health, but simply to segregate, as regards residence, a certain class of race is a very different thing. Legislation of the class under consideration, in my opinion, goes farther than is necessary to deal fully and effectively with reasonable municipal requirements. It is not municipal legislation, such legislation is a matter for the Union parliament. In coming to the above conclusion I have not overlooked the case of *George and Others v Pretoria Municipality*.⁴ The powers there dealt with seem to me distinguishable from those under consideration in the present case. The establishment and working of tramways is clearly a matter coming within municipal institutions. If a mixed service is not workable (as the evidence in the case quoted showed was the case), it might be argued with force that the power of prohibiting natives from travelling on tramscars appointed for

¹ *Middleburg Municipality v Gerten* [1911] A D 544

² [1915] T P D 413

³ *Johannesburg Consolidated Investment Company v Marshall's Townshep Syndicate Limited*, [1917] A D 662

⁴ [1916] T P D, 701. See for other examples of discrimination, *Rez v Plaatses*, [1910] E D L 61, 146; *Moses v Boksburg Municipality* [1912] T P D 659; *Williams & Adendorff v Johannesburg Municipality*, [1913] T P D 106

the use of white persons is reasonably necessary to enable the council to exercise the power of working tramways.' The whole matter of race and class discrimination, therefore, can be determined by the test of reasonable necessity. Indeed, as previously stated, this is the test of validity of all municipal powers.¹

Once the power has been granted the question arises as to how it must be exercised. The answer is that it must be exercised in a reasonable and bona fide manner.² A provincial council once it has the power to legislate, has a full discretion, it may legislate unreasonably, unfairly. But a municipal council has a delegated authority, and it may not abuse that delegated power. It may not legislate in unreasonable restraint of trade.³ It may not grant its officials arbitrary powers.⁴ It may not legislate by reference.⁵ It may not delegate the powers which it was intended it itself should exercise.⁶ Its legislation must be definite and certain. Where a municipal by-law provided that 'no person shall willfully or negligently cause any obstruction on any street by any means whatsoever', it was held that as this by-law did not indicate with reasonable clearness what the public must not do in order to avoid contravening its provisions, it was void for uncertainty.⁷ And, unlike other legislation, penal sanctions do not attach to municipal legislation unless provided for in the by-laws themselves.⁸

When a power to regulate is granted it does not imply a right to prohibit what was intended to be regulated,⁹ but the power to regulate includes the right to prohibit acts which interfere with proper regulation. For example, the power to regulate public markets includes the right to prohibit the doing of certain acts on that market which hinder the proper regulation and working of that market.¹⁰

The validity of municipal legislation, therefore, is seen to be subject to the restriction of reasonableness. But the courts are very loth to hold

¹ In *Abraham v Durban Corporation* [1927] A D 444, this test was not applied because provincial councils have an unlimited power within their sphere of jurisdiction. See *supra* Chapter XIII (iii).

² *Johannesburg Municipality v Grusd*, [1929] T P D 457, *Zachy v Germiston Municipality*, [1926] T P D 380, *Antony v Benoni Municipality* [1929] T P D 902, *Peninsula Abattoirs Limited v Capetown Corporation*, [1915] A D 679. Such powers are at all times to be exercised bona fide and with judgment and discretion. *Reynolds & Williamson v Pretoria Municipality* [1912] T P D 540. ³ *Thomas v Brakpan Municipality*, [1927] T P D 893.

⁴ *Stoeken & Walker v Johannesburg Municipality*, [1923] T P D 311.

⁵ *Ismael Amos v Pretorius Municipality*, [1901] T S 321.

⁶ *Wilson v Mayor of Durban*, [1920] N P D 5, *Housson v Wynberg Municipality*, [1916] A D 236, 1916 C P D 194.

⁷ *Laidoo v Pretoria Municipality*, [1927] T P D 1013, see *Stanton v Johannesburg Municipality*, [1916] T P D 742. *Pretoria Municipality v Rostousky*, [1923] T P D 329, *Reyncke v Paarl Municipality*, [1923] C P D 78.

⁸ *Rez v Mills*, [1927] C P D 133.

⁹ See *Rez v Williams*, [1914] A D 460, *Bhika Hira v Boksburg Municipality*, [1914] T P D 513, *Rez v Roderick*, [1915] O P D 67.

¹⁰ *Ishingiti v Johannesburg Municipality*, [1928] T P D 333.

by-laws unreasonable,¹ and the onus is on the person alleging their invalidity to prove that fact either by argument or by evidence as the case may require.² And if some portion of the by-laws is *ultra vires*, the other portion may still be held valid if the court thinks that the municipal council would have passed the by-laws in the truncated form they are left in after the invalid portion has been severed from the rest of the by-laws.³

With these general remarks on local government and the legislative powers of local government institutions, we may pass on to what seems a similar subject, but which is one entirely different.

7 Local Works

Local works and undertakings within the province, other than railways and harbours and other than such works as extend beyond the borders of the province, and subject to the power of Parliament to declare any work a national work and to provide for its construction by arrangement with the provincial council or otherwise—Sec. 85 (11) S.A. Act

Public works may be classified as those which are national in character or scope, those which are provincial, and those which are municipal (municipal including all the local government institutions which we mentioned in the preceding section). Among those which are national in character or scope are railways and harbours and the buildings which accommodate the staff of this vast organization, the post and telegraph buildings and machinery, and the public buildings of other national state departments, such as the department of justice. It will be found that most of the national public works are established and maintained by the national government, local works are left to the provincial councils or to municipalities. Among works which are really local are dams and other irrigation structures, but the provision of irrigation facilities is a matter of such national importance that it is dealt with entirely by the Union government. National works may therefore be described as those which by reason of their national importance, such as, for example, irrigation works or the telegraph machinery and equipment, or those which by reason of their national extent,

¹ *Reynolds & Williamson v. Pretoria Municipality*, [1912] T P D 546, *Re v. Hockly*, [1917] E D L 117, *Re v. de Jager*, [1917] C P D 558.

² *See Montagu Municipality v. Honkman*, [1913] C P D 798, *Epstein v. Kingwilliamstown Municipality*, 26 S C 97.

³ *See Zacky v. Germiston Municipality*, [1926] T P D 380.

such as, for example, railways, are more satisfactorily or efficiently dealt with by a central government department. All other works are local works. Local works are divided between the provincial councils and local government institutions. The local works of the local government institutions, such as municipalities and divisional councils, comprise those amenities to which city dwellers have become accustomed—the tramways, electric works, sewerage, &c. What then, it may be asked, has been left to the provincial councils? The answer is very little. Unless definite powers (such as education and hospitals) are given to a provincial council to exercise, every function of government tends to fall into the hands either of the central government or of a local government body. This is the tendency all over the world. The provincial council is neither the one nor the other, and therefore the functions which it was at first thought would be particularly well dealt with by that body have gradually come to be exercised and exercised more efficiently, by either the central government or a local government body. An example of the exercise of an intended provincial function by the central government is the control of agriculture, an example of the exercise of an intended provincial function by local government bodies is the control of markets. Many other examples could be given, but these two are given because the very mention of them is sufficient to convince any person that these functions are being better exercised by the other bodies than they could possibly be by the provincial council. This must inevitably be so as long as the provinces are too large for proper detailed local government, and as long as their powers are too limited for any bold exercise of policy. The tragedy of the provincial system is that it is an hybrid system. It never had a chance from the start.

8. Roads and Bridges

Roads, outspans,¹ ponds,² and bridges, other than bridges connecting two provinces—Sec 85 (viii) S A Act

The Union is a country of great open spaces, and large distances divide the centres of urban prosperity from each other. On the coast there are prosperous towns, in the hinterland there

¹ Places where horses and cattle are unharnessed or unyoked for purposes of rest and feeding

² Pontoons

are centres of agriculture and in the midst of all there is the great mining area of the Witwatersrand to which the roads from all the centres of agriculture and shipping and mining lead. Roads are a necessity in so large a country especially where the railways do not yet connect every district of the country. There are great main roads which run from Capetown to Durban, and from Durban to Johannesburg and smaller branch roads converge on to the main roads at every point. The maintenance of the existing roads is a great drain upon the resources of the country, and new roads which have to be cut through virgin soil, are required in increasing numbers. The problem is a difficult one, connected, as all problems of development are connected, with the question of financial outlay or financial return. The Union government does not concern itself with roads at all, their construction and maintenance is left to the provincial councils. The provincial councils have delegated a great deal of this work to local government bodies, a wise proceeding, but one which has in practice given rise to many difficulties. Must one local area finance the construction and maintenance of a main road which is used principally by the people of an urban area? And some local areas have not sufficient revenue even to maintain their local roads. The best solution of the problem seems to have been found in the Cape province, where local roads are managed by the divisional councils concerned, and main roads are managed partly by the provincial council and partly by the divisional councils through whose areas of management they pass. By means of co-operation the difficulties and objections attendant upon local areas being responsible for the entire maintenance of main roads have been overcome. In the Transvaal main roads are under the direct control of the provincial administration, and this body bears all the charges in connexion with road maintenance and construction. District road boards assist in the management of local roads. Roads in urban areas are managed and maintained by municipalities in all the provinces.

9 Markets and Pounds

Markets and pounds - Sec 85 (1r) S A Act

The control of markets in the four provinces is vested in the municipal authorities. Urban pounds are controlled solely by

municipalities, who also draw the revenue therefrom. Rural pounds are managed, in the Cape by the divisional councils, and in the other provinces by the provincial councils.

10. Fish and Game Preservation

Fish and game preservation —Sec 85 (v) S A Act

There are various ordinances in the provinces dealing with the preservation of fish. Attempts have been made, with varying degrees of success, to introduce trout into the streams of South Africa. Except for a certain amount of deep-sea fishing the fishing industry is not very well developed in South Africa and need not concern us very much. It is otherwise in regard to game.

Game is fully protected in the Cape province. The close seasons, which vary as to periods according to area, occur generally between August 1 and March 31. In the Cape province the preservation of game is regulated by Act No. 11 of 1909 and its amendments. Any person desirous of shooting or capturing royal or big game is required to obtain an ordinary game licence, a royal game licence, and a special permit from the administrator. In Natal the laws relating to game were consolidated in an Ordinance in 1912. Game in Natal is divided into ordinary game for which a shooting fee of one pound is required, specially protected game for which the fees vary according to the game desired to be shot, and royal game which may not be destroyed at all except for scientific or special public purposes. The Transvaal laws are contained in Ordinance No. 6 of 1905, Acts Nos. 13 and 30 of 1907, Act No. 11 of 1909, Ordinance No. 21 of 1917, No. 9 of 1918, and Act No. 2 of 1918. Lions and leopards are not classed as game but are regarded as vermin. The big game season is from June 15 to August 15. The Orange Free State laws are consolidated in Ordinance No. 13 of 1914. The game laws in the four provinces are not very dissimilar.

With a view to ensuring the preservation of the wild game of the Union, many varieties of which, in spite of their immense numbers when the first European settlers pushed their way into the interior, were in 1926 in imminent danger of becoming extinct, the National Parks Act, No. 56 of 1926, was passed, providing for the establishment of national parks by the governor-general. Provision is made in the act for a board of

trustees, consisting of ten members to be appointed by the governor-general, whose duties are the control and management of the parks. The most famous of the national parks is the Kruger National Park, which has its origin in representations made to President Kruger for the preservation of various forms of characteristic South African fauna. The area of this wonderful park is now nearly 8,000 square miles maintained in its wild, rugged condition, traversed by streams and dotted with hills and bush country. Here may be found elephant and hippo and the black rhinoceros and antelopes and birds in all their kind. The public is freely admitted on permit, but no shooting may be done. Most animals may be seen from the roads traversing the park, but special trips are required to view the wilder or more secluded species.

11. The Imposition of Punishments

The imposition of punishment by fine, penalty, or imprisonment for enforcing any law or any ordinance of the province made in relation to any matter coming within any of the classes of subjects enumerated in this section—Sec. 85 (21) S A Act

Any authority which has the power to make laws, must have the incidental powers of fixing a penalty for the breach of those laws, as well as the right to have that penalty inflicted when necessary by some body or other. The provincial council may impose penalties which however, must be enforced in accordance with the general criminal law of the Union. Provincial ordinances may not institute new methods of trial or procedure.¹ Nor may they oust the jurisdiction of the courts. The General Dealers (Control) Ordinance 1926 (Transvaal) provided that the decision of a local authority on any application made to it for a certificate authorizing the issue of a new general dealer's licence shall be final and shall not be liable to review, reversal, or alteration by any court of law. It was held on several occasions that if this was intended to cover any decision however irregularly arrived at, the provision was *ultra vires* the provincial council. The power of the supreme court to correct the proceedings of a public body (which has a duty imposed upon it by statute) if it disregards important provisions of that

¹ *Germiston Municipality v. Anghem & Piel*, [1913] T P D 135, quoted, *supra*, section (6) of this chapter.

statute, flows from the provisions of the South Africa Act. The ordinance in question purports to take away that power, and thereby has the effect of altering the South Africa Act—a power not possessed by the provincial councils.¹ Whatever powers are given to the provincial councils in the South Africa Act must be enforced under the rules of procedure which exist in criminal cases throughout the Union, and they must be enforced in the ordinary criminal courts of the Union. They cannot set up new courts of justice, nor can they impose a new kind of penalty, i.e. one which does not already exist in the criminal law of the land. No limits are placed, however, on the amounts of fines or the periods of imprisonment which a provincial council may fix as penalties for contraventions of its ordinances, so long as these penalties do not conflict with a Union statute. For example, a provincial council may not impose the death penalty for a breach of an ordinance, because by a Union statute the only capital crimes are murder, treason, and rape.²

12. Other Local Matters

Generally all matters which, in the opinion of the governor-general-in-council, are of a merely local or private nature in the province
—Sec. 85 (21) S.A. Act

This is one of the strangest provisions in the constitution. When is the governor-general-in-council to signify his opinion? Is he to be specially asked? Or is he to declare a list of matters to be private or local matters within the province? And has he an absolute discretion? Can he declare any matter or class of matters in the category of private or local?

Dr. Manfred Nathan has discussed this topic.

"The actual meaning of the words "local" and "private" is clear. The word "local" may have reference to anything arising within the province at large, as distinguished from the other provinces, or to a matter affecting some particular locality within the province. "Private" matters are such as wholly affect private, as distinguished from public or general interests. The real difficulty lies in the occasion for the enactment of ordinances relating to matters of a merely local or private nature. How, or when, is the opinion of the governor-general-in-council to be signified? Is such signification to be made before or after the

¹ *Bignar v. Municipality of Rustenburg*, [1927] T.P.D. 815, *Dangoor v. Erundo Licensing Court*, [1927] T.P.D. 795.

² Criminal Evidence and Procedure Act No. 31 of 1917, section 338.

provincial council deals with a matter of a merely local or private nature⁹ In their ordinary sense, matters of a private nature would include such subjects as may appropriately be dealt with by means of private bill legislation as distinguished from public bills In practice, the provincial councils have assumed the right to deal with private bills, that is, draft ordinances affecting matters of a private nature,¹ and their standing orders contain elaborate provisions as to the procedure to be followed in connexion with the promotion and passing of private bills, without any reference to the necessity of obtaining the opinion of the governor-general-in-council as to whether the proposed ordinance relates to matters of a private nature.² For instance, the standing rules of the Transvaal provincial council provide that "every draft ordinance for the particular interest or benefit of any person or persons as distinguished from a measure of public policy shall be treated by the Council as a private draft ordinance, whether it be for the interest of an individual, a public company, a corporation, a local authority, municipality, or other locality" This definition certainly embraces "matters of a merely local or private nature in the province" According to the practice to which we have referred, the opinion of the governor-general-in-council is not sought, at the time of the introduction of a private ordinance, as to whether it deals with matters of a merely local or private nature It seems, however, that as the South Africa Act makes no provision for the time when such opinion is to be sought the assent of the governor-general-in-council to the private ordinance when passed by the provincial council is a sufficient indication of the opinion of the governor-general-in-council that the subject matter of the ordinance is of a local or private nature There would, however, be nothing to prevent the governor-general-in-council apart from assenting to particular ordinances, from issuing a general proclamation to the effect that matters of a specified nature are to be regarded as merely local or private in a province or provinces.³

It is evident that the course which Dr Nathan suggests may be taken is one which would enlarge the powers of provincial councils enormously Indeed we may go so far as to say that it is possible under this subsection (if Dr Nathan is correct in his view) to nullify the restricting effects of section 85 of the South Africa Act entirely The council, by passing any ordinance dealing with local matters (which may include almost anything within the province, in terms of Dr Nathan's opening remarks) may, by receiving the governor-general-in-council's assent, receive legislative jurisdiction over the whole field of national affairs within its territorial borders The correct position

¹ See *infra*, Chapter XV § (c) (i)

² These bills must cover subjects within the power of the provincial councils

³ M Nathan, *South African Commonwealth* (Johannesburg, 1919), p. 120

seems to be that the provincial councils cannot validly pass legislation at all dealing with 'private' or 'local' matters if these matters fall outside the actual powers given them, otherwise it would not be possible for the courts to declare any ordinance which deals with provincial matters and which has received the assent of the governor-general-in-council to be *ultra vires*, and all the doctrines of the limited powers of provincial councils to which we have so frequently referred would have no meaning at all. In fact, it has been held that before an ordinance can deal with 'private' or 'local' matters under this subsection and these are 'local' matters not mentioned in section 85 or its amendments, it is necessary for the governor-general-in-council to express his opinion first.¹

13 Other Delegated Powers

All other subjects in respect of which parliament shall by any law delegate the power of making ordinances to the provincial council—Sec 85 (211) S A Act

When it is borne in mind that parliament has (subject to the exceptions which we have mentioned) supreme legislative power in the Union and can pass any laws it desires to pass, it seems strange to find this subsection in the South Africa Act. It is another indication that the framers of the Act thought that they were drafting a constitution that was intended to have a certain amount of rigidity. We have endeavoured to point out that this is by no means the case—that the constitution of the Union, except for the provisions which we have mentioned, is as flexible as the constitution of the United Kingdom. If this subsection had not been inserted in the South Africa Act the parliament of the Union could still have passed legislation giving the provincial councils additional powers of legislation. And such legislation could have been repugnant to the provisions of the South Africa Act. For instance, it was pointed out in the first subsection to this chapter that the legislation amending the provincial powers of taxation certainly went a

¹ *Germiston Municipality v Anghien d. Piel*, [1913] T P D, at pp 142, 143. It should be borne in mind that the governor general does not possess the power to validate *ex post facto* an ordinance not passed in terms of an act of parliament or the South Africa Act (*Re v Williams*, [1914] C P D 277, *Re v Sher*, [1914] T P D 270, *Re v Fox*, [1912] E D L 310).

long way beyond the power granted in subsection (1) of direct taxation. Under the amending laws the provincial councils have the power of indirect taxation. Nevertheless it is safe to state that nearly all the legislation which has been passed delegating further legislative powers to the provinces falls under this subsection (xiii) of the South Africa Act and an examination of this legislation will show to what extent parliament had this subsection in mind.

FINANCIAL RELATIONS ACT

No. 10 of 1913

12 (1) When and so often as it may be deemed desirable to add to the matters entrusted to any province by the South Africa Act, 1909, by this Act, any additional matter may be entrusted to that province subject to the following provisions, that is to say

(a) If it be a matter specified in the Second Schedule to this Act, the Governor-General, with the concurrence of the executive committee of the province, may determine whether that additional matter should be so entrusted.

(b) If it be any other matter, an Act of Parliament shall, in accordance of section 85 (xiii) of the South Africa Act, be necessary.

(2) When any matter shall have been entrusted to a province by the Governor-General as in subsection (1) (a) provided, notice thereof shall be given by proclamation in the *Gazette* and, as from a date specified in that proclamation, all powers, authorities, and functions relating to that matter shall thereupon be vested in the executive committee of the province as if they were powers, authorities and functions referred to in section eighty-one of the South Africa Act, 1909, and the provincial council shall be competent to make ordinances in relation to that matter as if it were a matter mentioned in section eighty-five of the same Act.

SECOND SCHEDULE

MATTERS THE CONTROL WHEREOF AND THE POWER TO LEGISLATE IN RESPECT WHEREOF MAY BE TRANSFERRED BY THE GOVERNOR-GENERAL TO THE PROVINCES IN TERMS OF SECTION TWELVE (1) (a) OF THIS ACT ¹

*1 The destruction of noxious weeds and vermin and the registration and control of dogs outside the area of jurisdiction of any municipal or local authority which has powers by law or by-law in respect of such destruction, registration or control.

¹ Powers transferred. To Cape, Proclamation 115 of 1913. *Gazette*, July 4, 1913, generally, Proclamation 118 of 1917, 194 of 1923.

- *2 The experimental cultivation of sugar, tea, and vines, save in so far as it concerns the administration of laws or regulations relating to plant diseases
- *3 The provision of grants in respect of agricultural and kindred societies, other than societies registered under any law
- *4 The administration of libraries, museums, art galleries, herbaria and botanic gardens, except the South African Library, Museum and Art Gallery, Cape Town, and the Government Library and Transvaal Museum, Pretoria
- *5 The control and management of such places upon Crown land as the Governor-General may reserve as being places of public resort or of public recreation or of historical or scientific interest
- *6 The establishment, administration, management and regulation of cemeteries and crematoria and the regulation of matters relating to the removal or disposal of dead bodies ¹
- *7 The distribution of poor relief
- *8 The regulation of the hours of opening and closing of shops and the restriction of hours of work of shop assistants
- 9 The administration of the Labour Colonies Act, 1909 (Cape of Good Hope), in so far as it relates to industrial institutions
- *10 The establishment and administration of townships
- *11 The licensing and control of vehicles and of any other conveyances or means of transport whatsoever using those roads and bridges which under paragraph (vii) of section *eighty-five* of the South Africa Act, 1909, are matters as to which a provincial council may make ordinances and of the drivers of any such vehicles or means of conveyance or transport
- *12 The control and regulation of horse and other racing, the control, regulation, and restriction of betting and wagering (whether as to circumstances, locality or premises), the prevention, control and regulation of dissemination of information as to betting within the province, and the licensing of any instrument machine or contrivance, commonly known as a totalisator, and the imposition of duty in respect of the takings thereof, upon the licensee ²
- *13 The licensing, regulation, and control of places of amusement within the province and the imposition of a duty upon the licensee in respect of the takings thereof or of a charge based upon the payments for admission thereto ³
- *14 The control and regulation of posters, pictures, and advertisements outside or in connexion with places of amusement or entertainment or recreation and the prohibition of any such posters, pictures, or advertisements as are indecent or calculated to excite racial prejudices or subversive of good morals ⁴

¹ As amended by section 6 (a) of Act No. 5 of 1922, mostly delegated to municipal and other authorities

² As amended by section 6 (b) of Act No. 5 of 1922

³ Added by the schedule of Act No. 9 of 1917

⁴ Added by section 6 (c) of Act No. 5 of 1922

EXAMINATION OF PROVINCIAL POWERS IN DETAIL 311

*15 Town planning,¹ including—

- (a) the subdivision and lay-out of areas or groups of areas for building purposes or urban settlement or deemed by the executive committee of the province concerned to be destined for such purposes or settlement,
- *(b) the regulation and limitation of building upon sites
- *(c) the variation subject to compensation in cases of prejudice, of any existing subdivision or lay-out of land used for building purposes or urban settlement or deemed by the executive committee of the province concerned to be destined for such purposes or settlement, and the authorization of the consequential amendment of any general plan or any diagram of any subdivision or lay-out so varied and of the consequential alteration or endorsement of any document of title or any entry in a deeds registry,
- *(d) the reservation of land for local government or other public purposes in any approved or varied scheme of town planning, and
- *(e) the prohibition of the transfer of land included in any approved or varied scheme of town planning where any lawful requirement has not been fulfilled

¹ Added by section 17 of Act 46 of 1925

* All the above powers have been delegated to the provinces. The National Parks Act, 1926, removes any area which has been proclaimed a national park from the control or jurisdiction of the provincial councils

XV

THE ORGANS OF PROVINCIAL GOVERNMENT

THE provincial system of South Africa presents to students of constitutional law something unique in British constitutions. It represents a compromise between federal and union ideas. When the South African constitution was in the making the colony of Natal fought most strongly for federation, the other colonies desired a union. The battle between the two systems presented itself to the national convention at the outset of its deliberations. Though the unifiers won, the victory was a compromise. The failure of the convention was thus averted, for no delegate dared to incur the responsibility of wrecking it.¹ The price of the victory was the assurance to Natal that the provinces would be given a very full measure of autonomy in local matters. The provincial councils, therefore, are something more than local authorities, something less than state parliaments.

It has been stated that the constitution of the Union is an entirely unitary one. The Union parliament is supreme and may at any time abolish the provinces. The provincial constitutions are not rigid, but extremely flexible. But while they exist in their present form, they show certain federal characteristics which reflect the demands of Natal at the national convention. First, the provinces were given certain subjects of control over which (while they might be enlarged or curtailed by the Union parliament) they had a plenary and not a delegated power. They were thus placed high above mere local government organs. Secondly, they were allowed to elect members of the senate of the Union parliament on a provincial and not on a numerical basis, thus conforming in one respect to a characteristic of certain federations.

The main features of the provincial constitutions are these: (1) *an administrator* appointed by the Union government for five years, paid by it, representing it, and removable only by it, and thus responsible to the Union government only, and not to the provincial legislature, (2) *an executive committee* of four members presided over by the administrator, who has a cast-

¹ See *supra*, Chapter II

ing as well as a deliberative vote. The executive committee is elected by the council by means of the single transferable vote system of proportional representation for a period of three years and cannot be removed by the council or the administrator or the Union government, and is thus responsible to nobody, (iii) a *council* consisting of as many members as the province has members of parliament with a minimum of twenty-five members, elected by the electors who elect members of parliament, and elected for three years. As neither the executive nor the administrator is responsible to the council, the latter body's power consists mainly of the negative one of refusing to pass legislation introduced by the executive¹ or refusing to consent to appropriations recommended by the administrator, positively, it can initiate legislation other than financial, and it can amend draft ordinances introduced by the executive.

The constitution of a province thus represents in itself a feature of the constitution of the United States or of Switzerland, a complete separation of the executive from the legislature, while it is entirely different from the constitutions of the Australian states or the Canadian provinces, for in both the latter constitutions the executive is responsible to the legislature. It is curious that in this feature of the separation of the executive from the legislature and its non-responsibility to the elected body the provincial constitutions should have followed the United States Federal constitution. Yet the system in the South African provinces is very different from the United States model, for there the president is elected and he appoints his own executive, while the provincial administrator is appointed by the Union government and he does not appoint the executive committee but it is elected by a council to which it is not responsible. The members of the executive committee, it is to be noted, need not be members of the council. The Swiss system is the nearest approach to the South African provincial system, and therefore it deserves examination. It is significant that this part of the constitution of the Swiss Republic was fully printed in a volume entitled *The Framework of Union*, which was published by the Closer Union Society of South Africa in 1908, and which certainly had much influence on the delegates to the national convention.

¹ Private members may introduce legislation on non financial subjects

The provisions of the federal constitution of Switzerland, establishing and defining the functions of the federal executive—known as the federal council—are contained in Articles 95 to 104 of the Constitution. We shall refer to this body as the executive. The executive is the supreme executive and directive body of the confederation. It consists of seven members, and is chosen by the federal assembly¹ for a term of three years, after every general election. Members of the executive need not be members of the assembly. Though they are generally chosen from the assembly, unlike the South African analogy they lose their seats in that body on election to the executive, but they may take part in the debates in each house. The federal president, who presides at executive meetings, is chosen by the assembly—a provision which if applied to South Africa would certainly improve the position of the administrator and his relationship to the executive and the provincial council. The federal president is elected for only one year and is not eligible for re-election in the next following year.

In the two South African Republics before the Boer war² there was in each a president elected by the people. He presided over an executive council and had a casting as well as a deliberative vote at its proceedings. Each executive council consisted of two officials, the president, and, in the case of the Free State three and in the case of the South African Republic two, members chosen by the legislature. Each member of the executive council as well as the president could take part in the proceedings of the legislature but could not vote therein, indeed, it was an important duty of the president in each state to report to the legislature from time to time on the condition of the country and the state of the finances, and every law proposed in the Volksraad of the South African Republic had to be proposed by the president personally or by a deputed member of the executive council. In the Free State the Volksraad had control over the executive, the Volksraad could dismiss the three members of the executive chosen by it without any difficulty, if it wished it could force the dismissal of the other two members from office.

¹ The Swiss federal assembly consists of two houses, namely, a council of states or senate to which the cantons send representatives and a national council elected by popular ballot. For the executive system of Switzerland see, Charles Lempérière, *Le Pouvoir exécutif en Suisse* (Paris, 1911).

² See *supra*, Chapter I § 3 (ii).

The South African provincial system seems to be a blending of parts of all the constitutions mentioned

We propose now to examine in detail the organs of provincial government, leaving the discussion of their working to the next chapter

1. The Administrator

The following are the provisions of the South Africa Act *regarding the administrator*

88 (1) In each province there shall be a chief executive officer appointed by the Governor General in Council, who shall be styled the administrator of the province, and in whose name all executive acts relating to provincial affairs therein shall be done

(2) In the appointment of the administrator of any province the Governor General in Council shall, as far as practicable, give preference to persons resident in such province

(3) Such administrator shall hold office for a term of five years and shall not be removed before the expiration thereof except by the Governor General in Council for cause assigned, which shall be communicated by message to both Houses of Parliament within one week after the removal, if Parliament be then sitting, or, if Parliament be not sitting, then within one week after the commencement of the next ensuing session

(4) The Governor General in Council may from time to time appoint a deputy administrator to execute the office and functions of the administrator during his absence illness, or other inability

69 The salaries of the administrators shall be fixed and provided by Parliament, and shall not be reduced during their respective terms of office

The administrator is one of the most important officials in the South African system of government. He probably has more power and influence than any person save a cabinet minister. His duties may be divided into four categories. In the first place, he is the public representative of the province. He welcomes distinguished visitors to the province at important official functions. He opens schools, bazaars, teachers' conferences, new roads and such like, and takes part in the official social life of the province. His duties in this respect are manifold and apparently necessary.

In the second place, he is a member and chairman of the executive committee and in this respect he has much more power than, e.g. the lieutenant-governor of a Canadian province. In the executive committee he has both a deliberative vote and

a casting vote¹ He is in no way responsible to the provincial council or to the executive committee, but he relies on the former to pass his measures and on the latter to co-operate with him in getting those measures translated into law Yet neither is absolutely necessary for the administration of the province If the administrator were given the legislative powers of the provincial council, experience has shown that the whole council and the executive committee could be abolished with beneficial results²

In the third place there is his relationship to the provincial council He summons the council to meet and prorogues it³ He prescribes the dates of general and by-elections⁴ He promulgates the ordinances of the provincial council⁵ He has to recommend or introduce all money or appropriation ordinances⁶ He sits in the council, may take part in the proceedings (though he cannot vote), and he may introduce his own measures⁷ Usually all the official measures are introduced by the administrator, though, very rarely they may be introduced by an executive committee member who represents the strongest party in the council The administrator's expertness in provincial matters, gained by reason of his experience of everyday provincial affairs, makes him a most influential and powerful factor in the council's debates Yet he is not part of the council He is the council's guide and its watchdog, and though not its master, he is also not its servant

In the fourth place, the administrator is an officer of the central government We saw that he was appointed by the governor-general-in-council for a period of five years, and that he may be removed by the governor-general-in-council for reasons communicated to both houses of parliament His salary is paid out of the Consolidated Revenue Fund of the Union⁸ In the last resort, therefore, he is responsible to the Union government And as he is responsible to the Union government, he must, in some measure, obey it There has been a great deal of contro-

¹ Section 82 of the South Africa Act

² *Provincial Administration Commission*, 1916, C J Langenhoven—question 2521 'The result will be almost the same'

³ South Africa Act, section 74

⁴ *Ibid*, section 71

⁵ *Ibid*, section 91

⁶ *Ibid*, section 80

⁷ *Ibid*, section 79

⁸ *Ibid*, section 69 The Transvaal and Cape administrators receive £2,500, in Natal and the Orange Free State, £2,000 per annum

versy on this point. The South Africa Act is certainly indefinite as to the amount of obedience that the administrator is expected to show. Section 84 of the South Africa Act reads as follows:

In regard to all matters in respect of which no powers are reserved or delegated to the provincial council, the administrator shall act on behalf of the Governor-General-in-Council when required to do so, and in such matters the administrator may act without reference to the other members of the executive committee.

There is no section in the South Africa Act which has given so little practical guidance as this one.¹ Sometimes, it is true, specific instructions are given by the Union government to an administrator, but these instructions are not in the form of a command, but in the form of a request to co-operate with the Union government in certain of its undertakings which may affect the province. It is a request for advice or for co-operation in the form of an instruction. Sometimes the Union government might request a province to assist in providing employment, sometimes the central government may instruct the provincial officers to administer certain matters for it. These communications are made in the form of a resolution of the governor-general-in-council conveyed to the administrator concerned by means of correspondence through the government department concerned.

It is as a liaison officer between the two administrations that the administrator does most useful work. Where there are two legislative bodies operating over the same field, though the one is entirely subordinate to the other, there is bound to be a certain amount of clashing and thus of friction. When provincial ordinances are being drafted the administrator keeps in touch with Union departments of state so that the interests of the Union as a whole may be considered.

In the field of finance the Union government is directly interested.² The provision that appropriation must be recommended by the administrator is a safeguard against the possibility of provincial financial maladministration embarrassing the finances of the Union,³ though it must be admitted that this safeguard has hardly been sufficient.

¹ The provincial administrations and the department of the interior are unable to state precisely what the position is.

² See *supra*, Chapters XIII and XIV (i, ii).

³ J. H. Hofmeyr, *Coming of Age* (Capetown, 1931). See specially the chapter on the provincial councils, pp. 301 ff.

We have seen that the administrator has a dual capacity, that of a provincial executive officer and that of a representative of the Union government—a dim analogy to the old dual capacity of the governor-general as a local constitutional monarch and a representative of the British government. As a Union government officer the administrator has various statutory duties of minor importance under Union statutes. As a provincial executive officer he has numerous duties under provincial ordinances. He proclaims the establishment of municipalities and other local government bodies. The whole of local government is under his control: municipalities cannot borrow money without his consent. Provincial officials audit the accounts of local bodies. Hospital boards, roads, and all the administrative detail of provincial government in one form or another come under the vigilance of the administrator acting either on his own responsibility or with the executive committee. But it is in the administrator's name that all official acts of the province are done.¹ The province may sue or be sued in his name.² He is the province's prime minister as well as its governor-general.

We may usefully compare the administrator and the governor-general³ for purposes of instruction only, for the two positions

¹ Section 68 of the South Africa Act.

² See *supra*, Chapter VIII.

³ Cf. the administrator with the provincial lieutenant-governor in Canada or state governor in Australia. "The Administrator is not a civil servant. Nor does he occupy the position of a Lieutenant-Governor, although it may be said that it approximates more nearly to the office of a Lieutenant-Governor than anything else. The Administrator is not a politician, but he will usually be the nominee of a political party, nor is he debarré, in the same way as is an officer of the public service, from giving expression to political views when occasion demands. His office resembles that of a Lieutenant-Governor in that he is chief executive officer of the Province, promulgates ordinances passed by the Provincial legislature, that is, the Provincial Council, summons sessions of the Provincial Council and prorogues that body, directs by proclamation the holding of general elections or by elections of members of the Provincial Council, in that no money ordinances may be passed by the Council unless first recommended by the Administrator, and in that no money may be issued from the Provincial revenue fund except under warrant signed by him, while he has temporary power to expend moneys for Provincial services (i.e. until one month after the first meeting of the Provincial Council). On the other hand, the Administrator's powers in several respects are unlike those of a Lieutenant-Governor. He has no veto on Provincial legislation. He is not merely advised in administrative matters by the Executive Committee, but must have their consent to administrative acts. In the Executive Committee he has a vote like an ordinary member of that body, but has a casting vote in case of an equality of votes. Thus, unlike a Lieutenant-Governor in a self-governing Dominion, the Administrator forms an integral portion of the Executive Committee, which from the delibera-

are in fact as different from each other as two positions well can be. Both administer the executive government in their respective spheres, both are chief executive officers in those spheres, both summon and prorogue the respective legislatures, both are not responsible to the legislature, both recommend or, more correctly, ask for supply, both are chairmen of the executive, but while the governor-general does not preside at cabinet meetings, the provincial executive cannot validly function without the presence of the administrator or his duly appointed deputy. Further, the administrator sits and speaks in the provincial council, while, of course, the governor-general never sits or speaks in parliament except when delivering the speech from the throne. The administrator comes into close contact with details of administration, meets deputations, hears the expression of views on the administration of his officers, whereas the governor-general does none of these things, except, of course, hearing the views of his ministers. The administrator has no veto on provincial ordinances—not even a formal right of assent,¹ nor may he dismiss a member of the executive.

2. The Executive Committee

The executive committee consists of four persons elected by the provincial council by the method of proportional representation,² together with the administrator. The administrator is the chairman of this committee. No member of the committee need necessarily be a member of the provincial council. The provisions of the South Africa Act regarding the constitution of the executive committee are

- 78 (1) Each provincial council shall at its first meeting after any general election elect from among its members, or otherwise, four persons to form with the administrator, who shall be chairman, an executive committee for the province. The members of the

ative point of view must be regarded as a Ministry although it has neither the status nor the parliamentary responsibility of a Ministry. The Administrator has also the right to sit and take part in debates in the Provincial Council (though without a vote) and here also he differs from a Lieutenant Governor. Nor has he any power to dismiss the members of the Executive Committee, who in Provincial affairs are his colleagues as well as his advisers' (M. Nathan, *South African Commonwealth* (Johannesburg, 1919), pp. 90-1).

¹ See section 90 of the South Africa Act.

² *Ibid.*, section 134.

executive committee other than the administrator¹ shall hold office until the election of their successors in the same manner

(2) Such members shall receive such remuneration as the provincial council, with the approval of the Governor General-in-Council, shall determine²

(3) A member of the provincial council shall not be disqualified from sitting as a member by reason of his having been elected as a member of the executive committee

(4) Any casual vacancy arising in the executive committee shall be filled by election by the provincial council if then in session or, if the council is not in session, by a person appointed by the executive committee to hold office temporarily pending an election by the council

79 The administrator and any other member of the executive committee of a province, not being a member of the provincial council, shall have the right to take part in the proceedings of the council, but shall not have the right to vote

80 The executive committee shall on behalf of the provincial council carry on the administration of provincial affairs³ Until the first election of members to serve on the executive committee, such administration shall be carried on by the administrator Whenever there are not sufficient members of the executive committee to form a quorum according to the rules of the committee, the administrator shall, as soon as practicable, convene a meeting of the provincial council for the purpose of electing members to fill the vacancies and until such election the administrator shall carry on the administration of provincial affairs

81 Subject to the provisions of this Act, all powers, authorities and functions which at the establishment of the Union are in any of the Colonies vested in or exercised by the Governor or Governor-in-Council, or any minister of the Colony, shall after such establishment be vested in the executive committee of the province so far as such powers, authorities, and functions relate to matters in respect of which the provincial council is competent to make *ordinances*

82 Questions arising in the executive committee shall be determined by a majority of votes of the members present, and in case of an equality of votes, the administrator shall have also

¹ The administrator holds office for five years The provincial council has a fixed term of three years As the provincial council must elect an executive committee at its first meeting after any general election, the life of the executive committee is just a little longer than that of the provincial council, namely from its first meeting until the first meeting of the new council

² The members of the executive committee as such receive £380 per annum Where a member of the committee is not a member of the council he receives £500 per annum, so that each member of the committee receives £500 in all per annum, as well as a free railway pass available throughout the province

³ In practice nearly all the work is done under the supervision of the administrator

a casting vote Subject to the approval of the Governor-General-in-Council, the executive committee may make rules for the conduct of its proceedings

- 83 Subject to the provisions of any law passed by Parliament regulating the conditions of appointment, tenure of office, retirement and superannuation of public officers,¹ the executive committee shall have power to appoint such officers as may be necessary, in addition to officers assigned to the province by the Governor-General-in-Council under the provisions of this Act,² to carry out the services entrusted to them and to make and enforce regulations for the organisation and discipline of such officers

The characteristics of the executive committee are an administrator appointed by an outside authority, presiding over the committee's proceedings, and necessary to the committee's functioning, and four elected members not responsible to the body which elects them, but able to sit and take part in the proceedings of that body, but not entitled to vote if they are not members of the council The executive committee, therefore, is similar neither to the executive in the United States, which is appointed by the President but does not sit in the legislature, nor to the executive or cabinet in the Canadian provinces or the Australian states, which are parliamentary executives in the full sense in which the British or Union ministries are parliamentary executives And the South African executive committee *has this important difference when compared with the Swiss executive council, namely, in Switzerland members lose their seats in the legislature when elected to the executive, whereas in South Africa they do not* The South African system therefore represents, in its entirety, neither a parliamentary executive nor a non-parliamentary executive It is, like so much else in the provincial system, a mixture of both It cannot easily be classified in the scheme of constitutional institutions For the above reasons it exhibits all the weaknesses of a foreign innovation in an otherwise harmonious constitution The practical power of a legislative body depends upon its ability to appoint and dismiss the executive, the absence of this power from the provincial councils has been the cause of the weaknesses which we shall notice in the next chapter

The executive committee has various important duties and

¹ See *supra*, Chapter V and *infra*, Chapter XIX

² See, e.g., section 92 of the South Africa Act, under which the governor-general-in-council appoints an auditor to audit the provincial accounts

powers. It carries out, or assists the administrator in carrying out, the provisions of the provincial council's legislation. Whether it does so efficiently or not, the council cannot effectively censure any maladministration by the executive committee and can only rely on an actual breach of law for action to be taken by the proper authorities. The executive committee has the power to appoint officials.¹ It can establish new schools, it can make or control the courses of study in the schools. Over all this the executive committee has a more or less uncontrolled discretion. The provincial council can only withhold supply. It can in the long run starve the executive committee into submission, but the process is capable of being a long and painful one, and if the Union government is at all in sympathy with the executive committee, it may come to its rescue with supplies as it did in 1914 when there was a deadlock in the Transvaal provincial council. Another important duty of the executive committee is to draw up the estimates for the province. The administrator usually makes the budget speech, but sometimes a member of the executive committee does this.² The executive committee endeavours to be unanimous in its decisions and recommendations, but its constitution and method of election do not allow this to be a universal rule. When, as happened in the Transvaal in 1917, each of four political parties has one representative on the executive committee, there is bound to be a great deal of friction and disagreement. The rule of collective cabinet responsibility does not therefore apply in either of its two meanings: the executive committee is not responsible to the council, and when it does make recommendations it is permissible for the representative of one party to state that he disagrees with the recommendation, and he may vote against it and advise his party to vote against it.

3 The Provincial Councils

(a) *The Constitution of the Councils and the Qualifications and Election of Provincial Councillors*

70 (1) There shall be a provincial council in each province consisting of the same number of members as are elected in the province

¹ Section 83 of the South Africa Act. The appointments are made by the executive committee on the recommendation of the public service commission.

² Gey van Pittius, *Die Stelsel van Provinsiale Rade in Suid Afrika* [*The System of Provincial Councils in South Africa*] (Pretoria, 1926), p. 233.

for the House of Assembly. Provided that, in any province whose representatives in the House of Assembly shall be less than twenty-five in number, the provincial council shall consist of twenty-five members.

(2) Any person qualified to vote for the election of members of the provincial council shall be qualified to be a member of such council.

- 71 (1) The members of the provincial council shall be elected by the persons qualified to vote for the election of members of the House of Assembly in the province voting in the same electoral divisions as are delimited for the election of members of the House of Assembly. Provided that in any province in which less than twenty-five members are elected to the House of Assembly, the delimitation of the electoral divisions, and any necessary re-allocation of members or adjustment of electoral divisions, shall be effected by the same commission and on the same principles as are prescribed in regard to the electoral divisions for the House of Assembly.

Under section 70 (1) of the South Africa Act Natal and the Orange Free State are to have twenty-five members each. Until they each return twenty-five members to parliament, the electoral divisions will be different in the provincial elections from what they are in the parliamentary elections. When they return twenty-five members of parliament (if ever), then the electoral divisions for the two elections will be the same. We saw, in previous chapters,¹ that there are two quotas on which the delimitation commission must work, namely a Union quota and a provincial quota. The latter is obtained by dividing the total number of electors in a province by the number of members of parliament allowed for that province. For the provincial councils of Natal and the Orange Free State a third quota is required, namely, what we may term a 'provincial council quota'. To obtain this we must take the total number of electors in each province, and, ignoring the Union quota, divide them by twenty-five. The figure obtained will represent the average number of electors in each constituency—i.e. the provincial council quota. The principles which the delimitation commission are to follow are set out in section 40 of the South Africa Act,² and it can depart from the quota to an extent of 15 per cent.

- 71 (2) Any alteration in the number of members of the provincial council, and any re-division of the province into electoral

¹ See *supra*, Chapters III, 1, and X (u and m).

² *Ibid*.

divisions, shall come into operation at the next general election for such council held after the completion of such re-division, or of any allocation consequent upon such alteration, and not earlier

(3) The election shall take place at such times as the administrator shall by proclamation direct, and the provisions of section thirty-seven¹ applicable to the election of members of the House of Assembly shall *mutatis mutandis* apply to such elections

- 72 The provisions of sections fifty-three,² fifty-four,³ and fifty-five,⁴ relative to members of the House of Assembly, shall *mutatis mutandis* apply to members of the provincial councils Provided that any member of a provincial council who shall become a member of either House of Parliament shall thereupon cease to be a member of such provincial council⁵
- 76 The members of the provincial council shall receive such allowances as shall be determined by the Governor-General in Council⁶
- 94 The seats of provincial government shall be—

For the Cape of Good Hope	Cape Town
For Natal	Pietermaritzburg
For the Transvaal	Pretoria
For the Orange Free State	Bloemfontein

(b) *Sessions and Duration of Provincial Councils*

- 73 Each provincial council shall continue for three years from the date of its first meeting, and shall not be subject to dissolution save by effluxion of time
- 74 The administrator of each province shall by proclamation fix such times for holding the sessions of the provincial council as he may think fit, and may from time to time prorogue such council Provided that there shall be a session of every provincial council once at least in every year, so that a period of twelve months shall not intervene between the last sitting of the council in one session and its first sitting in the next session

¹ i.e. qualifications of electors, &c

² i.e. the disqualifications of members

³ i.e. vacation of seats

⁴ i.e. penalty for sitting and voting when disqualified

⁵ There is, peculiarly enough, no provision stating that a member of parliament may not be elected to the provincial council, but section 72 of the act clearly implies that before a member of parliament can be elected to a provincial council, he must, *before such election takes place*, cease to be a member of parliament

⁶ £120 per annum A member is subject to a deduction of £2 for each day on which he is absent from a meeting of the council, except if he is ill or has to attend a court of law, but he has eight days' leave of absence per annum Each member receives a free railway pass available throughout the province

*(c) Officers of the Council and Proceedings in the Council*¹

75 The provincial council shall elect from among its members a chairman, and may make rules for the conduct of its proceedings. Such rules shall be transmitted by the administrator to the Governor-General, and shall have full force and effect unless and until the Governor-General-in-Council shall express his disapproval thereof in writing addressed to the administrator.

77 There shall be freedom of speech in the provincial council, and no member shall be liable to any action or proceeding in any court by reason of his speech or vote in such council.

The chairman of the provincial council is elected on very much the same lines as the speaker of the house of assembly.² After the election the administrator delivers the opening speech, but no debate is allowed on this speech. There is then appointed a sessional committee on standing rules and internal arrangements, which consists of five members.

(1) *Ordinary Business* The council usually sits from 2.30 p.m. until 6 p.m., but it may sit until 11 p.m., after a break for dinner. Every meeting of the council is opened with a prayer,³ after which the ordinary daily routine of business is as follows:

Petitions,
Reports of Select Committees,
Other Reports and Papers,
Notices of Question, and
Notices of Motion.

¹ See Standing Rules of each provincial council. The statements in the text are based on the procedure in the Transvaal provincial council. The procedure in the other provinces is very similar.

² The chairman of the council receives an extra allowance of £280 per annum (Transvaal). The chairman of committees receives an extra allowance of £180 per annum.

³ It is interesting to note that in some of the councils, various versions of van Riebeeck's prayer are still in use. The prayer used in the Transvaal provincial council is the following: 'O Merciful God and Heavenly Father, inasmuch as it hath pleased Thee to call us to the guidance of the affairs of this Province, for which purpose we are here in Council assembled, help us, O God, to adopt such resolutions and pass such ordinances as will maintain justice and best promote the interests of the people. We pray Thee, O Most Gracious Father, that Thou wilt attend us with Thy Fatherly Wisdom, and, presiding in these our meetings, wilt so enlighten our hearts that we may be freed from all wrong passions, misunderstandings, and other similar shortcomings, and our minds be so constituted that, in our deliberations, we may not purpose or decide otherwise than what may tend to Thy honour and glory. Bless our Sovereign, prosper our Union and Province, and promote the interests of our Empire. All this we beg in Thy Most Holy Name.' This prayer, abbreviated and adapted, was drafted by Jan van Riebeeck, the first governor of the Cape de Boa

Notices are set down on the order paper in the order in which they are given, with precedence as follows

- (1) Questions.
- (2) Motions for leave to introduce draft ordinances, whether public or private,
- (3) Motions for the appointment of select committees on private draft ordinances,
- (4) Motions for the appointment of members to serve on select committees already appointed,
- (5) Motions to go into committee of the whole council for instructions to committees on draft ordinances,
- (6) All other motions,
- (7) Draft ordinances

The orders of the day are disposed of in the order in which they stand upon the paper, but the right is reserved to the administrator, or in his absence a member of the executive committee, of placing administration motions and orders on the order paper in the rotation in which they are to be taken on Tuesdays and Thursdays

(ii) *Financial Business* The council may not proceed upon any motion, draft ordinance, incidental provision in any draft ordinance, or any other matter for the appropriation of any money out of the provincial revenue fund without the recommendation of the administrator. Every such recommendation must be communicated to the council by written message through the chairman in the following terms

The Honourable the Administrator, having been informed of the subject matter of the proposed motion, &c, recommends it to the consideration of the Council,

and the same shall be so entered in the votes and proceedings

The committee on the estimates and the committee of ways and means are appointed by resolution 'That this council do resolve itself into committee on the estimates' or 'of ways and means', as the case may be. When the council has passed such resolution, with or without debate, the question shall be put by the chairman 'That I do now leave the chair', which shall be passed without amendment or debate. There is a select committee designated 'The select committee on public accounts of the province', consisting of five members, for the examination

Esperance, and was adopted by resolution of the commander and council of the Fort of Good Hope on December 30, 1651

of the accounts showing the appropriation of the sums granted by the council to meet the public expenditure

All proposals to raise funds whether by way of taxation or the imposition of any impost rate, or pecuniary burden upon the people, must originate in the committee of ways and means on previous notice being given by a member of the executive committee on behalf of that committee. The recommendation of the executive committee is conveyed to the council through the chairman in the same form *mutatis mutandis*, as the administrator's recommendation previously mentioned.¹

No draft ordinance or amendment to any draft ordinance, containing provisions which will have the effect of interfering with the crown, its lands or other prerogatives, may be proceeded with except with the administrator's consent.

All things which the provincial council may have to offer to parliament or to the governor-general-in-council must be offered by way of respectful address signed by the chairman and transmitted by him to the proper quarter. The provincial council may recommend to parliament the passing of any law relating to any matter in respect of which it is not competent to make ordinances.

All the other rules of procedure, as well as of debate, are similar to those outlined in the chapter on the rules and procedure in the house of assembly,² including private bill procedure. The Powers and Privileges of Parliament Act, 1911, applies to inquiries by provincial councils into matters referred to them by parliament for the purposes of private bill legislation under section 88 of the South Africa Act.³

(d) *The Assent to Ordinances* The assent of the governor-general-in-council, and the enrolment of provincial ordinances have been dealt with in the last section of chapter XIII, under the heading of 'The Control of the Provinces by the Union'

¹ Note that the administrator only recommends appropriation and the executive committee taxation, a difference that may have important practical results.

² See *supra*, Chapter XI 4.

³ Section 25 of Act 19 of 1911 see Chapter XI 5 (u).

XVI

THE WORKING OF THE PROVINCIAL SYSTEM AND SUGGESTIONS FOR ITS REFORM

(1) *Introductory* Provincial systems of government throughout the world have revealed a number of weaknesses which have proved very difficult to remedy. It will be instructive to discuss the provincial experiment in two British dominions, taking the one which has been most successful and the one which has been most disastrous.

The Canadian provincial system is the product of history out of which arose the divergent forces of race, religion, language, 'home lands', geography, and settlement. It was never possible for the makers of the Canadian federation to think in terms of a unitary system. In each of the federating provinces in 1867 there was a strong sentiment for and traditional attachment to its own institutions—a legislature with a responsible cabinet—a reproduction of the British parliamentary system. This sentiment was natural considering the fact that in each colony there had been fought and won the battle for 'responsible government', and that each had taken an active and worthy part in the achievement of those principles on which alone colonial government could continue to exist. In 1867 many were alive who knew personally the protagonists of responsible government or who stood close to its achievement. Thus, then, the foundations of the Canadian nation had to be built on all the realism of the situation.

The result in Canada has been that each province is in fact a complete political entity on the British model. There is the crown fully represented by a lieutenant-governor, with all the expensive trappings of government houses and such like. There is a fully developed cabinet system, a fully developed provincial civil service, with fully developed administrative boards, commissions and so on. As a consequence there is an excessive burden of taxation, since the mutually exclusive systems of the federal and the provincial governments impose taxation on the citizens without regard to each other. In addition, the distribution of powers in Canada is such that litigation has been exces-

sive and shows no sign of decrease, while, at the same time, subject-matters of national importance are handicapped by provincial legislative powers and the insistence on provincial rights. The reform, which may seem so obvious to the outsider, is postponed, is at the best piecemeal, is most often impossible, because the initial rigidity of the provincial system has accentuated the initial situations and the sentiment of the past has become an almost insurmountable obstacle in the face of undoubted and remarkable provincial accomplishment. The provincial system in Canada works and works well. It will doubtless continue in its present form perhaps indefinitely, though it is becoming increasingly obvious that the distribution of legislative powers must be changed. All this, however, ought not to blind practical students of constitutional law to several facts. First, it is far too rigid and inelastic. Secondly, it is far too expensive and extravagant. Thirdly, and above all it works because Canadian citizens wish it to work and it cannot be transplanted. It is the product of Canadian history. To attempt to reproduce it in South Africa in its entirety would be courting once more failure in the South African provinces.¹

The provincial system in New Zealand was established in 1852 and abolished, after twenty-three years, in 1875. The New Zealand parliament was given full power to legislate on provincial matters as has the Union parliament in South Africa, that is, New Zealand had a unitary constitution. The provincial councils were elected by the electors who voted for the election of members to the house of representatives—after the South African manner. The duration of the councils was for four years. The part of the South African administrator was taken by a superintendent in New Zealand. But here the analogy ends. The superintendent was elected by the whole body of provincial electors. This at once brought into provincial affairs a popular provincial president who had his own ministry in the legislature. It immediately caused trouble to the provinces, as it was bound to do, being too foreign an innovation in an otherwise harmonious system. The position which the superintendent occupied caused a great deal of unnecessary friction. He was elected by

¹ See W. P. M. Kennedy, *South African Law Times*, February and March, 1933, pp. 28 ff., 54 ff., and *Theories and Workings of Constitutional Law* (New York, 1932), pp. 64 ff.

the people but he could be removed from office only by the governor of New Zealand. He could appoint and dismiss provincial ministers but he was not responsible to the council whose legislation he could disallow. There was a clash between the British system of responsible government and the imported American innovation of an elected governor and an executive not responsible to the house of representatives. Further, the experiment was a failure because it imposed on tiny areas and a small population an almost complete system of state government with the most elaborate trappings. A provincial council system is fit only for large areas. It has to perform the work which, though too detailed for a central government, is yet too elaborate for a mere local authority.¹

The South African system is not, like the provincial system of Canada, the product of the country, the product of its history. Like the New Zealand system, it is a foreign innovation, a hybrid conglomeration. It undoubtedly needs reforming, and reformers would do well to bear in mind the lessons to be learnt from the history of New Zealand and the experience of Canada.

Before any suggestions for reform, however, can be made it is necessary first to explain how the present system in South Africa works and to point out its weaknesses. We shall discuss, first, the working of the various organs of provincial government and point out their weaknesses in functioning. We shall then be in a position to make suggestions for the reform of its organs of government. After that we shall discuss what reforms are necessary or possible in the status of the provinces: that is, whether the councils should be abolished or whether a federal system should be introduced. Finally, we shall discuss the weaknesses in the exercise of the powers granted to the councils and make suggestions for the amendment of those powers.

(1) *The Working of the Organs of Provincial Government* We may with profit refer to the writings of two authors who faithfully represent the hopes and intentions of the framers of the South Africa Act, and the fears of some of its critics. The Hon R. H. Brand, in his admirable *Union of South Africa*, states

¹ See W. P. Morrell, *The Provincial System of Government in New Zealand* (London, 1932). The provincial system in New Zealand was abolished in 1875 and its place taken by a system of extended municipal government, which could with advantage be applied to South Africa if the provincial system were abolished.

'The [executive] committee will contain representatives of more than one party. Party government, therefore, in the ordinary sense will be impossible. The provincial constitutions, indeed, presuppose a form of government entirely different from that to which Englishmen are used either in national or local politics. They seem to be based rather on the model of the Swiss constitution to which many of their features are strikingly similar. Their creators no doubt hope that the results will be equally successful. The outstanding feature of the Swiss form of government is that, although political parties exist, party government does not. As Professor Dicey observes, the federal council, i.e. the governing body, is in reality not a cabinet, but a board for the management of business analogous to a company's board of directors. Representatives of various parties sit upon it, and as Professor Lowell has pointed out, its members hold very divergent views. Nevertheless, the council conducts its business with admirable efficiency and harmony. A form of government may work well in Switzerland and still be entirely unsuited to a British community, but an experiment so successful in one country is at least worth a trial. These provincial constitutions have, moreover, been advocated on the ground that they are not unlike the pre-war constitutions of the South African Republic and Orange Free State, and that these latter were found to be well suited to Dutch ideas of government. But this analogy cannot be pressed too far. These republican constitutions were only suited to a comparatively simple community.

Those on the other hand who dislike so great a departure from British traditions maintain that the experiment must fail. They point out that no provision is made for avoiding deadlocks between the committee and the council, since the committee cannot be dismissed and the council cannot be dissolved. In practice, however, no great difficulties need be anticipated on this score. The committee cannot legally disobey the ordinances of the council and the council in the long run will be able to force the resignation of the committee by cutting off its supplies. The latter is indeed likely as in Switzerland to limit its functions to carrying out the policy of the council. A more serious criticism is that to attempt to force opposing parties to work together in the same government, will be to try to mix oil and water. But before the provincial constitutions are condemned on this score the powers which they will be called upon to exercise should be examined. With the exception of education there are none of a character into which party politics need enter.¹

Professor A. B. Keith, in the first edition of his *Responsible Government in the Dominions* writes

'The Provinces are not in any way to be set up as rivals to the Union, and therefore the system of government must not be a replica in however faint a form of the central government. The party system is to be continued in the ordinary central government, but it is not to be allowed to remain in force in the provinces. Therefore the legislature of the

¹ *The Union of South Africa* (Oxford, 1909), pp. 80-2

province is in no sense to be a parliament and the executive is not to be an executive council but an executive committee. The committee itself will not be a political or party body, the mode of choice by proportional representation with the single transferable vote will probably secure that the members are not representative of one party at all. It is hoped that they will simply be a body of men chosen as the most suited for administrative work.¹

These two statements were written before the provincial system had an opportunity of being put to the test. We may now quote the work of a distinguished author who himself has been a member of a provincial council. Dr Nathan, writing in 1919, states

'Never have predictions or hopes been more strikingly falsified! This result was due to the fact that the first general election for the provincial councils was held simultaneously with that for the house of assembly.² The contest was naturally conducted on party lines, and the unavoidable consequence was that the party system has ever since prevailed in the provincial councils, both in their elections and in their conduct of business. It followed that they elected members of the executive committees according to party ties, and not on the pious general principles which the framers of the constitution had in view. It must not be forgotten that a member of the executive committee sitting in the provincial council naturally assumes the leadership of the party which has elected him, and will advocate its views in the executive committee as well as in the council. And although he is not in the position of a minister, his political and party ties will be of the same nature as those which fetter a minister. The position thus created is an anomalous one. Members of the executive committee are not directly responsible to the council, though chosen by it. In actual practice, they are guided by the views of the council, though not bound to follow them. If the members of the executive belong to different parties, they must act as a composite body, although they will naturally tend to act in the interests of the parties they respectively represent. And the consequence is not so much a compromise as a deadlock. Sometimes there is an escape from this if the administrator has a powerful personality, able to force through his proposals. But this is hardly an ideal solution. In any case, it is plain that the existing system has failed. Probably a satisfactory solution may be found in making the executive committee a body responsible to the members who elect it, in the same way as a cabinet ministry.³

If a constitution can withstand the pressure of interests that lead sooner or later to political crises, it is a good or workable

¹ *Responsible Government in the Dominions* (Oxford, 1912), vol. II, pp. 967-8.

² The constituencies in the two larger provinces are exactly the same for both provincial and parliamentary elections.

³ *South African Commonwealth* (Johannesburg, 1919), p. 94.

constitution. Such is the constitution of the United Kingdom or of the Union of South Africa so far as its central government is concerned. A good constitution should be easily amenable to the will of the people. It should avoid the deadlocks which are created whenever there is no machinery available to put into action the expressed will of the people. If the people want a law, if the people wish to be rid of an executive, if the people desire a particular policy the constitution should provide a smooth machinery to give them that law, to rid them of that executive, or to enforce that policy. If the constitution is too rigid, deadlock may result, if it has too many checks, or if parts of it are out of harmony with the whole, it tends of itself to create political crises. The provincial constitutions in South Africa are out of harmony with the constitution of the Union, and they have nearly all the above-mentioned weaknesses. Therefore, the provincial constitutions are bad constitutions. They have the inherent weaknesses of hybrids without the advantages which often spring from fresh infusions. It is inherent in the positions which the administrator and the executive committee hold in the present provincial system that there should be deadlocks. The administrator is a fortunate person when he is the nominee of a political party in power both in parliament and in the provincial council with which he is concerned. Then everything works smoothly. The executive committee probably is composed of members of one party, thinking politically, as the administrator thinks, and anxious to assist him. The council wishes to grant him supply and to pass the ordinances which the executive committee recommends. The administrator works in harmony with the central government. In the Orange Free State from 1924 until 1934, this was the happy state of affairs. In Natal also the whole council was a politically homogeneous body but of a party different from that in power in the Union parliament from 1924 until 1933. Fortunately the administrator of that province could work in perfect harmony with the Union government, for he had previously been and he remained a non-party man. In these two provinces there has been no clash between the administrator and the executive committee or the administrator and the council. Such was the position which the national convention visualized when it drafted the constitutions of the provinces.

except that they had hoped that there would be no politics at all in the provincial councils

In the two larger provinces the administrator has been less fortunate. In 1914 the labour party in the Transvaal obtained a small majority in the provincial council, entitling it to two representatives out of the four on the executive committee. But it refused to accept representation on the executive committee with the result that the executive committee was composed of representatives of the minority. The reason why the labour party refused representation was because it thought that the administrator was hostile to it, and that, as he had a deliberate as well as a casting vote, he could at all times have overridden the wishes of the labour party. If the administrator were in fact hostile, it was argued, the acceptance of representation on the executive committee would have resulted in the same position as it resulted in with no representation at all on the committee. The administrator was appointed by a Union government to which the labour party in parliament was in opposition, and therefore it was probable (to say the least) that the administrator was of a different political outlook from that of the labour majority in the provincial council. The position resulted in a deadlock. The labour party in the council objected to certain taxation proposals of the administrator and refused supply. The whole government of the Transvaal province came to a standstill, and the Union parliament had to pass special legislation supplying funds for the public service of the province. In 1917, in the Transvaal also, each of four political parties had a representative on the executive committee, and a partial deadlock arose.

In 1924 the administrator of the Transvaal was Mr J. H. Hofmeyr, appointed by the South African party till then in power in parliament. With a change of government that year a demand was made that there should be a change of administrator, as the nationalist party, together with the labour party, with whom they were working in harmony, had a majority in the Transvaal provincial council. But this majority on the council did not have a majority on the executive, as there were two South African party representatives and two nationalists on the executive. Mr Hofmeyr, it was alleged, was hostile to the majority on the council because (it was argued) he had been

appointed by the late South African party government. To a letter which Mr Hofmeyr wrote to the prime minister in June, 1924, on the question of the administrator's resignation on the accession to office of a government which was in opposition at the time when the administrator was appointed, the prime minister gave a non-committal reply, but at a subsequent interview an understanding was reached between the premier and Mr Hofmeyr. On August 1, 1924, in reply to a question in the assembly, the prime minister, General Hertzog, stated

'I cannot admit that the post of administrator is a political one. This post, so far as it concerns the four provinces of the Union, was established under the constitution, and the incumbent occupies the position for five years. It is clear, therefore, that there is no reason to suppose that the post is to be regarded as a political one requiring that the incumbent must either necessarily profess the politics of the government of the day, or vacate his post where this is not the case. Whatever might have been the practice of the former government, I am of opinion that the intention of our constitution is that the provincial administrator shall be a member of the federal system in so far as that system finds expression in the establishment of the provincial administration, and that the administrator shall be a person who, at his appointment, shall be acceptable to and enjoy the confidence of the majority of the province concerned and who in any case shall co-operate in the interest of the province in a spirit compatible with the political feeling of the majority as reflected in his council, unless he may in the general interest of the province have a sound reason for departing from that feeling. According to our constitution, therefore, there is no necessary connexion between the party political views of the administrator and that of the government of the day, however desirable this may sometimes be for practical purposes. With regard to the administrator of South-West Africa, this post will always necessitate the selection of the most competent and suitable person obtainable to represent the government of the Union there in the execution of the important duties devolving upon it under the Mandate. These duties will always have to stand in an inseparable relation to the policy of the government of the day and it is clear that no government can be properly represented by a person imbued with a policy other than or in conflict with that of the government. Where this is the case it would be the duty of the government to see that its policy be, if necessary, carried out by another person. But here also I consider it undesirable that an administrator, once appointed, shall be compelled to lay down his post merely on the ground of difference in general political convictions, so long as such difference appears to be no obstacle to the proper fulfilment of the duty imposed upon him by his office as required by the policy of the Government.'

Obviously, the administrator could not be removed except for

'good cause' amounting almost to misconduct or inefficiency. On March 11, 1925, the provincial council of the Transvaal passed a vote of no confidence in Mr Hofmeyr and requested him to resign because he did not have the confidence of the council, that is to say, because it was thought that, having been appointed by a South African party government, his views were hostile to those of the majority in the council. The fact that this majority in the council did not have a majority on the executive committee provided the pith of the protest. Before and after this motion of no confidence, three ministers of the government went so far as to give the council their support in public, but the prime minister, on the matter being taken up by Mr Hofmeyr, supported the latter. Mr Hofmeyr continued at his post until the effluxion of the period prescribed for his office, acting tactfully and without allowing much friction to arise between himself and the council. The whole incident proved nothing so much as that the office of administrator is one of great independence, but it was only a person of Mr Hofmeyr's tact and ability who could have carried on the administration of the province so smoothly in such circumstances.

The suggestion that there should be a change of administrator with a change in the Union government has found much support in responsible quarters and an author who has written well on the provincial system¹ strongly supports this suggestion. Reform, however, would have to go much farther, because it would otherwise be possible for the same deadlock to arise as arose in the Transvaal in 1914.

(iii) *Reform of the Organs of Provincial Government* It is generally true that it is precarious to move too far away from tried and trustworthy systems of government. Only the most exceptional circumstances or a revolution in the political philosophy of a nation can justify hasty and distant departures. This is precisely what was done when the South African provincial system was created. The framers of the South Africa Act moved a great distance away in this respect from the tried and trustworthy system of responsible government and introduced the foreign innovation of a non-responsible executive. The problem now before reformers is to bring the provinces back to

¹ Gey van Pittius, *Die Stelsel van Provinsiale Rade*, p. 230

the system of government which has been tried and proved throughout the British Empire

In dealing with the provincial council as a legislative machine, we should remember that the council, while allowing private members to introduce legislation on matters of local government, education, shop hours, betting, and any other subject within its legislative jurisdiction, except ordinances involving financial imposts, is at present entirely dependent on the administrator and executive committee for the carrying out of a policy involving public expenditure, without having the right which representative bodies usually have in British constitutions of turning out an executive which does not carry out the financial policy of the majority of the electors as represented in that elected body. In matters involving public expenditure the council's only power is that of a negative machine. In the scheme of modern government finance plays by far the largest part, and a body which, though it can withhold supply, cannot force an executive which has another and stronger (Union) treasury at its back, to carry out its financial policy, eventually tends to become little more than the rubber stamp of that executive. The council cannot dismiss the administrator or the executive. It might have been elected on a specific platform to carry out specific reforms, but as soon as it arrives at a stage when financial imposts are necessary, it has to sit waiting, in the case of an hostile executive, for the pleasure of the executive to carry out necessary or desired reforms. It can do nothing if the executive refuses to fill in the blank cheque given to it by the council owing to the fact of its having elected a non-responsible executive under the constitution. The result has in many cases been a deadlock.

The most important reform, therefore, must be in regard to the executive committee. On that reform hinges the whole mechanism of a new system of provincial government. The administrator must be a person elected by and responsible to the provincial council. The person chosen need not necessarily be a member of the council. This would allow a wide choice and probably one of the best men in the province would be elected to this position, one who would work in harmony with the council and the executive committee. The Union government has always the three important levers of control, namely, it

could refuse to assent to provincial ordinances, it could threaten to pass legislation to enforce its desires, or it could refuse financial assistance to such persistent mendicants as the provinces have proved themselves to be. In effect, this reform would make the administrator the prime minister of the province. He would in all probability be a party leader and would be elected on a party ticket. His term of office would be dependent on the wish of the council and he would thus be responsible to the council. This reform must naturally be accompanied by making the executive committee responsible to the council, either by the members being chosen by the administrator or by the council. The latter course would be preferable, making for the stability of the executive, allowing it to be changed, if occasion should arise, by the council and not by a popular appeal to the province, and allowing for the election to the executive committee of persons not members of the provincial council.

An amendment to the South Africa Act has been drafted to reflect these suggestions of the reform of the provincial system and appears at the end of this chapter. It is to be noted that the phrase used to signify that the administrator will be responsible to the provincial council is analogous to that used in constitutions granting responsible government, namely, 'during the pleasure of the provincial council'. Whenever the provincial council passes a vote of no confidence in the administrator he will have to resign. It will not be necessary, though it may be advisable, to resign if any important measure is not carried. If the administrator makes the measure one of confidence he himself may resign, but he will have to resign only on a direct vote of no confidence. This slight departure from the usual practice has been suggested in order to allow the administrator to introduce controversial measures and leave them to the free vote of the council without making every important measure a question of confidence. When the administrator resigns, it may be that it will not be necessary to have a general election. Another party leader may be chosen to replace him. On the other hand, a general election will sometimes be necessary. But before this takes place, the approval of the governor-general-in-council should first be obtained, for the government of the country, by mediation or otherwise, may be able to adjust the

causes of dispute This provision is also necessary because a general election should not be sprung upon a province without the central government, which administers the Electoral Act, knowing of it beforehand

At the same sitting at which the administrator is elected, the provincial council shall elect an executive committee for the administration of the different departments grouped, e g under education, roads, local government, hospitals, finance, or such like In order to have harmony within the executive, there should be no election of executive committee-men by the proportional representation system of voting Proportional representation on the executive has not been a success, and the provision should not be retained as it is out of harmony with the general scheme and principle of responsible government The council should have the right of dismissing an incompetent, unpopular, or indolent member of the executive committee without dismissing the rest of the committee

It is obvious that the reform suggested means the introduction of even more politics into provincial affairs, but people who imagine that the government of a province or even a municipality can for long be carried on without divergent and conflicting policies being pressed forward, have no proper insight into the administration of human affairs When we speak of government without party politics we mean government without *organized* party politics To have groups or parties in the provincial councils need not be detrimental to progress provided the organization or constitutional machinery of the provinces is such as will readily adapt itself to political grouping and the aims of conflicting interests The weakness of the provincial system is due to the erroneous belief which the framers of the South African constitution had that there would be no politics in provincial government, and that therefore provincial constitutions could be created on lines that need to take no heed of political conflict Instead of realizing the true nature of domestic sentiment and conditions, and framing the constitution so that such sentiment and conditions could have full play, the framers of the constitution were carried away by an excess of optimism and created a provincial system which was out of harmony with the constitution of the central government and the nature and habits of the people Therein lay their error and therein can be

found the reason for the failure in the working of the provincial system. The present provincial system, with its brake on political conflict, in no way suits the South African temperament or South African notions of government. It does not allow for the automatic adjustment of political conflict as does the parliamentary form of government. The nature and inclination of the population being what they are, the constitution of all political institutions in South Africa should be such as to allow for the free play of antagonistic forces and interests in domestic affairs, organized as they are along party lines. The present system is certainly not of South African or British origin. It might work admirably in Switzerland where the citizen of one canton does not care what his brother beyond the mountain is doing, but it is entirely foreign to the South African, whose horizon is as wide and flat as his country is itself. A constitution should be built from within, from out of the loins of the people, as was the Canadian system. Whether it means more politics or not can in no way alter the basic principle that a political institution should be of domestic growth so as to suit the temper of a nation; it should be the product of the people itself. It should not be a curious conglomeration of the different parts of foreign constitutions. For these reasons the first and most important reform should be to make the executive committee and the administrator responsible to the council.

(iv) *No Reform is required in the Status of the Provinces*. We may now discuss what reform, if any, is necessary or possible in the status of the provinces, that is, whether the system should be a federal one, or remain as it is, a unitary system, or whether the provincial governments should be abolished altogether. There is no doubt that the South African requires a unitary form of government. Before Union, before the Boer war, the governments which he had were unitary governments. He was never too much troubled by local matters, however interested he might be in them. A perusal of the chapter on the making of the constitution will convince the reader that the strongest feeling for unification under a central government has always existed in South Africa, and there is no doubt that this feeling still exists, perhaps in an intensified form. The recent agitation¹ in Natal for federation has left the other provinces quite unin-

terested, and indeed it did not have very powerful backing in that province. Any reform, therefore, in the direction of federation, is out of the question. The experience of federal countries has shown us that federalism results in expensive government, an increase in litigation on matters arising out of state or federal legislation, and a drawback to national unity. Federalism, at the moment of its adoption, reflects forces and interests which make it inevitable, and these forces do not exist in South Africa. Reform of the provincial system, therefore, should not proceed along federal lines, because the predominant feeling in South Africa is to maintain the unity of the country. Reform must be sought for in another direction. The alternatives which present themselves to us are either the total abolition of the provincial constitutions, replacing them by a modified divisional council system, not dissimilar to the English county council system, or a reform of the constitution and functions of the various organs of the provincial council in such a manner that the system will harmonize with the central system of government. When in 1931 the government announced its intention of abolishing the provincial system, unpopular as that system was, the outcry in Natal compelled the government to proceed with caution. A commission was appointed, but this commission was ignored in all the provinces and especially by the provincial councils themselves. The government was unable to proceed with its investigations, and abolition became a dead letter. The only practical course now left open is reform by harmonization.

In any suggestion for reform there are two features of South African politics that must constantly be borne in mind. The first is that many people, and certainly the majority in Natal, desire an expansion of the powers of the provincial council, the second is that the majority of the people of South Africa are not really concerned with the method and result of reform so long as the pinpricks and annoyance caused by the provincial councils are removed. These two points are apparently contradictory, because the more power an institution of government has in a particular area, the more it can interfere with the people whom it governs. The problem for organizers of reform is to harmonize these apparently conflicting wishes.

(v) *The Exercise of Provincial Powers* The provinces were granted certain powers under the South Africa Act and they

function within those powers. We shall now consider the question whether they function efficiently under the various heads of power, and make our suggestions of reform regarding each power and function.

The most immediate duty of a government is the collection of the revenue necessary for carrying out the functions of government. Such revenue is taken from the pockets of the people, and whether it be taken by one authority or many different authorities is of no account to the taxpayer. This is true so long as (i) he obtains the same measure of efficiency from a central and single local authority system as he would from a central and double local authority system (as the existence of *provincial councils and municipal councils side by side* is), (ii) he has the same convenience of payment in both instances, and (iii) the same amount, and not one penny more, is in both instances taken from his pocket.

Under the Financial Relations Act, 1913, and its amendments, the provinces were given certain powers of taxation and were also allowed certain assigned and transferred revenues from the Union government. The power of taxation and legislation regarding the specified objects of taxation provided great cause for dissatisfaction. All kinds of new taxes, new licences, and new restrictions sprang up in every direction. In whatever region of finance the provincial administration moved, it exercised what had become a traditional privilege of annoyance. The provinces were not entirely to blame. When two authorities operate in the same field of taxation, it inevitably becomes impossible to avoid inequitable incidence, as neither authority is able to get a complete view of the taxpayers' burden and the necessary balance is not secured. The stronger authority usually takes for itself the most lucrative sources of revenue. In South Africa the result has been two-fold. In the first place, provincial taxation has been unsound, and has irritated the people, making provincial government thoroughly unpopular. In the second place, the provinces have not been left with sufficient sources of revenue. The latter is the reason why the provincial finances have always been in such an unhappy position. In an effort to remedy the first result, namely, the irritation caused by the provinces endeavouring to obtain as much revenue as possible from sources of taxation which in their nature could not afford sufficient revenue, the

Union government stepped in and passed the Licences Consolidation Act, 1925. This act deprived the provinces of the right to legislate regarding licences but assigned the revenue so obtained to the provinces in which the licence fees were paid. The result, though it did not remedy the causes of general dissatisfaction with provincial taxation, has, in this instance, been highly satisfactory. People now know with certainty what their trading, professional, and occupational licences are, the taxes are not too onerous, the law is uniform for every province and the immense amount of litigation which was once the accompaniment of provincial legislation on this subject has been considerably reduced. A long list of provincial taxes can be mentioned which almost exasperated the population. Nearly all provincial taxation legislation was bad legislation. The taxes were onerous. The provinces were in need of revenue and did not know where to turn for it. The taxes were thus unfair in their incidence, and the ordinances imposing them were confusing and difficult to enforce practically. A great deal has, however, been done to remedy the errors made. The evolution of provincial finance has been in the direction of the provinces obtaining more and more from the Union government by way of assigned revenues like transfer duties or, under the Act of 1925, licence fees, and less by means of direct taxation by the provincial councils themselves. The question now presents itself whether the Union government should not go the whole way and do all the taxation for the provinces, assigning certain defined and specifically obtained revenues to the provinces in which those revenues are raised. The Licences Consolidation Act has been such a success from every point of view that the same principle should be adopted to obtain all the revenue necessary for the provinces. The Provincial Subsidies and Taxation Powers Amendment Act, 1925, which we discussed in Chapter XIV 1, went a long way in this direction by restricting provincial taxation to certain specified items, and the change has been beneficial. It is only another step forward in the same direction to restrict provincial taxation to certain minor specified services rendered by the provinces. In other words, the provinces should be deprived of their powers of taxation, and should obtain their revenues from the taxation imposed by the Union government on certain specified objects of revenue and assigned to the

provinces in which the revenue is raised, as in the case of the Licences Consolidation Act. For example, the Union government should pass legislation taxing racing and betting, entertainments, motor and other vehicles, &c, and assign all those revenues to the provinces in which the revenues are raised. The advantages of this suggestion are manifold. Taxation throughout the Union will be uniform. There will be no unfair incidence of taxation. There will be one chief taxing authority for the whole country, and a proper view of the country's taxation sources will always be kept in mind. This is the only possible way to remedy the defects in provincial taxation. Whatever revenue is raised in a particular province will be placed at the disposal of the provincial council of that province for the needs of the province. The amount of revenue received will depend on the population and wealth of a province, but a special bonus or subsidy should be given to a province that can prove that through special circumstances it needs more funds.

This reform will lead to economy of administration, for the general principle adopted by the treasury will be that no province will get more than what was originally voted for it by way of assigned revenues and subsidies at the beginning of each financial year. Any expenditure by borrowing or overdrawing on the provincial account, unless ratified by the Union parliament, will be illegal expenditure.

The criticism of this suggestion will be that it would deprive the provincial councils of their most potent weapon and would narrow their powers to a nullity. The provincial councils, it will be argued, will be merely negative. They will have no power to impose taxation, and therefore, no power at all, save to decide on what matters money should be spent. This criticism can be met in a number of ways. At present the councils are, in financial matters, but negative machines, for the administrator introduces all financial measures. The council, it is true, will be deprived of the power of raising revenue, but it will have full power of spending that revenue. Its revenue will be raised for it, but the power of withholding that revenue from the executive or of compelling the executive to spend the money as the council wishes, which is the basis of the constitutional practice of all responsible government, will exist in a much more formidable form than it now exists, for the elected council will

have the power to turn the executive out of office if the latter body does not fall in with its wishes. To those who are conversant with the difficulties which administrators have always had to raise sufficient revenue the advantages of the suggestions here made will easily be apparent.

It follows from what has been stated above that the councils neither will possess nor ought to require any borrowing powers. Under the present system they do have the power, but the Union government has never allowed the provinces to exercise that power. Undoubtedly money will be required for works of a capital nature, but the Union government, as it has hitherto done, will raise the money for such purposes.

The provinces have full power of control over education other than higher education, and have carried out their duties efficiently, though the cost of education is, per pupil, nearly twice as much in South Africa as in the other dominions. The administration cost per pupil in Natal is less than half that in the other provinces, probably because the administration in Natal is centralized. Education is a matter particularly suited to the control of provincial councils and they should be left to work out their own system and to manage with the money which is voted to the province in the best way they can. The provinces should retain the power of charging school fees, and more regard should be given to the question of differentiating fees according to the means of the parents. The creation of special public schools where higher fees are charged would be welcomed. There is at present a joint matriculation board which sets examinations for entrance to the universities. This system has the advantage of unifying education courses in all the provinces. Technical and vocational education, at present under the care of the Union government, should be transferred to the provinces, but there should be a joint examination board appointed by the Union government, so that the qualifications of apprentices and others will be uniform throughout the country.

There are certain powers in regard to agriculture that it would be wise to delegate to the provinces, such as afforestation and agricultural education. At present afforestation is carried out by the Union government, but if the provinces could undertake this work, and receive the funds which will eventually accrue from afforestation, it is quite possible that much good will be

done. The drawback is that afforestation and irrigation should go hand in hand, and the latter is obviously unsuited for provincial control, but this drawback is not fatal. Agricultural training courses could advantageously be part of the curriculum of all the country schools.

Public health is under the control of the central government and hospitals under the control of the provinces. All the duties under the Public Health Act, 1918, may well be transferred to the provinces, provided always that the minister of the interior has the power of co-ordinating services and even of issuing instructions in the case of dangerous infectious diseases.

Though the provinces are responsible for local works and undertakings, the Union government always carries out the construction of public works of any nature, unless the works are placed with private firms after public tender. There is no reason why the provinces should not do all the construction of public works.

There are numerous other functions, of which the Union government now takes control, that can well be left to the provinces. Native education, universities, and the local administration under many Union enactments, may be left in the hands of the provinces. It should be the object of any reform to give the provinces much more power than they now have, so that as much as possible of the minor governmental functions of the country is removed from the ever-increasing work which parliament and the Union executive have to perform. An attempt has been made in the draft amendment to the constitution appended to this chapter to suggest the manner in which reform should be approached. The list of provincial powers there given may be added to from time to time if experience shows that the reforms have been a success.

APPENDIX I TO CHAPTER XVI

Draft Amendment of South Africa Act providing for the Reform of Provincial Constitutions

- 68 (1) In each province there shall be a chief executive officer styled the administrator of the province, in whom the executive government of the province shall be vested, and in whose name all executive acts relating to provincial affairs therein shall be done.

(2) The administrator shall be elected by the provincial council and shall hold office during the pleasure of the provincial council.

(3) An administrator shall be elected at the first sitting of the provincial council following a general election of the council, or upon his office becoming vacant, as the case may be.

(4) The administrator may from time to time appoint a member of the executive committee to act in his place during his absence from the province.

(5) Whenever the council by resolution signifies its desire that the administrator shall vacate his office, he shall immediately do so or he shall dissolve the council.

73 Each provincial council shall continue for four years from the first meeting thereof and no longer but may be sooner dissolved by the administrator with the approval of the Governor General-in-Council first had and obtained and published in the *Gazette*.

78 (1) As often and at the same sitting as that at which the administrator is elected, each provincial council shall elect four persons to form with the administrator an executive committee for the province. The administrator shall designate members of the executive committee to administer such departments of the province as the administrator may establish. The members of the executive committee shall hold office during the pleasure of the council. Whenever the council signifies its desire that the executive committee excluding the administrator or any member thereof shall vacate office, each member of the executive committee or that member, as the case may be, with the exception of the administrator, shall resign, but each or any of them may again be elected to office. Whenever and so often as the administrator shall vacate his office, the members of the executive committee shall also immediately vacate their offices, and the council shall elect another executive committee in the manner prescribed.

(4) Any casual vacancy arising in the executive committee, may be filled by the administrator pending an election by the council.

(5) Section 134 of the South Africa Act, 1908, in so far as it relates to provincial councils, is hereby repealed.

80 The executive committee shall on behalf of the provincial council carry on the administration of provincial affairs. Until an election of members to serve on the executive committee, such administration shall be carried on by the administrator for the time being in office. The resignation of the administrator shall take effect on the election of his successor in office.

85. (1) Subject to the provisions of this act and the assent of the Governor General in Council as hereinafter provided, the provincial council may make ordinances in relation to matters coming within the following classes of subjects—(that is to say)

(i) education, that is to say, the establishment and maintenance of primary and secondary schools, schools for

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natives and coloured persons, agricultural schools, technical and vocational schools, and universities,

- (ii) afforestation, including the sale of timber from provincial forests,
- (iii) hospitals, asylums, homes for the ailing, and charitable institutions,
- (iv) local government,
- (v) local works and undertakings within the province other than railways and harbours,
- (vi) roads, outspans, ponds, and bridges,
- (vii) markets and pounds,
- (viii) fish and game preservation,
- (ix) the control of dogs, cats, horse and dog racing and betting thereon, amusements, vehicles, including motor, mechanical, and animal drawn vehicles,
- (x) all matters which, in the opinion of the Governor-General-in-Council, are of a merely local or private nature within the province, after publication in the *Gazette* of the decision of the Governor-General-in-Council to that effect

(2) A provincial council shall have power to raise revenue for its own purposes through the following sources and through no other source whatever, that is to say

- (i) education and school, university, vocational training, and agricultural training fees,
- (ii) the proceeds of the sale of timber and plants from provincial forests and plantations,
- (iii) fees for services rendered in hospitals, asylums, and homes for the ailing,
- (iv) market and pound fees,
- (v) auction dues,
- (vi) licences in respect of—
 - (a) dogs,
 - (b) horses,
 - (c) fish and game,
 - (d) the picking and selling of wild flowers,
 - (e) totalisators,
- (vii) a tax on—
 - (a) the takings of totalisators,
 - (b) betting and wagering on horse and other racing,
 - (c) amusements and entertainments,
 - (d) unimproved land within municipal areas ¹

(2) The revenue obtained by the Union government from the undermentioned sources within a province shall be assigned to

¹ Vehicular taxation, which is an important source of revenue, should be exercised by the Union government in order to prevent the anomalies of heavy taxation in any province and lighter taxation just across the border, which lead to attempts to evade the law

that province without any deductions whatsoever, that is to say, from—

- (i) Licences Consolidation Act, 1925,
- (ii) transfer duty
- (iii) liquor licences,
- (iv) a percentage, to be equal in each province, to be determined each year of the tax upon the incomes of persons and the capitation tax upon Europeans,
- (v) other revenues assigned to the provinces by parliament,
- (vi) such subsidies and advances to a particular province as parliament may authorize, provided that if an annual subsidy is made to Natal and the Orange Free State such subsidy shall always be equal in its amount for each of the said provinces

- 87 A provincial council may pass a bill on a matter in respect of which it has no power of legislation, and the bill as passed shall be introduced at the next sitting of parliament within two weeks of the commencement of such session by the Minister of the Interior, or it may be introduced earlier by any member of the senate, and if passed by parliament with or without amendment shall be an act of parliament

APPENDIX II TO CHAPTER XVI

The Provincial Finance Commission, 1934, issued its report on December 23, 1934. The report contained the following: The Commissioners approached their work from the definite standpoint that the provinces are to continue to function as provided in the South Africa Act, with or without modification. The provincial system can be made a useful and effective arm of government, the present difficult position in which most of the provinces find themselves is due mainly to the uncertainty that has existed since the inception of the provincial system and to variations in the provinces' powers and financial relations from time to time. An atmosphere of latent hostility appears to exist between the provinces and the Union government, owing to clash of functions. The central government should accept the fact that the provinces occupy a not unimportant place in the structure of government. There should be set up without delay a permanent provincial consultative committee consisting of representatives of the cabinet and the four provincial executives, presided over by the Minister of the Interior, to co-ordinate the whole field of provincial activity, without in any way undermining Union or provincial autonomy.

The subsidy system based on educational statistics is severely condemned, and a new subsidy system, too complicated for detailed examination here, is suggested. The following recommendations are made. Borrowing powers should not be extended to the provinces. The Union government should tax land and assign the proceeds to the provinces.

Part of the import duties on petrol should be assigned to a roads fund. The roads fund should be under the control of a national roads board, which should be responsible for the construction and maintenance of national roads.

The tendency to extravagance and increased expenditure due to natural expansion, bilingualism, free education and increased salaries, should be watched carefully by a proposed efficiency and thrift audit department. Special provisions regarding financial relations and loans to provinces are recommended.

The life of provincial councils should be lengthened from three to five years. A more extended system of rural local self-government should be encouraged. Owing to the bankrupt position of the Native Development Fund, native education is in a chaotic and backward state. A special inquiry on all aspects of native education is suggested. A national health policy should be determined by the central government and responsibilities thereunder assigned to provincial and local bodies. The following functions should be transferred to the provinces: local irrigation, local land settlement and labour colonies — *Report of the Provincial Finance Commission, 1934*

PART V
THE ADMINISTRATION OF JUSTICE

XVII

THE JUDICIAL SYSTEM

1. The Development of Judicial Institutions in South Africa

We saw in the first chapter that the East India Company was founded by a charter granted by the states-general in 1602. This charter made provision for the establishment of courts of justice. At the Cape a court was established called the *Raad van Justitie*. Its judgments and sentences were pronounced in the name of the states-general and the Prince of Orange, and not in the name of the East India Company. The full court, which consisted at different times of from seven to thirteen members, had plenary jurisdiction in all civil and criminal matters. Its seat was at Capetown. It was the court of appeal for all the inferior and district courts in criminal as well as civil matters. From the *Raad van Justitie* an appeal lay to the supreme court at Batavia.

In 1682 a court of first instance for petty cases was created for Capetown and the Cape district, and courts of landdrost and heemraden were established in two districts adjoining the Cape district.¹ The landdrost was a kind of magistrate presiding over a board of burghers called heemraden. In 1805 five magistracies or *drosdyen* were established. The jurisdiction of the landdrosts was limited by statute. Under the landdrost stood the field-cornet. The landdrost occupied a judicial position only in civil cases, in criminal cases of a serious nature they acted as prosecutors, and sent the cases to Capetown for trial. From any judgment of a landdrost an appeal lay to the court of justice at Capetown.

The whole of the civil administration of the district was entrusted to the board of landdrost and heemraden. They caused roads to be made, supervised prisons and all other public buildings, and collected the taxes.

Until 1813 all the proceedings of the courts were not conducted in public. In 1814 the Dutch possessions in South

¹ J. W. Wessels, *History of the Roman-Dutch Law* (Grahamstown, 1908), p. 152.

Africa were formally ceded to Great Britain. The British government recognized the judicial institutions then existing and left the people to be governed by the system of law to which they had grown accustomed. Gradually, however, statutory alterations were made in the legal system and the legal institutions of the colony. During the first occupation the governor had constituted himself a court of appeal for civil cases, with an appeal from his decision to the privy council. A year later, in 1808, the governor and two assessors became a court of appeal in criminal cases. In 1811 circuit courts were first established. In 1819 some of the provisions of English criminal practice were introduced.

In 1826 an ordinance was promulgated creating justices of the peace. From 1814 the Dutch and English languages had been used in judicial proceedings, but in 1827 all judicial acts and proceedings were required to be conducted in the English language. In 1828 the important office of registrar of deeds was created. In 1830 the law of evidence was altered in such a way that English rules of evidence added to the jury system which had been introduced in 1827 made the Cape courts almost a replica of English courts.

With the Charter of Justice of 1827 the *Raad van Justitie* passed away, and was replaced by a supreme court of three judges appointed by the crown for life. The *landdrost* and *heemraden* also disappeared and their functions were taken over by resident magistrates and civil commissioners. The supreme court established in 1827 continued with but little alteration until the South Africa Act merged it in the supreme court of South Africa. The New Charter of Justice of 1832 repealed and re-enacted the Charter of Justice of 1827 amplifying it in regard to matters of detail.

The Dutch courts recognized two classes of legal practitioners, the attorney and the advocate. As these practitioners were also known to the English practice, there was no difference in this respect after the establishment of the supreme court.

In 1864 an Eastern Districts' court was established and in 1879 a high court of Griqualand West. Each consisted of a judge-president and two puisne judges. The jurisdiction of the above courts will be discussed in the next section of this chapter.

The supreme court of Natal and the Natal judicial system were modelled on the British and Cape systems. Roman-Dutch

law was introduced in 1843 and a Code of Native Law recognized in 1849. The laws governing the constitution and jurisdiction of the Natal supreme court were codified in 1896.

A superior court in the Transvaal was established by the Grondwet of 1858 and consisted of three landdrosts and twelve jurymen. In 1877 a law was passed amending the Grondwet and constituting a high court of three judges and circuit courts. The high court thus constituted was also modelled upon the supreme court of Cape Colony. After the annexation the constitution of the superior court was regulated by a statute of 1903, the supreme court sitting at Pretoria consisted of seven judges, and the high court of the Witwatersrand, which was the court of a single judge, presided over by one of the judges of the supreme court, was a local division of the supreme court.

In the Orange Free State the Cape model was closely followed, the statute of 1902 created a high court of three judges.

The procedure of the superior courts of each colony, including Southern Rhodesia, was regulated by a set of rules published for each particular court, but these rules were all so similar to the rules of the supreme court of the Cape of Good Hope that the difference in judicial procedure of the various courts was very slight. These rules still form the basis of the procedure in the different divisions of the supreme court of South Africa.

After the war of 1900 all the inferior courts in South Africa were known as resident magistrate courts. The magistrates throughout the Union still have administrative duties which can be traced down from the duties which were imposed upon the early landdrosts at the Cape.

2. Judicial Institutions at the Time of Union

Immediately before the establishment of the Union, the administration of justice in each colony, as we have seen, was divided between a supreme court and the magistrates' courts. Within the limits of the colony each supreme court had full jurisdiction, subject to a limited right of appeal to the privy council. The Cape supreme court had appellate jurisdiction over the high court of Southern Rhodesia. Each of the supreme courts had original jurisdiction in civil suits, and criminal cases were tried by a judge and jury. In each supreme court, three judges heard appeals from the decisions of a single judge, and two

judges heard appeals from a magistrate's decision. All the courts were creations of statute, and there were no customary courts as there are in England. Nevertheless the superior courts have always claimed an inherent jurisdiction to provide substantial justice in matters not precisely defined or embraced in the statutes creating these courts.

The magistrates' courts had jurisdiction in the areas of the magisterial districts for which they were created, but their jurisdiction was limited in civil matters in respect of the amount of the claim and the nature of the suit, and in criminal cases in respect of the punishment and the nature of the crime.

The Supreme Court of the Cape of Good Hope had jurisdiction over the whole of the colony. It sat at Capetown, and consisted of a chief justice, with two judges permanently assigned to the court, and other judges sitting in it from time to time as occasion might require. There were two other courts in the Cape which were in the nature of local divisions of the Cape supreme court. Their judges were judges of the Cape supreme court, entitled to sit and take part in the proceedings of the supreme court at Capetown. These courts were known as the *Court of the Eastern Districts of the Cape of Good Hope*, sitting at Grahamstown, and the *High Court of Griqualand West*, sitting at Kimberley. Each consisted of a judge-president and two puisne judges. Within their respective territorial areas of jurisdiction they had concurrent jurisdiction, i.e. both an original jurisdiction and an appellate jurisdiction from the decisions of magistrates, with the supreme court of the Cape of Good Hope, but from the decisions of these two local courts an appeal lay to the supreme court at Capetown. *The Supreme Court of the Transvaal* sat at Pretoria and had jurisdiction over the whole of the Transvaal. A local division of this Court known as the *Witwatersrand High Court*, sat at Johannesburg, and, except that it had no appellate jurisdiction at all, its powers within its area of jurisdiction were almost equal to those of the Transvaal supreme court. *The Supreme Court of Natal* sat at Maritzburg, and the *High Court of the Orange River Colony* sat at Bloemfontein.

3. The Superior Courts of the Union

The South Africa Act created one supreme court for the whole of the Union.

- 95 There shall be a Supreme Court of South Africa consisting of a Chief Justice of South Africa, the judges¹ of appeal, and the other judges of the several divisions of the Supreme Court of South Africa in the provinces
- 96 There shall be an appellate division of the Supreme Court of South Africa consisting of the Chief Justice of South Africa and four judges of appeal²
- 98 (1) The several supreme courts of the Cape of Good Hope, Natal, and the Transvaal, and the High Court of the Orange River Colony shall, on the establishment of the Union, become provincial divisions of the Supreme Court of South Africa within their respective provinces, and shall each be presided over by a judge-president
- (2) The court of the eastern districts of the Cape of Good Hope, the High Court of Griqualand, the High Court of Witwatersrand, and the several circuit courts shall become local divisions of the Supreme Court of South Africa within the respective areas of their jurisdiction as existing at the establishment of the Union
- (3) The said provincial and local divisions, referred to in this act as superior courts, shall in addition to any original jurisdiction exercised by the corresponding courts of the Colonies at the establishment of the Union have jurisdiction in all matters—
- (a) in which the Government of the Union or a person suing or being sued on behalf of such government is a party,
- (b) in which the validity of any provincial ordinance shall come into question
- (4) Unless and until Parliament shall otherwise provide, the said superior courts shall *mutatis mutandis* have the same jurisdiction in matters affecting the validity of elections of members of the House of Assembly and provincial councils as the corresponding courts of the Colonies have at the establishment of the Union in regard to Parliamentary elections in such Colonies respectively

It thus appears that after the establishment of the Union, all that was changed was the nomenclature of the several superior courts, and an appellate division for hearing appeals from those courts was created. Except for an increased jurisdiction to deal with matters that would arise from the fact of the establishment of one government for the Union and of provincial councils, the jurisdiction of the superior courts remained the same.

The following table shows the various divisions of the supreme court in comparison with the superior courts of the former colonies

¹ As amended by section 2 (1) (a) of Act No. 12 of 1920

² As substituted by section 1 of Act No. 12 of 1920

THE SUPREME COURT OF SOUTH AFRICA		CORRESPONDING COLONIAL COURTS	
APPELLATE DIVISION	*Cape of Good Hope Provincial Division	*Supreme Court of the Cape of Good Hope	NO APPEAL FROM COURTS WITHIN SOUTH AFRICA FOR VIOLATION OF HUMAN RIGHTS
	Eastern Districts Local Division	Eastern Districts Court	
	Griffiths West Local Division	High Court of Griffiths West	
	*Transvaal Provincial Division	*Supreme Court of the Transvaal	
	Witwatersrand Local Division	Witwatersrand High Court	
	*Natal Provincial Division	*Supreme Court of Natal	
Circuit Local Divisions of each Provincial Division	*Orange Free State Provincial Division	*High Court of the Orange River Colony	Circuit Courts for each Colonial Court
	asterisk * indicates that there are—		

4. The Appellate Division

The appellate division of the supreme court of South Africa possesses only an appellate jurisdiction. In criminal cases, there is an appeal to the appellate division from provincial and local divisions before whom cases have been tried in the first instance, only on points of law. Such jurisdiction as the appellate division possesses in criminal matters is exercised under Act No. 31 of 1917 on an application for (a) arrest of judgment on the ground that the indictment discloses no offence, or (b) the consideration of a special entry on the record made on the application of the accused, in which a specified allegation of irregularity or illegality in the proceedings is made, or (c) the consideration of a question of law reserved at the trial by the presiding judge on his own motion or at the request of the prosecution or defence. The appellate division may either confirm the judgment of the trial court, or set it aside, or remit the case to the court below for judgment to be given if it has not already been given, or it may itself give such judgment as ought to have been given, or it may make such other order as justice may require.

From the above it appears that the Union does not possess a court of criminal appeal from trials held in the first instance in the superior courts (other than from the native high court, to

which reference is made below) This omission is due to the age-long doctrine that juries do not make mistakes on questions of fact, though judges may well make mistakes on questions of law It is a matter of constant surprise to the ordinary layman who learns for the first time that persons may be convicted of murder or sentenced to imprisonment for life without being allowed any appeal on the facts of the case The nearest appeal that may be brought on fact is a question of law reserved on the point whether there was evidence to go to the jury, and to succeed on this ground is most difficult Some change in the law to allow appeals on facts in certain cases may allay the misgivings of many responsible thinkers The court of criminal appeal in England is an example of what may be done in this direction ¹

Arising out of this weakness is another, but this time the weakness is on the side of the accused and is to be condemned equally with the weakness which may send an innocent man to prison or to death For under the interpretation which has been given to the criminal code of 1917 a person almost obviously guilty may escape punishment in certain circumstances If there has been an irregularity in the proceedings which has prejudiced the accused, the conviction must be set aside and the accused must be acquitted For example if evidence has been wrongly admitted, and the appellate division is of opinion that the admission of this evidence has prejudiced the accused (and any benefit of the doubt must be given to the accused) the conviction must be quashed Now it nearly always happens in these cases that there would almost certainly have been a conviction without the admission of the irregular evidence, but just because a mistake has been made by the crown in leading the evidence and by the court in admitting it (and the accused, perceiving the error, remains quiet and unprotesting) the appellate division, if it thinks that there might possibly have been no conviction if such evidence had not been led, must set aside the conviction For, just as the appellate division cannot sit as a court of appeal

¹ Since the above was written and while this book was in the press, the General Law Amendment Bill was introduced in the Union Parliament in May, 1934 It failed to pass during that session, having been sent to a select committee, and it will be introduced again early in 1935 The Bill aims at making the appellate division a court of criminal appeal and divides murder into murder in the first degree and murder in the second degree, making the death sentence discretionary in the latter case

on questions of fact, when this point of law is brought before it, it must assume the same fictitious role and declare that as it is not a judge of fact, it is unable to say whether or not, without the wrongly received evidence, the accused would certainly have been convicted. The remedy for this weakness lies in the simple necessity for making the appellate division a court of criminal appeal on questions of fact as it is on questions of law.

Appeals from the magistrates' courts are brought to the superior courts having jurisdiction, and thence, after special leave has been given by it, to the appellate division. The same applies to civil appeals brought from the inferior courts.

Contrast now, with the criminal jurisdiction of the appellate division, its civil jurisdiction. It may hear appeals in trial cases from the decisions of a single judge of any superior court or a decision given by two judges in a trial case. It may examine every element in the evidence, and though it will not readily reverse a decision on pure questions of fact, it will not hesitate to do so if it is of opinion that such decision was wrong, or, to use legal phraseology, against the weight of evidence. Here, at any rate, an aggrieved person has the possibility of a remedy.

By the Administration of Justice (Further Amendment) Act, No 11 of 1927, three judges of the appellate division form a quorum for appeals from a single judge, four from two or more judges. If four judges hear an appeal and are equally divided the judgment of the court appealed from stands as the judgment of the appellate division, and costs follow such judgment unless the appellate division by a majority decides otherwise. Three judges form a quorum in applications for leave to appeal, or in criminal matters, or in appeals from the native high court of Natal.

There is a great weakness in this statute, which has been dictated by the desire for economy. Applications, motions, petitions, orders as to costs only, and certain other matters, brought before a single judge, must be taken to three judges of a provincial division on appeal, and then, with special leave, to the appellate division. The original judge may allow the prayer in a petition, the three provincial judges may be divided, one in favour of the prayer, two against it. The appeal judges may be equally divided. In all, four judges are against the

prayer and four are in favour of it, yet it is disallowed. Litigants cannot be wholly satisfied.

By the Rhodesia Appeals Act No. 18 of 1931, the appellate division has jurisdiction to hear appeals from the high court of Southern Rhodesia as though they were appeals from a local division of the Supreme Court of South Africa, and by the Appellate Division Act, No. 12 of 1920, the appellate division has jurisdiction to hear appeals from the high court of South-West Africa, as though they were appeals from a provincial division of the supreme court of South Africa. Appeals may be brought in criminal cases from the native high court of Natal (this court's civil jurisdiction was abolished by the Native Administration Act, 1927) on questions of law as well as on questions of fact.

Sometimes the intermediate provincial division may be eliminated in the process of appeal to the appellate division by agreement between the parties in appeals from a single judge's decision in applications, motions, &c., or by agreement between the prosecutor and the accused in criminal cases before magistrates.

The appeal to the appellate division is not limited in respect of the amount in dispute or the nature of the case. Except in interlocutory matters, certain applications, and orders as to costs only, appeal may be brought as of right. Where appeal is brought from a court in which the matter has already been decided as an appeal, the leave of the appellate division must first be had.

The seat of the appellate division is at Bloemfontein. The South Africa Act provided that (section 109) 'The appellate Division shall sit in Bloemfontein but may from time to time for the convenience of suitors hold its sittings at other places within the Union'. Owing to some dissatisfaction having been expressed in the Orange Free State at the hearing of appeals elsewhere than in Bloemfontein, the Administration of Justice Act, 1912, provided that the question whether appeals should be heard elsewhere than at Bloemfontein might only be decided by the appellate division sitting at Bloemfontein, and an application for an appeal to be heard elsewhere might be granted only in 'exceptional circumstances'. The effect of this amendment in the law is, in practice, to make it too expensive for appeals to

be heard elsewhere than in Bloemfontein, and it is very rare indeed for the appellate division to sit elsewhere

The decisions of the appellate division are binding upon every court in the Union. The establishment of this court, therefore, marked a great advance in the securing of a uniform interpretation of the law throughout South Africa. However much the judges endeavoured to secure this end in pre-union days, there was often a conflict in the decisions of the courts of the four separate colonies. Now, each of the provincial and local divisions is bound to follow the decisions of the appellate division.

There are important statutory provisions which have for their object the harmonizing of the administration of justice and of judicial interpretation throughout the Union. The South Africa Act provides

- 111 The process of the Appellate Division shall run throughout the Union, and all its judgments and orders shall have full force and effect in every province, and shall be executed in like manner as if they were original judgments and orders of the provincial division of the Supreme Court of South Africa in such province

Criminal matters are dealt with by the Criminal Procedure and Evidence Act, No. 31 of 1917, as amended by Act No. 39 of 1926

- 388 Whenever the Minister has any doubt as to the correctness of any decision in any criminal case on a matter of law by any superior court, the Appellate Division may, upon the application of the Minister, order that a special case be prepared for its consideration and that the matters which were determined by such decision be argued before it in order to obtain its ruling thereon, and such ruling shall thereafter be deemed by all courts to be the correct decision in the matter

There is no analogous provision regarding civil matters. These are left to the discretion of suitors. If they are dissatisfied with judgments and think they are wrong, they may go to the Appellate Division at their own expense. The Magistrates' Courts Act, No. 32 of 1917, has a provision which, though it is not confined to criminal cases, is not likely to be, and has not yet been, applied to civil cases. By that act

- 107 Whenever in one province any decision is given by a provincial or local division of the Supreme Court as to the interpretation of any provision of this Act in conflict with a decision of any other such court in another province, the Minister may proceed

to have a special case prepared for the Appellate Division and to have the matter argued before the Appellate Division in order to obtain its ruling thereon, and such ruling shall thereafter be deemed by all other courts to be the true interpretation of such provision

5. Criminal Jurisdiction of the Superior Courts

(1) *Original Jurisdiction* The South Africa Act left the superior courts of the Union in precisely the same position as regards criminal jurisdiction as before the establishment of the Union. The act created only an appellate division to which appeals might be brought on criminal matters from provincial or local divisions after special leave to appeal has been given by the appellate court. The several supreme courts, high courts, and circuit courts continued after the establishment of the Union to possess as provincial or local divisions (as the case might be) the same criminal jurisdiction which they had previously possessed. Presided over by a judge, and with a jury to determine questions of fact such a superior court had before the establishment of the Union, and has now practically unlimited jurisdiction in criminal cases within the area for which it was constituted. This jurisdiction except in very special cases, comes into operation on presentation to the court of an indictment by the attorney-general of the province, or in the case of the Eastern Districts court, an indictment by the solicitor-general, and such indictment is presented after the accused has been committed for trial by a magistrate holding in a semi-judicial and semi-administrative capacity an inquiry called a preparatory examination.

The Criminal Procedure and Evidence Act No 31 of 1917, besides confirming the jurisdiction previously possessed, recognizes two other classes of superior court for the trial of criminal cases, (a) the native high court of Natal as a permanent court,¹ and (b) a special criminal court constituted by the governor-general-in-council on the request of the attorney-general for the trial of certain classes of cases where there are grounds for believing that the ends of justice may be defeated by a trial before a jury.²

¹ See section 9 of this chapter

² See *infra*, Chapter XXII. By Act No 20 of 1931, women and persons under the age of 15 years may claim to be tried by a jury consisting of women

Circuit courts are held at such places and on such days as the governor-general may approve, on the recommendation of the judge-presidents and judges of the provincial divisions concerned. Descriptions of the groupings of magisterial districts into circuit districts and the places and days of holding circuit courts are published in the *Gazette* from time to time.

Except in the case of the native high court and the special criminal court, or when an accused makes application to be tried without a jury, criminal trials are conducted before a jury of nine men, of whom seven at least must be unanimous as to the verdict returned. After a verdict, the court is limited as to the punishment by the provisions of the common law as to the offence, or in the case of a statutory offence, by the terms of the statute creating the offence. The court *must* impose the death sentence on convictions for murder except where the accused is a woman convicted of the murder of her newly born child or is a person under sixteen years of age and the court *may* impose the death sentence on a conviction for treason or rape. In other cases the court may impose a fine or imprisonment or whipping or all such punishments, and may also impose special classes of detention or punishment described later in the section dealing with inferior courts. On a third conviction for certain scheduled offences, a superior court may declare the offender to be an habitual criminal, and impose upon him an indeterminate sentence.

Under Act No. 31 of 1917 the attorney-general of a province (or the solicitor-general of the Cape Eastern districts) was vested with the right of prosecuting all offences, but under the amending Act No. 39 of 1926 such right is vested in the minister of justice, who may delegate his powers of prosecution to the above-mentioned persons.

(u) *Appellate Jurisdiction* Every decision involving a conviction in a criminal case by a magistrate's court whether on law or on fact and whether against the conviction or against the

only. The qualifications for women sitting on a jury are the same as for men, but it is not a duty for women to be placed on the jurors' roll, but a right for which application must be made. If nine women are not available, either because of challenge or because there are fewer than eighteen female jurors available for service in the particular jury district, the trial proceeds in the ordinary way. There can therefore be no mixed juries consisting of men and women. Up to the present no women juries have sat.

sentence passed, is subject to an appeal by the convicted person to the provincial division within the area of jurisdiction covering the magistrate's court or to a local division (with the single exception that the Witwatersrand local division has no appellate jurisdiction at all and appellants must go to the provincial division sitting at Pretoria) The court to which such an appeal lies may confirm, alter or reverse the conviction, or vary the sentence or remit the case back to the magistrate with instructions Section 56 of Act No 39 of 1926 has wisely altered the law making it impossible for an accused to take undue advantage of success on appeal on a technical point such as the illegal admission of evidence because the amendment in the law makes it competent for a new prosecution to be instituted, if an appeal has succeeded on the ground that evidence was illegally admitted or on some other irregularity

In addition to the above appeal jurisdiction, the Magistrates' Courts Act, 1917 contains one of the most salutary provisions in any system of law and one most necessary in a country like South Africa with its large and mostly ignorant native population This is the provision relating to automatic review Whenever a sentence of imprisonment or other detention for more than three months or a fine over £25 is inflicted, or whipping is ordered on a person more than sixteen years of age, the record of the case must be sent by the magistrate to the registrar of the division of the supreme court to which appeal may be brought, and it must be submitted immediately to a judge in chambers for his consideration If the judge is satisfied that the proceedings have been in accordance with real and substantial justice, he gives his certificate to that effect Otherwise the case is dealt with in open court which possesses the same powers as it possesses on appeal If the case presents any difficulty, or if the judge is in any doubt the court may request counsel to argue the case before it fully The junior bar always assists most willingly The law reports abound with decisions of the judges on review, and a fair percentage of the reviews have ended in favour of the accused Despite the automatic review, an accused need not wait or rely on it, but may appeal on his own behalf

The crown may also appeal to the above court against any decision in a magistrate's court dismissing a summons or charge on the ground that it is bad in law or discloses no offence The

reasonableness of this provision will be understood if it is explained that exceptions on the above grounds must be taken before any evidence is led and before the accused has pleaded. The accused, therefore, has not been in jeopardy, and the trial may continue if the crown's appeal is successful, or if it is not, the accused may be charged again. The crown may also bring the decision of a magistrates' court in a criminal case in review but the provincial division's ruling on such review does not affect the decision in the particular case, but serves for the future guidance of magistrates' courts.

6. Criminal Jurisdiction of the Inferior Courts

The Magistrates' Courts Act of 1917 codified and amended the laws of the several former colonies regarding the inferior courts. The magistrates' courts of the Union owe their existence now to the aforementioned act. All these courts are creatures of this statute, and their jurisdiction, power, and authority are limited and defined by this statute and its amendments, and by the Criminal Procedure and Evidence Act, 1917, and its amendments. The ordinary jurisdiction of a magistrate includes the power to inflict a fine of not more than £50, or imprisonment with or without hard labour, spare diet or solitary confinement, the total period of imprisonment on each count not to exceed six months, and fifteen strokes in so far as corporal punishment is concerned. If a magistrate has committed a person for trial or sentence before the supreme court and the attorney-general has remitted the case back to the magistrate, his powers of punishment are twice those stated above as regards fine or imprisonment.

Magistrates have power to order adults to be sent to farm colonies or indurate reformatories, and juveniles to juvenile reformatories. Sentences may be postponed or suspended on condition of good behaviour, or may be merely technical, such as a caution, or a reprimand, or imprisonment until the rising of the court.

Courts of special justices of the peace are now governed by Act No. 2 of 1918 and the two enactments mentioned above. Their jurisdiction is limited to (i) statutory offences, for which the maximum penalty does not exceed a £25 fine or three months' imprisonment, or both, (ii) petty thefts or assaults, (iii) certain

petty rural offences respecting preservation of game, the pound laws, &c , (iv) contraventions of the Native Labour Regulation Act, 1911, and (v) contravention of the Masters and Servants Acts. In the last class of cases a special justice of the peace is given the full jurisdiction of a magistrate but otherwise the powers possessed by a special justice are small, fines being limited to £10 and punishments to one month's imprisonment. Cases, however, may be transmitted by him to a magistrate whenever they are serious enough for this course to be taken, and appeal against his decisions in all matters may be brought before a magistrate, while the procedure of automatic review outlined above regarding magistrates' decisions in certain cases is adopted in all convictions by a special justice, the records being sent to the local magistrate and the review being conducted by him. Decisions by a magistrate in his appellate capacity may be taken to the supreme court.

While the jurisdiction of a special justice of the peace is limited in respect of both punishment and the subject-matter of the charge, the jurisdiction of magistrates, except in cases of homicide, treason, and rape (which classes of cases he may not try at all), is not limited in respect of the nature of the charge. There is a tendency to increase the punitive powers of magistrates, and recent statutes have given magistrates extended powers.

Most of the criminal cases of the Union are disposed of by magistrates. The system may be described as speedy, rough and ready, and, considering the amount of work which is performed by the magistrates, extraordinarily efficient. Magistrates are promoted from the ranks of officials in the departments of justice, after having taken certain examinations, and having acted as prosecutors. Their knowledge and experience of criminal work are therefore most thorough.

7 Civil Jurisdiction of the Superior Courts

The manner in which the several superior courts came into being at the establishment of the Union has been described above. A superior court has in addition to any original jurisdiction exercised by the corresponding court of the colony at the date of the establishment of Union, jurisdiction in all matters in which the government of the Union or a person suing or being

sued on behalf of such government is a party, or in which the validity of any provincial ordinance comes into question. Generally it may be said that a provincial division in each province has unlimited jurisdiction throughout the province in respect of all causes or matters arising within that area, while each local division has jurisdiction (slightly restricted in some respects) in regard to causes arising and persons residing within its defined area. For example, the Witwatersrand Local Division, while it has concurrent jurisdiction with the provincial division so long as the cause or matter arises within its defined limits, is expressly excluded from exercising any appellate jurisdiction or from reviewing the proceedings of inferior courts. Special jurisdiction is given to any provincial division in which a parliamentary or a provincial council election is held (but not to a local division) to try election petitions.

The provincial divisions sit at Capetown, Pietermaritzburg, Pretoria, and Bloemfontein respectively. The Cape Provincial Division consisting of five judges, the Natal Division of four judges, the Transvaal Division of seven judges, and the Orange Free State Division of three judges. The Eastern Districts Local Division consists of four¹ judges, the Griqualand West Local Division of one judge, and one judge of the Transvaal Provincial Division may preside over any sitting of the Witwatersrand Local Division.

In all the Cape divisions, the court may sit with one judge only as a divisional court, and as many divisional courts as there are judges available to preside may sit at the same time for the dispatch of civil business. In the Transvaal and in the Free State (except in vacation time when one judge constitutes a quorum) the quorum of the court is two, except in motions, applications, and trial cases where the defendant is in default, when one judge sitting in chambers constitutes the court. A divisional court of one judge may exercise the civil jurisdiction of the court in any trial action if both parties consent, or if the action is remitted to such divisional court for trial by order of the full court.² The provisions applying to Natal are the same,

¹ See Eastern District Local Division Constitution Act, 1934.

² See Orange Free State Administration of Justice Amendment Act, 1934, bringing the Orange Free State practice into line with Transvaal Ordinance No. 31 of 1904.

except that a judge sitting in chambers has a more restricted jurisdiction

In order to make the machinery of justice work more smoothly in actions between persons resident in different provinces, it has been provided that a civil process for commencing civil proceedings may, subject to compliance with certain forms, be served throughout the Union upon any defendant who resides or is for the time being within the Union, and is subject also to the jurisdiction of the court. When a defendant resides within the Union, no attachment of his person or property is necessary to found jurisdiction, and summonses are to be served in the ordinary manner personally upon the defendant.

The South Africa Act has certain provisions aiming at the facilitation of hearing actions and enforcing judgments

- 112 The registrar of every provincial division of the Supreme Court of South Africa, if thereto requested by any party in whose favour any judgment or order has been given or made by any other division shall, upon the deposit with him of an authenticated copy of such judgment or order and on proof that the same remains unsatisfied issue a writ or other process for the execution of such judgment or order, and thereupon such writ or other process shall be executed in like manner as if it had been originally issued from the division of which he is registrar.
- 113 Any provincial or local division of the Supreme Court of South Africa to which it may be made to appear that any civil suit pending therein may be more conveniently or fitly heard or determined in another division, may order the same to be removed to such other division, and thereupon such last-mentioned division may proceed with such suit in like manner as if it had originally commenced therein.

All the divisions, except the Witwatersrand Local Division, may hear appeals from the decisions of magistrates in civil cases. The superior courts have also inherent jurisdiction to correct the proceedings of semi-judicial and administrative bodies whenever there has been gross irregularity or illegality.

8. Civil Jurisdiction of the Inferior Courts

On January 1, 1918, the new consolidating and amending Magistrates' Courts Act, No 32 of 1917, came into operation, and, repealing the considerable number of statutes which had previously governed the inferior courts of South Africa, imposed uniformity in the jurisdiction and procedure of these courts

throughout the Union. The result is that a single code governs the constitution, jurisdiction, and rules of procedure of every inferior court hearing civil disputes in the Union.

The act provides that a magistrate's court shall have jurisdiction (a) in actions in which is claimed the delivery or transfer of any property movable or immovable not exceeding £200 in value, (b) in actions of ejectment against the occupier of land or premises within the district if the right of occupation does not exceed £200 in clear value to the occupier, (c) in other sections (except those specifically excluded) where the claim or value of the matter in dispute does not exceed £200.

The following classes of actions, however, are specifically excluded from the jurisdiction of the magistrate's court, however little may be the amount at stake, viz actions for or concerning (a) divorce and judicial separation, (b) the validity and interpretation of wills and testamentary documents, (c) status of persons in respect of mental capacity, (d) specific performance of acts without the alternative of damages, except as to rendering accounts or delivering property not exceeding £200 in value, (e) decree of perpetual silence,¹ (f) provisional sentence.²

Except as to these specially excluded actions, a magistrate's court may acquire jurisdiction by the written consent of both parties, whatever may be the amount or value in dispute.

Incidental to the jurisdiction in civil matters, a magistrate may issue orders of personal arrest of persons suspected of absconding, orders of attachment of property, interdicts prohibiting the removal of furniture which is subject to the landlord's hypothec for rent, and its judgments may be enforced by execution against movables primarily and afterwards against immovable property which is not subject to prior charges. Attachment of money in the hands of third parties belonging to the debtor or due to the debtor, and, on debts incurred previous to May 19, 1932 by imprisonment of the debtor himself.³

Appeals from the decisions of magistrates have already been

¹ A method of preventing the repetition of libels.

² Obtaining a form of summary judgment on liquid documents, i.e. bills of exchange, mortgage bonds, or any document regarding which it is not required to lead any evidence. The only allegations made in the summons are that the money claimed is owing and has not been paid.

³ Act No. 17 of 1932 abolished civil imprisonment except in cases of misrepresentation.

dealt with. The parties may, however, agree in writing before the hearing of a case that there shall be no appeal, and that the judgment of the magistrate shall be final.

The Magistrates Courts Act, 1917, has been applied to the mandated territory of South-West Africa.

Special justices of the peace have civil jurisdiction in matters in which a liquidated sum not exceeding £25 is claimed, but this court only has this jurisdiction if there is no magistrate's court within a radius of 25 miles. Appeal from this court lies to the magistrate's court.

9 Native Courts

Natives, in both civil and criminal matters, are generally speaking, subject to the ordinary laws and the ordinary courts of the land. Certain special tribunals have, however, been established for the hearing of purely native cases, with a view to affording the native a simpler and less expensive method of procedure, and also to ensure that cases arising out of native law and custom are heard by officials experienced and learned in such laws and customs, and, in so far as native chiefs' courts are concerned, to accord a measure of recognition to purely native institutions.

Civil Matters

In so far as civil matters are concerned, the following special native courts have been established:

(1) *Native Chiefs' and Headmen's Courts*. A native chief or headman appointed as such under the Native Administration Act, No 38 of 1927 (as amended by Act No 9 of 1929) may be authorized by the governor-general to hear and determine civil suits arising out of native law and custom between natives resident within his area of jurisdiction. An appeal from the decision of any such court lies to the court of the native commissioner.

(2) *Native Commissioners' Courts*. The governor-general is empowered, under the Native Administration Act, 1927, to establish native commissioners' courts for the hearing of all civil causes and matters between natives only, provided that no such court shall have jurisdiction in any matter in which

(a) The status of a person in respect of mental capacity is sought to be affected,

- (b) a decree of perpetual silence is sought,
- (c) provisional sentence is sought,
- (d) the validity or interpretation of a will or other testamentary document is in question, or
- (e) a decree of nullity, divorce, or separation in respect of a marriage contracted according to Christian or civil rites is sought

Under this provision native commissioners' courts have been established in all districts in which there is a large native population resident under tribal conditions

These courts are authorized to decide cases involving questions of customs followed by natives, according to the native law applying to such customs, except in so far as this law is repealed or modified or is against the principles of public policy or natural justice

(iii) *Native Appeal Courts* There are two native appeal courts in existence, one for the Cape and Orange Free State and one for the Transvaal and Natal. These courts were constituted under the above-mentioned act for the hearing of appeals from the native commissioners' courts. Each native appeal court consists of a president and two members. The president is a full-time officer appointed by the governor-general, while the members are appointed by the minister from time to time as required, and are selected from magistrates, native commissioners, and other qualified persons.

The decision of a native appeal court is final, except

- (a) where conflicting decisions have been given by a native appeal court within its area of jurisdiction, in which case the minister may cause a special case to be argued before the appellate division of the Supreme court,
- (b) where the native appeal court consents to an application for leave to appeal, upon any point stated by the court, to the appellate division.

(iv) *Native Divorce Courts* These courts were established to hear matrimonial suits between natives married according to Christian or civil rites. Each such court must consist of the president of a native appeal court, and its area of jurisdiction must coincide with that of a native appeal court. Two native divorce courts have accordingly been established with areas of jurisdiction coinciding with those of the two native appeal courts.

The jurisdiction of the supreme court as a forum of first instance for native divorce cases is not ousted by the native divorce courts, and, moreover an appeal from the judgment of a native divorce court lies to the provincial or local division of the supreme court having jurisdiction

Criminal Matters

The special courts established for the exercise of criminal jurisdiction in respect of natives are as follows

(i) *Native Chiefs and Headmen's Criminal Courts* The governor-general is empowered to grant to any native chief or headman jurisdiction over members of his own tribe resident upon tribal land or in a tribal location within his area in respect of offences punishable under native law and custom. His jurisdiction is limited to a maximum penalty of two head of cattle, or £5. An appeal from the decision of any such court in a criminal matter lies to the magistrate of the district concerned.

(ii) *Native Commissioners' Courts* The governor-general may confer criminal jurisdiction upon native commissioners in respect of offences committed by natives, subject to the jurisdiction of a magistrate's court. Appeals from the decisions of native commissioners exercising criminal jurisdiction so conferred lie to the supreme court.

(iii) *Natal Native High Court* This court exercises criminal jurisdiction only. The court consists of a judge-president and three other judges and tries criminal cases when the accused are natives, but without prejudice to the jurisdiction of magistrates' courts. It exercises jurisdiction in respect of all crimes, including capital offences, committed by natives save certain particular classes of crimes specified in Natal Act No. 49 of 1898, as amended by Natal Act No. 30 of 1910. The jurisdiction of the supreme court as a court of first instance is expressly excluded in respect of such crimes committed by natives as are cognizable by the Natal Native High Court. In other words, this court takes the place, in criminal charges against natives, of the Natal provincial division of the supreme court.

10. Other Courts

(i) *Water Courts* A water court is constituted by an itinerant water court judge who is an additional judge of the Cape

Provincial Division under Act No 2 of 1924, as president and two assessors, one of them a competent hydraulic engineer attached to the irrigation department of the government, and the other a person selected from persons nominated by the governor-general for each proclaimed water court district. The Union has been divided into twenty-two water court districts.

(1) *Income Tax Appeal Court* A special court for income tax appeals was constituted by section 58 of Act No 40 of 1925. The court consists of a president who must be an advocate of not less than ten years' standing, an accountant of not less than ten years' standing, and a representative of the commercial community, or alternatively, a mining engineer in cases related to the business of mining. The period of the above appointments is for five years. A case may be stated by this court at the request of the appellant or the commissioner on a question of law to a provincial or local division of the supreme court, and a further appeal may be brought to the appellate division.

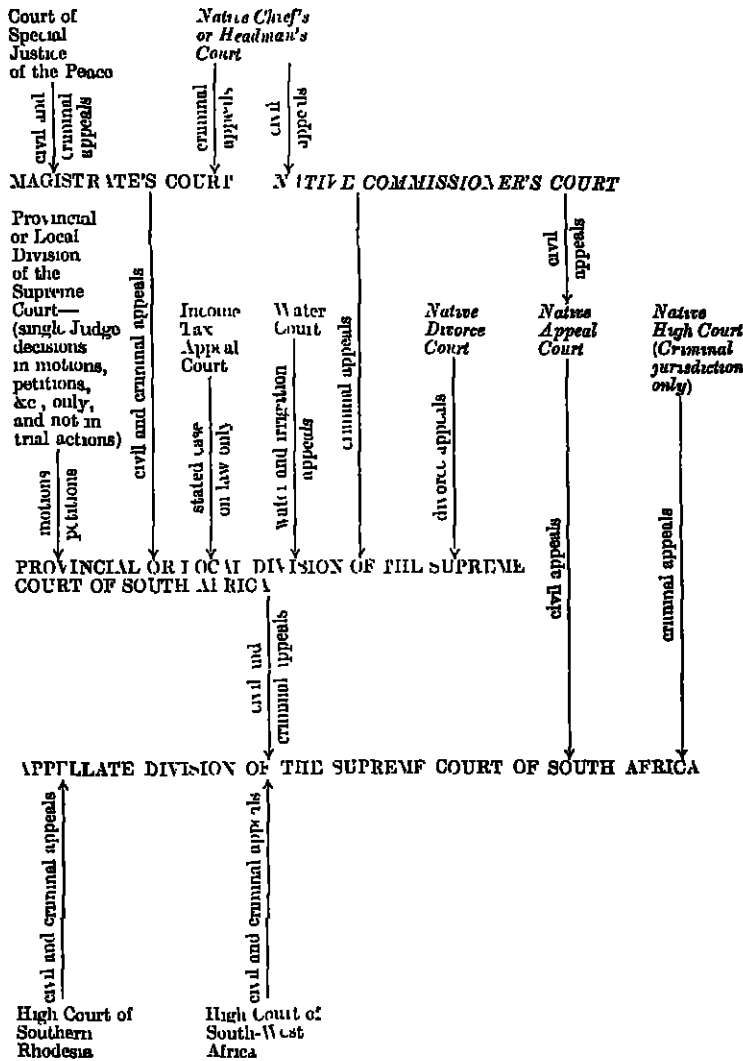
11. Table showing Relationship of South African Courts to each other

The courts of special justices of the peace and the native chiefs' and headman's courts are petty courts, and there are not a great number of them in existence. The bulk of the civil and criminal work of the Union is done by the magistrates' courts for the European and native population and the native commissioner's courts for the native population. These courts are the important inferior courts of the Union.

The provincial and local divisions of the supreme court of South Africa, besides exercising a most important original jurisdiction are connected with both the inferior courts as a court of appeal (except in civil matters from the native commissioners' courts, which go direct to the native appeal court), and with the native divorce court.

The following table shows the relationship to each other of the various South African Courts ¹

¹ The Witwatersrand Local Division has no appellate jurisdiction at all. Appeals lie from the provincial or local divisions from appeals brought to them to the appellate division in all cases, usually after leave, but no leave is required in trial cases—see text. In all cases appeal to a local or provincial division can be brought without leave. The exclusively native courts are shown in italics.



12. Appeals to the Privy Council

Before the establishment of the Union there was an appeal as of right (as far as the law of South Africa was concerned) from the superior courts of the South African colonies to the privy council. Local statutes and ordinances only placed a

limitation on appeal according to the amount or value of the claim. The South Africa Act repealed this right (in the sense in which the word must be understood in this connexion) and left only the right of applying to the King-in-Council for special leave to appeal, which is enjoyed by subjects of the crown throughout the empire. The section is as follows

- 106 There shall be no appeal from the Supreme Court of South Africa or from any division thereof to the King-in Council, but nothing herein contained shall be construed to impair any right which the King-in Council may be pleased to exercise to grant special leave to appeal from the Appellate Division to the King-in-Council. Parliament may make laws limiting the matters in respect of which such special leave may be asked, but Bills containing any such limitation shall be reserved by the Governor-General for the signification of His Majesty's pleasure: provided that nothing in this section shall affect any right of appeal to His Majesty-in-Council from any judgment given by the Appellate Division of the Supreme Court under or in virtue of the Colonial Courts of Admiralty Act, 1890

The privy council will not readily grant leave to appeal. It will not do so in cases raising questions of a local nature, it may do so in cases raising serious constitutional questions¹. Very few appeals indeed are heard from the appellate division of the supreme court by the privy council.

The South Africa Act preserved the prerogative of the crown regarding its right to grant leave to any of its subjects to appeal from a decision of His Majesty's courts in the dominions. This privilege of invoking the exercise of the royal prerogative by way of granting special leave to appeal has long obtained throughout the British Empire. In its origin it might have been no more than a petitory appeal to the sovereign as the fountain of justice for protection against an unjust administration of the law, but the practice has long since ripened into a privilege belonging to every subject of the King. It has been recognized and regulated in a series of imperial statutes².

Before 1931, any law by a dominion parliament, in so far as it intended to prevent the King from giving effective leave to appeal against an order of a dominion court, was repugnant to the statutes of the United Kingdom regulating such right of

¹ *Whittaker v Durban Corporation*, [1921] 90 L.J.P.C. 119, 124 L.T. 104, 30 T.L.R. 784

² e.g. Judicial Committee Acts of 1833 and 1844

appeal, and was therefore void and inoperative by virtue of the Colonial Laws Validity Act, 1865¹ Only the parliament of the United Kingdom could negative this statutory as well as prerogative right²

Whilst the Colonial Laws Validity Act remained in force, the above was the legal position. But, with the passing of the Statute of Westminster, 1931 the force and effect of the Colonial Laws Validity Act have been swept away, and there is now nothing to prevent the Union parliament prohibiting any citizen of the Union from asking leave to appeal to the privy council or of enacting that its judgments shall have no effect in South Africa. The Status of the Union Act, 1934, left this right of appeal intact as well as the provision that bills limiting the right of appeal must be reserved for the King's pleasure.

13. Judicial and other Officers of the Law

Judges. The judges of the supreme court hold office and are appointed under the following provisions of the South Africa Act:

- 99 All judges of the supreme courts of the Colonies, including the High Court of the Orange River Colony, holding office at the establishment of the Union shall on such establishment become judges of the Supreme Court of South Africa, assigned to the divisions of the Supreme Court in the respective provinces, and shall retain all such rights in regard to salaries and pensions as they may possess at the establishment of the Union. The Chief Justices of the Colonies holding office at the establishment of the Union shall on such establishment become the Judges-President of the divisions of the Supreme Court in the respective provinces, but shall so long as they hold that office retain the title of Chief Justice of their respective provinces.
- 100 The Chief Justice of South Africa, the judges of appeal, and all other judges of the Supreme Court of South Africa to be appointed after the establishment of the Union, shall be appointed by the Governor-General in Council, and shall receive such remuneration as Parliament shall prescribe and their remuneration shall not be diminished during their continuance in office.
- 101 The Chief Justice of South Africa and other judges of the Supreme Court of South Africa shall not be removed from office except by the Governor-General in Council on an address from both Houses of Parliament in the same session praying for such removal on the ground of misbehaviour or incapacity.
102. Upon any vacancy occurring in any division of the Supreme

¹ *Nadon v The King*, [1926] A C 491

² *Cushing v Dupuy*, (1880) 5 A C 409

Court of South Africa, other than the Appellate Division, the Governor-General in-Council may, in case he shall consider that the number of judges of such court may with advantage to the public interests be reduced, postpone filling the vacancy until Parliament shall have determined whether such reduction shall take place

The salaries and pensions of the judges are fixed by the Judges' Salaries and Pensions Act, No 16 of 1912 as amended by the Judges' Salaries (Amendment) Act, 1934. The following table shows the salaries and pensions which the judges receive

	<i>Annual salary</i>	<i>Annual pension</i>	<i>Pension on less than 10 years' service</i>
Chief justice of South Africa	£3,500	£1,300	£130
Ordinary judge of appeal	£3,250	£1,200	£120
Judge-president of a division ¹	£3,000	£1,100	£110
Puisne judge of a division ²	£2,750	£1,100	£100
			for every year of service

A judge who has served for ten years or more may retire from office at the age of sixty-five and be entitled to his pension, and all judges shall retire from office at the age of seventy years

The Master of the Supreme Court In each province having his office at the seat of government of the province, there is an officer appointed by the governor-general, styled the master of the supreme court.³ The master administers and has an almost exclusive supervision over the property of deceased persons, minors, lunatics, persons permanently absent from the Union without a lawful representative therein and whose whereabouts is unknown, and persons under curatorship. The master also supervises the administration of insolvent estates.

Each master keeps a complete record of original wills, death notices, inventories, and accounts of estates. Deceased estates are administered by executors, who are usually appointed by will or by the next of kin. Insolvent estates are administered by trustees, usually elected by the creditors, and sometimes

¹ The judge-president of the native high court of Natal receives a salary of £1,500 per annum with a pension on the usual scale. The presidents of the native appeal courts receive £1,100 per annum.

² Puisne judges of the Natal native high court receive £1,400 per annum. The president of the income tax court receives £1,500 per annum.

³ Administration of Estates Act, 1913.

appointed by the master. But all persons acting in an executory or trust position in relation to estates act under the supervision of the master.

There is a fund known as the guardians' fund, into which are paid all moneys, which are to be held in trust for minors, absent persons, lunatics, or moneys unclaimed by their owners. The fund pays interest at the rate of $4\frac{1}{2}$ per cent compounded annually. The moneys credited to the guardians' fund are deposited with the public debt commissioners of the Union, but the master may at any time withdraw any part of the working balances which are retained at his disposal by the public debt commissioners.

The master is an officer of the public service and the conditions governing his employment are laid down in the Public Service Act, No. 27 of 1923. The salaries of the masters of the supreme court are as follows:

Cape and Transvaal	£950—30—1,100
Natal and Orange Free State	£800—25—900

The master is an indispensable adjunct of the supreme court, for he is the administrator and guardian of all estates and minors, and seeks through the supreme court the redress of any breach of the obligations owed by persons to estates and minors.

The Minister of Justice and the Attorneys-General. The minister of justice is the head of the department of justice and the executive head of the administration of justice. The South Africa Act lays down

- 139 The administration of justice throughout the Union shall be under the control of the Minister of State, in whom shall be vested all powers, authorities, and functions which shall at the establishment of the Union be vested in the Attorneys-General of the Colonies.

There is an attorney-general for each of the four provinces, and a solicitor-general for the Eastern Districts of the Cape of Good Hope. In South Africa the attorney-general is an officer of the public service and is in no way concerned with politics as in other British countries. He is promoted from the professional side of the department of justice to his post as attorney-general. Act No. 39 of 1926 provides that

- 1 (3) All powers, authorities, and functions relating to the prosecution of crimes and offences in the name and on behalf of His Majesty

the King are vested in the Minister of Justice who may in any Province assign to an officer, to be appointed by the Governor General subject to the provisions of the law relating to the Public Service, styled the Attorney-General or in the area of jurisdiction of the Eastern Districts of the Cape of Good Hope Local Division of the Supreme Court, the Solicitor General, the exercise, as his deputy, of such powers, authorities and functions in the area for which such officer has been appointed

In practice, the minister of justice does not interfere with the prosecution of crimes. The attorney-general is the director of public prosecutions, and appears in court either by himself or his assistants, or local public prosecutors, or authorizes counsel on circuit. He has a full discretion regarding the institution and withdrawal of prosecutions. The minister of justice has made it a very strict rule not to interfere with this discretion of the attorney-general, perhaps not even to inquire into any cases, save on the clearest evidence of irregularity. The minister's duties are not even supervisory, his power is always held in reserve. The attorney-general's office, therefore, is strictly screened from the influence of the public, politics or the cabinet, and though the legal profession is always free to make representations on behalf of their clients, it may with justice be said that the high standard of integrity of the attorneys-general has made the administration of the justice in South Africa something of which the country is proud.

It is not intended to detail the duties and powers either of the minister or the attorney-general. It is sufficient to say that the former recommends to the cabinet the appointment of judges, and himself appoints magistrates. The minister has great powers under various acts, e.g. the riotous assemblies act, and he countersigns all executive documents of his department, including death warrants. The attorney-general, besides his ordinary duties as chief prosecutor for the crown, is also the *curator ad litem* for persons alleged to be of unsound mind.

The following salaries are paid to the attorneys-general

Transvaal and Cape	£1,300—30—1,540
Natal	£1,150—30—1,300
Orange Free State	£1,050—30—1,200

Magistrates. Magistrates hold their appointments by virtue of the Magistrates' Court Act, 1917, or by reason of an appointment under a pre-Union statute. The latter appointments are

recognized by the 1917 Act. Their powers and duties are strictly limited by the statute. Their salaries vary from £495 per annum in the case of a junior appointment to £1,300 a year in the case of a chief magistrate, with pensions. The duties of magistrates are judicial and administrative. Most of the administrative duties devolve upon magistrates stationed in the country districts, but a great many onerous duties fall upon magistrates in charge of urban magisterial areas.

In rural districts the magistrates are also receivers of revenue and many hold the position of native commissioner. Magistrates preside over liquor licensing courts, and generally have numerous other duties, like the landdrost of the republican days, concerning the activities of almost all government departments—too numerous to detail.

Magistrates, like attorneys-general and masters of the supreme court, are officers of the public service and the conditions governing their employment are laid down in the Public Service Act, No. 27 of 1923.

*Native Commissioners*¹ These preside over native commissioners' courts. In many districts magistrates hold the appointment of native commissioner and come under the control of the department of justice, in others the native commissioners are officers of the department of native affairs. They perform the administrative duties which the minister of native affairs may from time to time assign to them. By law they have the powers of justices of the peace, and in their courts the powers conferred by the jurisdiction granted to such courts under the Native Administration Act, No. 38 of 1927.

Sheriffs and Messengers The registrars of the four provincial divisions of the supreme court of South Africa are also the sheriffs of those provinces. They are appointed by the governor-general-in-council and are members of the public service. Sheriffs have authority as such to appoint deputy-sheriffs. Messengers of court serve the processes of the magistrates' courts and are appointed by the minister of justice under the Magistrates' Courts Act, 1917. They are not members of the public service, and like deputy-sheriffs are remunerated by fees.

¹ The chief native commissioners receive £1,000 per annum. The salaries of the native commissioners vary from £775 per annum to £1,000 per annum, according to grade.

Advocates and Attorneys The legal profession in South Africa is divided into two branches on lines exactly the same as in England, and the etiquette governing the conduct of the legal profession has been taken from English practice

The universities in South Africa qualify students for practice at the bar. The degree of bachelor of laws, granted after obtaining the degree of bachelor of arts and passing the university law examinations, the minimum duration of the combined courses being five years, entitles a person to be admitted by the supreme court for practice before that court. A member of the English bar has to take a statutory examination in Roman-Dutch law and South African statute law before he can be admitted to practice

Solicitors take the law certificate examinations and require three years' service in the offices of a qualified solicitor. Special examinations in conveyancing and notarial practice are required to be passed before practice in these branches of the law is permitted. All practising barristers and solicitors must be British subjects

XVIII

THE LEGAL SYSTEM OF SOUTH AFRICA

THE practising lawyer in South Africa, when called upon to ascertain the law governing a particular set of facts, has, like his brother practitioner in England, first to ascertain whether any statutes exist which may rule out the application of the common law. Such statutes may be acts of the Union parliament or regulations issued under the authority of acts of parliament, provincial ordinances and regulations under them, or municipal by-laws. If there are no statutes applicable, recourse must be had to the common law. Under statutory authority, a set of customary practices, variously referred to as native law, native custom, or native usage, entirely distinct and separate from the ordinary common law of the country, is applicable to disputes between native and native. We propose in this chapter to deal briefly with the three branches of the laws of South Africa, namely, the common law, the statute law, and native law.

1 The Common Law

The common law of South Africa is the Roman-Dutch law of Holland in so far as it has been accepted in South Africa, modified by the interpretation of the courts, and left unrepealed by the enactments of local legislatures.

The practitioner who wishes to find out exactly what the common law is on a particular point will consult a modern South African text-book or a digest of cases in order to ascertain whether the courts have yet decided a similar question. In this respect the South African practitioner is in more or less the same position as his English brother. The decision of the highest court in the land (the appellate division) is binding. The law declared by the judges of appeal is the right law. Only parliament can change the law as declared by that court. If there is no decision of the appellate division, the practitioner will look for decisions of the superior courts. He will give most respect to the decisions of the Transvaal and Cape

provincial divisions, and a full, if not quite equal respect to the decisions of the other courts. He will remember that in pre-Union days, the Transvaal had a famous bench, most of whose members later adorned the appellate court, judges who, like Chief Justice de Villiers, of the Cape supreme court, were great law-makers as well as great judges. Their decisions carry great weight and are not easily ignored. The decisions of a full court of a provincial division are binding upon single judges in that division, and a supreme court decision is binding upon magistrates' courts.

But law being what it is, the decisions of even the provincial divisions may be wrong. He is a bold advocate who argues they *are* wrong. He must remember that in matters of practice and procedure, especially practice of long standing, the appellate division will be slow to interfere, and a provincial division has declared that where the court has followed a particular rule even of law, for a long time and on a number of occasions, that rule will not be reversed even if wrong, because the people are entitled to act upon the repeated declarations of the supreme court having jurisdiction over them. How is a practitioner to ascertain that any particular decision of a provincial division (in the absence of a decision of the appellate division) is wrong? He will go to the 'authorities' of Roman-Dutch law, namely, the text-books, the opinions, the dissertations, and the 'advices' of the famous old writers of Holland and the decisions of the courts of Holland in the sixteenth and seventeenth centuries. He may even have to go as far back as the Roman law, or consult the works of German commentators on the Roman law, or such books as the *Traité des Obligations* of Pothier.

In England, extracts from the books of celebrated dead authors may be quoted in argument. Such extracts may lend weight to an argument; the court treats them with respect. But the Roman-Dutch authors' works stand on a different footing. These dead men's books are the only living witnesses of what the Roman-Dutch law of Holland was. If the judges are satisfied that the author quoted from the bar correctly states the Roman-Dutch law, the judges will declare what the author has stated to be the law. Some writers carry more weight than others, a preponderance of opinion is usually con-

clusive unless conditions have so changed that such opinions can no longer be followed. The following extract from a judgment will show how the judges follow the old authorities and go back even to the Roman law.

'Van Leeuwen *Roman Dutch Law* remarked that "he whose animal causes damage to another must make compensation or deliver up the animal for the same. But if the animal be wild by nature, or otherwise of a mischievous propensity, as for instance, a dog accustomed to bite or a horse accustomed to kick, or the like, the owner will be liable to make full compensation for the damage done without being able to get off by giving up the animal." The only authorities relied upon for the above pronouncement were *Digest* 21.1. sec. 40 to 41 and *Institutes* (4.9 pr.) *Van Leeuwen* was dealing therefore with the *de pauperie* and the *Aedilician* remedies. And the mere fact that he omitted to notice the *contra naturam* principle in the one and the public place limitation in the other, could not have been intended to indicate that the law had been altered in those respects either by obsolescence or amendment. What he seems to have done was to class vicious domesticated animals with those naturally ferocious as was done in the case of a dog by the Edict and in the case of other animals by the Criminal Ordinance of Charles V. In the *Consuetudo Forensis* however he merely stated the Roman Law. A passage in *Grotius* which is the one referred to by *Schellinga*, must also be noticed. Having stated that the *actio de pauperie* was operative in Holland on the lines of the Civil Law (sec 3.38, par 10) he proceeded to say that "the owner of a dog which has killed anyone's swans or other birds is bound to make good the loss, without its being sufficient for him to give up the dog" (3.38 sec 13). But he did not intend to contradict himself or to assert that the Common Law of Holland had widened the scope of the Civil Law remedy, for, a reference to *Recht-Observation* (vol II obs. 96) shows that he must have had in mind certain local *Kenten* and a *Placquet* of 1559, but not the general law of the country. There is no need to quote further authority, for in spite of some confusion there can I think be little doubt that *Voet* was right when he said (9.2 sec 9) that the law of Holland in regard to compensation for damage done by animals was in substance the law of Rome."¹

The persuasive influence of English law has been very great. The introduction of the English jury system necessitated the adoption of the English rules of evidence in both criminal cases and civil cases. The English system of pleading, and many English rules of court practice, have resulted in the constant quotation of English authorities in the South African

¹ *O Callaghan v. Chaplin*, [1927] A.D., at p. 320.

courts English text-books are constantly consulted Wessels says

'The English barrister who attends a South African court must often wonder what we really mean when we say the Roman Dutch law is the common law of South Africa He hears a dispute about a contract, or perhaps an action for damages in a running down case He hears the pleadings read, and to him the claim in convention and claim in reconvention, the declaration, plea and rejoinder are familiar terms The very form in which these are couched is the same as he was accustomed to in England The rules of evidence are the same he learnt at his Inn or College, and when the argument is reached he hears quotations from such familiar books as Addison or Lenke on Contracts, Addison or Pollock on Torts, and he finds that both bench and bar refer to the same law reports with which he is familiar in England The arguments are closed, and the decision is given upon English authorities and sometimes not a single Dutch authority is even casually touched upon ¹

The judgments of the privy council have had a very great influence upon the decisions of the South African courts Not only are appeals which have been brought from South Africa tinged with English legal ideas because the judicial committee is not always familiar with the finer points of the Roman-Dutch law, but judgments by the privy council on disputes brought from other parts of the British commonwealth and the judgments of English courts are referred to with great respect on a similar set of facts by the South African courts even though they are in no way binding in South Africa

Introduction of Roman-Dutch Law into South Africa ² The system of law first known as Roman-Dutch law is that which obtained in the province of Holland during the existence of the republic of the United Netherlands Its main principles were carried by the Dutch into their settlements in the East and West Indies When some of these including the Cape of Good Hope were annexed by or ceded to Great Britain, the old law was retained as the common law of the territories which now became British possessions

'With the expansion of the British Empire in South Africa the sphere of the Roman Dutch law has extended its boundaries until the whole of the area comprised within the Union of South Africa as well as Southern Rhodesia, has adopted this system as its common law This

¹ J W Wessels, *History of the Roman Dutch Law* (Grahamstown, 1905), p 387

² This section is based on Professor R W Lee's classical *Introduction to Roman-Dutch Law* (Oxford, 1931)

is the more remarkable since in Holland itself and in the Dutch colonies of the present day, the old law has been replaced by modern codes, so that the statutes and textbooks, which are still consulted and followed in the above mentioned British dominions, are no longer of practical interest in the land of their origin.¹

Roman-Dutch law itself is a combination of Roman law and Germanic custom after a process of development which was almost completed in the fifteenth and sixteenth centuries. It was brought to the Cape by van Riebeeck in 1652, and the law administered subsequently to the Dutch occupation of the Cape was the Roman-Dutch law of Holland, so far as it was applicable to local conditions: the statutes of the East India Company when they were locally promulgated, and the enactments of the local governors. When all the above were silent, recourse was had to the law of Rome.

When the Cape was finally taken by the British in 1806, the continuance of Roman-Dutch law was the expression of the settled principle of English law and policy that colonies acquired by cession or by conquest retain their old laws. Very little remains, however, of the pre-British statute law of the Cape. Most of these early statutes have been abrogated by disuse.

As Cape Colony expanded, the Roman-Dutch law extended its sphere by the same natural process without express enactment, and when the republics of the Orange Free State and the Transvaal were established the Roman-Dutch law was established at the same time.² It was introduced into Natal by Cape Ordinance No. 12 of 1845, Zululand in 1897, Basutoland in 1884, Bechuanaland in 1909, Southern Rhodesia in 1891, Swaziland in 1907 and South-West Africa in 1919.³

The South Africa Act especially provided that the laws in force in the four colonies should continue to be in force after the establishment of the Union until repealed by parliament. This provision applied not only to the common law, but also to the statute law of the four colonies.

¹ R. W. Lee *Introduction to Roman Dutch Law* (Oxford, 1931), p. 2.

² A resolution of the Volksraad of the South African Republic of September 19, 1859 gave statutory authority to the legal treatise of van der Linden, failing which, the commentaries of van Leeuwen and the introduction of Grotius were to be binding. This enactment was repealed by Proclamation 34 of 1902 and the Roman-Dutch law was made generally applicable by enactments in 1902.

³ By the Administration of Justice Proclamation, 1919. See also Union Act, No. 49 of 1919, and Proclamation No. 1 of 1921.

*Sources of the Roman-Dutch Law*¹

(i) *Treatises* The numerous works of the Dutch jurists written in Dutch and Latin from the sixteenth to the nineteenth centuries, are cited to-day as authoritative statements of the law with which they deal. The works of these old writers have a weight almost comparable to that of the decisions of the courts.

The principal writers on the old law and their most important works are the following: Grotius *Introduction to Dutch Jurisprudence*, 1631, Vinnius *Commentaries*, 1642, Groenewegen *Tractatus de Legibus*, 1649, van Leeuwen *Censura Forensis* 1662, *Roman-Dutch Law*, 1664, Huber *Praelectiones Juris Civilis*, 1678, Johannes Voet *Commentarius ad Pandectas*, 1698, Bynkershoek *Quaestiones Juris Privati* 1744, van der Keesel *Theses Selectae*, 1800, van der Linden *Handboek* 1806.

(ii) *Statute Law* The enactments of the states-general and of the states of Holland are to be found in the ten folio volumes of the Groot Placaat Boek. The statutes of Batavia are printed in van der Chijs, *Nederlandsch-Indisch Placaat Boek*. The pre-British statutes of the Cape exist, but have not been printed. The present law of intestate succession for the whole of the Union is to be found in a charter of the East India Company of January 10, 1661, the *Political Ordinance* of 1580 and the *Interpretation* thereof of 1594.

(iii) *Decisions of the Dutch Courts* The many published volumes of *Decisiones* are a valuable source of law. They are summaries of the actual decisions of the Dutch courts.

(iv) *Opinions of Jurists* The *Hollandsche Consultatien* contains the opinions of Grotius and other eminent lawyers. Such consultations and opinions are a characteristic feature of the Roman-Dutch system of jurisprudence.

(v) *Custom* This is in every country a source of law. The whole of Roman-Dutch law is really a modification of Roman law by Dutch customs and statutes.

The above remain to-day the sources of Roman-Dutch law in South Africa, but these sources are supplemented by enactments of the local legislatures, and the decisions of the local courts. Much that is written in the old books is obsolete or

¹ The summary given in this and the next section is based on Professor R. W. Lee's *Introduction to Roman-Dutch Law* (Oxford, 1931).

~~superseeded~~ The courts have declined to follow doctrines which are out of harmony with the conditions of modern life, and rules of the old law are often explained and modified according to the demands of modern conditions. The supreme court of South Africa, and especially its appellate division, is year by year producing a body of judge-made law which is an expansion and development of the old Roman-Dutch law. Aided by the powerful influence of the English law in every sphere of commercial law, the common law of South Africa has attained a completeness, a symmetry and elasticity which meets all the requirements of a modern civilization.

Features of Modern Roman-Dutch Law

In a work of this kind it is impossible to do more than give a short summary of the salient features of modern Roman-Dutch law. The criminal law of the Union is not generally different from the criminal law of England. The terminology used is in most cases the same. The division of crimes into felonies and misdemeanours is unknown. The general principles of the law of persons, of property, of contract, of delict, and of succession are given below. Many of the statements are necessarily made in general terms, for it is impossible to go into detail.

The Law of Persons. Parentage involves the duty of reciprocal support between parents and children. The duty on the part of parents continues until the children have sufficient means or are able by their industry to support themselves. Children, likewise, must maintain their indigent parents. In every case the proper process to enforce this duty is by petition to the court. The power of parents over their children includes their custody, control and education, the management of any separate property belonging to the children, and the granting or refusing consent to marriage while the children are still minors. The marriage of a minor contracted without parental consent may be set aside by the Court at the suit of the parent. A person is a minor until he or she reaches the twenty-first birthday, but majority may be accelerated by marriage or by *venia aetatis*. The latter phrase indicates a method of granting emancipation by the governor-general-in-council on a petition to him, after the petition has been referred to the supreme court for inquiry.

Emancipation is granted for reasons which are usually in the discretion of the court to recommend as being proper, and concern the right of responsible minors to carry on business or manage their own property (without the right, however, of being able to alienate immovables) The only province in which *venus aetatis* has been granted is the Orange Free State, and the granting of it is very infrequent Marriage puts an end to minority absolutely in the case of the male, but not in the case of the female, for she is placed (save for certain exceptions) in the care and control of her husband The contracts of minors are divided into a number of categories If the child is too young to know what he is about, he cannot enter into a contract at all with or without assistance If he is old enough to understand what he is doing, his contracts are good if he has been benefited by them For example, contracts by minors for necessaries are enforceable against them If a minor carries on a trade or profession, with the permission of his parent or guardian, he may validly contract in relation thereto Minors can, of course, ratify their contracts on reaching the age of majority

Guardians are either testamentary or appointed In default of a testamentary guardian, who may be a person other than a surviving mother, who however is entitled to guardianship if no other guardian is appointed, a tutor dative is appointed by the master of the supreme court The duties of guardians are to give security to the master of the supreme court, to make a full inventory of the estate for the master, to educate the children with the income of the estate, and generally to administer the minor's estate with the diligence of a *bonus paterfamilias* They may not alienate immovable property without the leave of the court, must render annual accounts to the master of the supreme court, represent the minor in court, and authorize his necessary transactions Guardians are removed on the grounds of insolvency, dishonesty or insanity Curators dative are appointed by the court for insane persons and prodigals

Marriage is permitted between boys over fourteen years and girls over twelve, provided they obtain their father's or guardian's consent Those who are insane or impotent cannot contract a valid marriage Intermarriage is forbidden within the degrees defined by the Political Ordinance of 1580 of the States of Holland and by local statutes The legal consequences of

marriage consist principally in the wife becoming subject to the marital power of the husband as far as she and her property are concerned, that is she remains or becomes a minor, and she takes his domicile and nationality. Marriage creates *ipso jure* a community of goods between the parties. The husband may alienate or encumber his wife's property as he pleases, but she cannot do so without his consent. The husband may contract in his wife's name and render her liable or entitled under contracts so made. The wife cannot, without the consent of her husband, render herself liable by her contracts except in cases in which a minor would be liable. Thus she and her husband may be held liable for contracts which are solely for her benefit or by which she has been enriched or for household necessities. Further, if with her husband's consent she has become a public trader, she binds herself and her husband by her trade contracts. If the husband has deserted his wife and is absent from the jurisdiction, she may contract in her own name. This unfortunate position of a wife under the common law may be guarded against by the parties entering into a contract before their marriage known as an ante-nuptial contract. This must be notarial and registered in the office of the registrar of deeds. Generally speaking, any condition not contrary to law or good morals may be inserted in an ante-nuptial contract. The usual conditions provide for the exclusion of community of property and the marital power leaving it to each party to manage his or her own affairs and contract without restraint regarding his or her own interests. But parties often get married without such wide liberty of contracting being given to the wife. It is a matter of personal discretion. Ante-nuptial contracts, once made, cannot be revoked or modified while the parties are alive except by the court. If the ante-nuptial contract has testamentary provisions regarding mutual succession, alteration is allowed, generally speaking only by mutual will.

Divorce is decreed by the supreme court on the ground of adultery or malicious desertion. In neither case is cruelty necessary, nor is there any minimum time limit in the case of desertion, except in Natal where eighteen months is required to elapse between the desertion and the commencement of the suit. In desertion cases the court in the first instance issues an order calling upon the defendant to restore conjugal rights by

a certain date, usually about two months ahead, failing which a final decree of divorce is granted. Alimony to the wife is not enforceable after divorce.

Judicial separation is granted on the ground of cruelty, which has received a wide interpretation, as well as on the ground of adultery or malicious desertion. The result of separation is to relieve the parties from the personal consequences of marriage but not to dissolve the marriage tie. The common estate is usually divided or alimony is ordered to be paid. Nullity of marriage is decreed when the parties have married within the prohibited degrees, or when minors have married without consent, at the suit of a parent, or when one of the parties was impotent or insane at the time of marriage, or in case of antenuptial stuprum followed by pregnancy of the wife, unknown to the husband and not condoned.

Donations between spouses are prohibited during their lifetime, but, if validly executed, are confirmed by the death of the donor. A surviving spouse, before contracting another marriage, has to pay or to secure to the minor children of the first marriage the shares due to them out of the estate of the deceased, otherwise the defaulting spouse forfeits for the benefit of the minor children a sum equal to one-fourth of his or her share in the joint estate besides incurring a statutory penalty of fine or imprisonment.

The Law of Property. Property is classified according to the rules of the Roman law, but the most important classification is the division of all property as either movable or immovable. Immovable things and things deemed to be immovable are land and houses, things naturally or artificially annexed to land or houses (such as growing trees or fruits, minerals, stones), movables annexed to houses even though temporarily removed, certain movables enjoyed with land or destined for perpetual use therewith, servitudes, actions *in rem* directed to the recovery of immovables, annual rents charged on land, and leases of immovable property so far as they create rights *in rem*. Mortgages, however, even of land, are classed as movables, the mortgage being considered as merely accessory to a principal and personal obligation, whose nature it therefore follows. All other property, generally speaking, is classed as movable, and includes money and rents accrued due, securities, mortgages, &c.

The importance of this distinction of things as movables or immovables is chiefly that immovables require special formalities of sale, transfer or hypothecation. All transfers of land require registration in the deeds registry. Leases of immovable property for ten years or more must be notarially executed and registered, in Natal leases for two years or more must be in writing. Land may be held either on freehold or leasehold title or on perpetual tenure from the government.

The Law of Contracts. The law of contract in South Africa is similar to that in England. The parties must be agreed, they must intend to create a legal obligation, the object of the agreement must be physically and legally possible, the agreement must not have been procured by fraud, fear, misrepresentation or undue influence and the agreement must not be directed to an illegal object. The only differences from English law appear to be in the requirements of form and in the doctrine of consideration. Roman-Dutch law requires neither form nor consideration for a contract to be valid. But statutory provisions have been introduced. Natal has a statute closely following the English Statute of Frauds, and throughout South Africa, transfers of land, mortgages, and long leases of land, as well as ante-nuptial contracts, must be registered in the office of the registrar of deeds for the province. Consideration in the sense required by English law finds no place in Roman-Dutch law, e.g. a promise in South Africa is valid if made for reasons of gratitude, past happenings or close relationship. All that is required is for the contract to be made deliberately and for a moral or reasonable cause. The Roman-Dutch law allows a stipulation in a contract to be made for a third or absent party, and if that third party accepts the stipulation it becomes binding. The consequences of non-performance of a contract give rise to actions for damages based on substantially the same principles as in English law, or actions for specific performance of the contract. Where a defendant can be made to perform a contract instead of paying damages, the court has a discretion to order specific performance. The most frequent case for a decree of specific performance is a contract for the sale or lease of land. The interpretation and determination of contracts are governed by the same principles as they are in England. Different periods of prescription apply in each province.

Certain special contracts may be referred to. Donation is regarded as a contract and thus requires all the essentials of an ordinary contract and is generally irrevocable. Gifts over £500 in value must be registered. The *donatio mortis causa* is, however, revocable before death. The contract of sale is complete so soon as the parties are agreed as to the price, and property passes upon delivery, unless a suspensive condition is attached to the sale. If in a sale for cash the price has not been paid the seller may recover the property within a reasonable time. Special rules apply to contracts of suretyship by women. Before a woman can be a surety she must renounce the benefit of the Roman *senatus consultum velleianum*, and of the *authentica si qua mulier* also, if she is married, and these benefits have to be explained to her before she signs.

The Law of Delict. The first class of delicts is wrongs against the person, such as assault, false imprisonment, malicious arrest, seduction, &c. The action for seduction has no resemblance to the English action for seduction which a father brings for the pretended loss of his daughter's services. It is an action brought for the loss of maidenhood. Wongs against property, such as nuisance, are governed by principles analogous to the English law on the subject, but trespass in South Africa requires 'injuria' or actual damage to ground an action. A trespass is 'injurious' when it is committed in defiance of or as a denial of another's right or accompanied by circumstances of insult or contumely. If a person has suffered pecuniary loss by the death of another, he has an action for damages for the loss suffered. Wongs against reputation are based on 'injuria' which, however, is usually inferred. Defamation, verbal or written, requires no proof of special damage, but false statements injuring a person in his trade or profession even though not defamatory, require proof of malice and special damage. The action for malicious prosecution is framed on the English model.

The Law of Succession. No department of the Roman-Dutch law is more thoroughly penetrated by the Roman tradition than that of testamentary succession. Wills must be executed in the presence of two competent witnesses. Testamentary trusts are known as fideicommissa. A fideicommissum is created by such words as these 'I make my wife my heir, but when she comes to die, I desire that the property shall go to' (certain named

persons) General prohibitions of alienation are not upheld. The fideicommissary property vests in the first instance in the heir, who has to give security for the restoration of the property, undiminished in value, to the person named and the fideicommissum may be expressed to determine on death or upon the happening of a contemplated event during lifetime. A fideicommissum therefore is a grant of property to a person subject to a condition that he will hand over the property after the happening of a certain contemplated event to a third party. It must be distinguished from usufruct, which is a life tenancy or use of property, but where the ownership vests not in the usufructuary but in the heir. Mutual wills are made by husband and wife together, but once made cannot be changed if the survivor has adiated or accepted benefits under the will.

By the Succession Act 1934 the surviving spouse of any person who dies either wholly or partly intestate is declared to be an intestate heir of the deceased spouse according to the following rules: (a) if the spouses were married in community of property and if the deceased spouse leaves any descendant who is entitled to succeed *ab intestato*, the surviving spouse shall succeed to the extent of a child's share or to so much as, together with the surviving spouse's share in the joint estate, does not exceed six hundred pounds in value (whichever is the greater); (b) if the spouses were married out of community of property and if the deceased spouse leaves any descendant who is entitled to succeed *ab intestato*, the surviving spouse shall succeed to the extent of a child's share or to so much as does not exceed six hundred pounds in value (whichever is the greater); (c) if the spouses were married either in or out of community of property and the deceased spouse leaves no descendant who is entitled to succeed *ab intestato*, but leaves a parent or a brother or sister (whether of the full or half blood) who is entitled so to succeed the surviving spouse shall succeed to the extent of a half share or to so much as does not exceed six hundred pounds in value (whichever is the greater); (d) in any case not covered by paragraph (a), (b), or (c), the surviving spouse shall be the sole intestate heir. The law of intestate succession, except as to the succession of a surviving spouse, follows the provisions of the Political Ordinance of 1580 of the States of the Province of Holland as interpreted by an

Edict dated May 13, 1594, and extended to the Cape with modifications by a charter granted to the Dutch East India Company on January 10, 1661. Only blood relationship, save for the succession of spouses to each other, is recognized in intestacy. The deceased's share of the estate goes to the survivor and the children equally, subject to the above rules. If there are no children and both spouses are dead, and then parents are alive, the parents divide the estate between them. If only one parent of a deceased spouse is dead, the surviving parent gets half the estate and the brothers and sisters of the deceased the other half. If both parents are dead, the estate is divided between the brothers and sisters of the deceased. If a brother or sister is dead, his or her children take the share due to their parent. If there are no brothers or sisters, succession goes through grandparents to uncles and aunts and then children. Failing all blood relations, the estate vests in the crown after forty years. The rules relating to intestate succession are extremely complicated and the reader is directed, if he wishes to know more of the subject, to study the usual text-books.

Professor Lee in his *Introduction to Roman-Dutch Law* writes of Roman-Dutch law as follows:

'At present we get our knowledge of the law of South Africa from the Statute Book, from the decisions of the South African Courts, and from an extensive literature in Dutch and Latin dating from the sixteenth to the early nineteenth century. As the reader will find, use has been made of this last-mentioned source in the following pages. But few people have the leisure or inclination to become familiar with these old books. For the practitioner, who makes an occasional raid upon them for an immediate purpose, they present every disadvantage. It has been said of the Roman-Dutch Law of to-day that its text-books are antiquated and its weapons rusty. The reproach is well founded and those who recognize the substantial merits of the system would wish to see it removed.

'Happily time provides a remedy. The Parliament of the Union of South Africa and the Appellate Division of the Supreme Court, which hears appeals also from Southern Rhodesia and from the Protectorate of South West Africa, are year by year producing a body of statutory and judge-made law, in which the principles of the Roman-Dutch Law are being expounded and developed. It may be anticipated that under such auspices the Roman-Dutch Law will assume a completeness and a symmetry which it has failed to attain in previous ages. It will be a system in which the best elements of the Roman and the English law will be welded together in a harmonious and indissoluble union. As

the *corpus* of South African Law grows to maturity the old folios and quartos, which some of us have learnt to handle with a feeling almost of affection, will be less and less consulted. Having served their turn they will yield to the fate of all things mortal. But the spirit of justice which inspires them and the rules of law which they express will live embodied in new forms. It may be that codification will come. This has even been urged as the one sure barrier against the all-pervading influence of English Law. But is the time yet ripe for it? The Law of South Africa is at present in a singularly fluid condition. It is passing through a period of formation. The way for codification must be prepared by consolidating legislation, by judicial decision, and perhaps not least, by the activity of our Schools of Law.¹

2. Statute Law

It is not intended to describe the statute law of the Union in detail. The Bills of Exchange Acts, the Companies Act of 1926, the Insolvency Act of 1916, the Insurance Act of 1923, matters of trade marks and copyright, income tax law, workmen's compensation, and generally all commercial statutes follow English precedents very closely. Statutes have established a registrar of births, marriages, and deaths, a public health organization and a system of miners' phthisis compensation, suited to the special conditions of the country. There is only one aspect of the statute law of South Africa that requires detailed examination, namely, the system of deeds registration.

*The Deeds Registries.*² The outstanding feature of the immovable property laws of the Union is the system of deeds registration. Whenever land or other fixed property is sold, the deed of transfer must be registered in the deeds registry having jurisdiction. Mortgages upon land, long leases, and ante-nuptial contracts must also be so registered.

The system of land registration in the Union requires that every deed granting or conveying landed property should have attached to it a diagram of the property being disposed of, or a reference back to a previous deed with such a diagram appended must be made. The area of the land, its dimensions, locality, description of its boundaries, and other distinguishing features, must be clearly set forth in the diagram referred to in the deed of conveyance of which it forms a component part.

¹ *Ibid.*, p. 25. For 'Protectorate of South-West Africa' 'Mandated Territory' should be read.

² See Act No. 13 of 1918.

The need for accuracy in the survey upon which the diagram is based is obvious, and to insure this, no diagram is accepted for registration with a deed of grant or transfer, unless it is signed by a surveyor duly admitted to practise as such in the province where the land in question is situated, and is further approved by the surveyor-general of that province. A Land Survey Act for the Union was passed in 1927, consolidating all previous laws, regulations, and tariffs of the four provinces.

It is essential for the purpose of registration that all transfer deeds and mortgage bonds shall have been drawn or prepared by persons duly authorized by law to do so and be executed in the presence of the registrar concerned. All conveyances are so authorized. Other deeds are only registered if they have been executed in the presence of a notary public and attested by his signature. There are in the Cape Province four deeds registry offices, situated at Capetown, King William's Town, Kimberley, and Vryburg. Each registry is in charge of an officer styled a registrar of deeds, and effects registration in respect of that portion of the province specially allotted to it. The deeds office of Natal is situated in Pietermaritzburg, and of the Orange Free State in Bloemfontein. The Transvaal has two deeds offices, the deeds registry at Pretoria with jurisdiction extending over the whole of the Transvaal except the registration of leases of lots in leasehold townships in the mining districts of Johannesburg and of mining titles in the Transvaal area, but the Pretoria registry keeps duplicates of registrations in the Johannesburg district. For the latter area and for mining titles in the Transvaal there are the mining titles and Rand townships registration offices in Johannesburg, which form a division of the mines and industries department, under the control of a registrar.

The principal functions of the various registrars of deeds are the following: (a) to register grants or leases, by the crown of land, (b) to examine, attest, and register deeds of transfer or hypothecation of land, (c) to register cessions of mortgage bonds, or renunciations, or waivers, by the legal holders, (d) to effect the necessary registration in connexion with the cancellation of mortgage-bonds, or part-payments, or releases therefrom, (e) to register ante-nuptial contracts, general or special notarial bonds, notarial deeds of servitude and of donation.

and other notarial deeds registrable by law (f) to register leases and cessions of leases of rights to minerals (g) to register usufructs of land (h) to register notarial deeds of lease of land for ten years and upwards (i) to issue and register such certificates of title to land as may be prescribed by law (j) when so required by law to satisfy themselves in connexion with the registration of any deeds—(1) that the duties, taxes fees, and dues payable to the government or to the provincial administration have been paid (2) that rates or charges payable in respect of land to a local authority have been paid, and (k) generally to exercise all such powers and discharge all such duties as are by statute and common law imposed upon them, and (l) in the case of the Rand townships and mining titles registrar to register deeds relating to stands or lots situated in government semi-government, and privately owned leasehold townships in the mining districts of Johannesburg, Boksburg and King'sdorp the registration of which is effected solely by the Rand townships registrar and to register deeds relating to all mining titles and the various rights granted under the laws dealing with the exploitation of precious and base metals and minerals the registration whereof is done by the registrar of mining titles

3. Native Law¹

The Nature of Native Law 'Native law is the indigenous system of customary jurisprudence existing among the various Bantu tribes of South Africa. It must be carefully differentiated from laws affecting natives, such as pass laws or laws relating to Christian marriage among natives. The test is that native law, properly so termed, was in existence among the Bantu prior to any European influence or control. Native law is customary law, exactly like Roman Dutch law or English common law, and obviously it is unwritten. Can we distinguish it from mere custom? It is a profitless question, perhaps, for the frontier-line between the two cannot be definitely ascertained and beacons off, and we might very well adopt the usual and question-begging phrase "native law and custom." But there is a danger if we do this, of creating the false impression that native law is not law in the sense that the unwritten common law of any country is law. Native law is every whit as valuable, as fixed, and as rational a system (so far as the law of persons is

¹ This section is based upon E. H. Brookes' *History of Native Policy in South Africa from 1830 to the present day* (Capetown, 1924), and G. M. B. Whitfield's *South African Native Law* (Capetown, 1930).

concerned) as Roman-Dutch law. In primitive times—and that means less than a century ago, for our purposes—native law was duly administered by courts of chiefs and counsellors, who possessed power to put their decisions into practice, all over South Africa.¹

A system of native law has for generations been uniformly recognized and administered in South Africa. Although an unwritten law, its principles and practice were widely understood by the natives, being mainly founded upon customary precedents, embodying the decisions of chiefs and their councils of bygone days, handed down by oral tradition and treasured in the memories of the people. This law took cognizance of certain crimes and offences, it enforced certain civil rights and obligations, it provided for the validity of polygamic marriages and it secured succession to property and inheritance according to simple and well-defined rules. But the system was a primitive and barbaric system, intermixed with a number of pernicious and degrading usages and superstitious beliefs, and administered by a judicial procedure which in cases of sorcery, witchcraft, &c., was utterly subversive of justice and repugnant to the principles of humanity.²

In considering the system of existing native law, it is essential at the outset to inquire into its derivation and source. The power of making law did not vest in the chief, although at times certain despotic chiefs endeavoured to persuade the people that the will of the chief was the law of the tribe. But the chief was himself subject to the laws in force when he assumed his chieftanship. The laws have grown up among the people, and are only administered by the chief. Their laws, if changed at all, are changed in consultation with the council of the people. With the exception of the military autocracies established over the Zulus by Tshaka, over the Matabele by Mzilikaze, and by the chief Mswazi in Swaziland, the rule of the native chiefs in South Africa was not so irresponsible as it is generally believed to have been. Their will was tempered and to a large extent controlled by a council so weighty and influential that no step of serious tribal importance was taken until the whole matter had been discussed by it at length. If a chief, who attempted a change of

¹ T. H. Brookes, *History of Native Policy in South Africa from 1830 to the present day* (Capetown, 1924), p. 172.

² See, on all topics of native law, G. M. B. Whitthold, *South African Native Law* (Capetown, 1930).

law or custom did so without consulting his councillors, and without allowing the proposed change to be publicly and thoroughly canvassed before it was adopted the possibility would be, if the law were at all objectionable, that the disaffected portion of his tribe would withdraw its allegiance from him and transfer it to some subordinate chief of the same clan.

The council of the tribe consisted of advisers of the chief, generally spoken of as councillors. They were the direct representatives of the people's wish, and in the very considerable freedom of speech permitted to them at their assemblies, the popular voice found means of expression. A councillor was not formally appointed: he simply became such as his opinions at the public gatherings of the tribe increased in weight, and as he acquired popular influence he grew to be accepted more and more as representative of a section of the tribe. It might be courage and warlike achievement, wealth, skill in public debate, penetration in the unravelling of the intricate windings of native law suits, or other personal attributes which made him a representative and a public man. At their homes the councillors were recognized as arbitrators in civil disputes. A few were always found at the 'great place' (the chief's personal residence), where they largely relieved the chief of the burden of judicial cross-questionings and assisted him in executive and administrative work, fulfilling many of the duties of ministers of state under more advanced forms of government. There was no form of election, but sufficient has been said to show that the council was distinctly representative of the people's voice. No sooner did any matter of concern to the tribe arise than the councillors were summoned, no important action being taken until it had been fully discussed in all its bearings. The laws of the natives thus embodied the tribal will.

There are many tribes in South Africa, but among all there is great similarity in the systems of law. The modifications of detail are unimportant. Professor Brookes has admirably summed up the leading principles:

'Native criminal law can hardly be said to have formed a distinct system from native civil law. But all European administrations in South Africa have drawn the distinction and, even where recognizing civil law, have virtually ignored the native customary rules regarding crime. The punishments in native law were death and cattle fines.

Imprisonment was unknown. Death was the penalty commonly inflicted for murder of a chief or parent or for desertion from the tribe, and of course for witchcraft. The main crimes punishable by fine were murder, adultery, rape, arson, theft, maiming, or injuring cattle causing cattle to abort, false witness, speaking disrespectfully of authorities and using love philtres. The last four were considered deserving of specially heavy fines. Murder, apart from incidents of warfare, was not common.

'In many of these cases, particularly theft, the procedure was what we should call a civil, rather than a criminal one. The cattle [of the offender] or the bulk of them, went to the injured individual, but in the case of murder, all usually went to the chief.

'Of all this mass of public or quasi-public law, all that remains recognized by European Courts to day is the status of chiefs, headmen, kraal heads, &c., and the doctrine of communal responsibility—illustrated in the so called "spoor law"—a law based on intimate knowledge of native judicial conceptions—which provides that if the 'spoor' of stolen cattle be traced to a certain kraal and it proves impossible to detect the actual thieves, the whole kraal is responsible.

'This chain of mutual responsibility is very fully and admirably worked out in the Natal Code of 1891. The whole system is strikingly illustrative of Maine's and Vinogradoff's contention that status is the determining factor in all systems of archaic law.

'Coming now to that part of native law—frequently termed native civil law—which has received more adequate recognition from the various Governments of South Africa, we find ourselves in a region of intense interest to the legal investigator. The main elements of native law hinge on a few leading principles. The subjection of the female sex to the male and of children to their father or the head of their family—primogeniture among males as the general rule for succession—the incapacity, generally speaking, of women to own property—polygamy with its accompanying lines of demarcation according to 'houses' in parts of the polygamist's property—adoption, or guardianship, or other conventional or hypothetical fatherhood.

'It will be gathered that native law is in the main a law of persons. And as a law of persons it is admirably worked out with exquisite skill comparing very favourably with early Roman or Germanic law. Its rules of intestate succession are such as to make professional exponents of *Scheppendomsrecht* and *Aandomsrecht* grow pale. Paradoxically it may be pointed out that testate succession is unknown—a striking proof of Maine's contention that intestate succession was first in the history of legal development. As regards relationship the Bantu are still in the agnatic stage—a mother may, and frequently does, moreover, come under the guardianship of her own son. The most interesting features of the Bantu law of persons to laymen are the institutions of polygamy and of *lobola*—the passing of cattle prior to marriage.

'The law of property is much less worked out. Individual property in land is unknown in native law. All the land at the moment occupied

by a tribe is held to rest in the chief not in his personal capacity but (to import our ideas into a less advanced system) in trust for the tribe. A chief could not, e.g. alienate tribal land with any binding effect except by a tribal act, involving full and public discussion with his councillors. The tribe is the utmost entity normally conceived of by native law. A paramount chief had, in practice, no power to adjudicate between tribes as to the ownership of land. A quarrel between tribes would be analogous not to a law-suit but to a war—a matter of 'international law' shall we say? The individual tribesmen possessed nothing but the right to occupy at the chief's good pleasure.

'The movable property of the Bantu, under tribal conditions, consisted mostly of livestock. The only normal ways of acquiring this property, under such conditions were by inheritance, gift, or *lobola* payment. Sale was absolutely unknown, and barter very uncommon.

'Naturally as the simplest and most rudimentary forms of contract were practically foreign to the Bantu mind, there was no law of contract at all. This provides us with two interesting points of departure. The entire absence of a law of contract suggests to us that, as a legal system, native law is more archaic than the oldest extant Roman law, and a detailed study of it is therefore a matter of intense interest to the scientific investigator of jurisprudence. Secondly, the absence of contract among a people like the Bantu, possessing the rudiments of civilization, a distinct and effective government and an admirable system of personal law, is a very convincing disproof of the suggestion that government is based on contract and a clear indication that the State has evolved from the family, and is to be explained ultimately by sex, the divine sacrament of society.¹

The Recognition of Native Law Native law was first recognized in the Cape Colony upon the annexation of that part of the country now known as the Transkeian Territories, when provision was made in 1897 (by proclamation) for the administration within these territories of the laws of the Cape Colony both in civil and criminal matters, except that where all the parties in civil suits were natives the magistrates were authorized to apply, at their discretion, native law and custom.

Prior to the passing of the Native Administration Act, 1927, there was no straightforward recognition of native law in the Cape Province proper. In the Bechuanaland districts of Cape Colony the operation of native law was fixed by statutory regulation. Proclamation 2 of 1885 (British Bechuanaland) gave chiefs exclusive jurisdiction in civil cases between natives of their own tribes, and they were allowed to retain criminal jurisdiction, except as regards certain grave crimes. Section 21 of the Native

¹ *History of Native Policy*, p. 175.

Administration Act, 1927, provides for the retention of the jurisdiction of native chiefs in Bechuanaland in civil and criminal matters, with certain modifications

In the Transkeian Territory of the Cape Province native law is recognized, and is administered at the discretion of the courts in civil suits between natives involving questions of customs between natives Here native law is susceptible to definition, limitation, and amendment by the governor-general-in-council, so that it can be moulded to suit the progress of the people and thus it neither shackles their development, nor forces, as an alternative, the premature adoption of principles of law alien to their conceptions and experience

In the Transvaal, native law derives its validity from the terms of Law No 4 of 1885, supplemented by sections 70 and 71 of Proclamation No 28 of 1902

In the Transvaal several limitations were placed on native customs It was held in *Rex v Naluna*,¹ and in *Rex v Mboko*² that marriage according to native custom was invalid as being inconsistent with the principles of civilization In *Kaba v Ntela*³ it was held that *lobola* (the price payable for a bride) is not recoverable, and that a mother is entitled to the guardianship of the children of native marriage unions, and in *Meesedoo-a v LmIs*⁴ it was decided that the custom under which a native woman remains a perpetual minor in native law cannot be recognized

In Natal the recognition and application of native law is governed by section 80 of Act No 49 of 1898

In Natal, native law is fully recognized, and it was in fact codified by Law No 19 of 1891, so that the incidents of customary marriage, *lobola* and succession, are provided for This code, however, was rigid, and could be amended by statute only which militated against its ready adaptability to changing conditions This objection has however been met in section 24 (1) of the Native Administration Act, 1927 Section 24 (2) of this act provides for the extension by proclamation of the native code of native law to Zululand in the province of Natal Zululand is at present subject to the Natal Code of 1875

In the Orange Free State, principles of succession and

¹ [1907] T S 407

² [1910] T S 984

³ [1910] T S 445

⁴ [1915] T P D 357

guardianship according to native customs are recognized, while in the native reserve of that province (Witzieshoek) the chief there is authorized to hear minor civil cases according to native law

Just as there were and are discrepancies in the Roman-Dutch law in the various provinces, there were more in the native laws, for native law was unwritten and unreported. The judges of the supreme court have on several occasions expressed the view that the legislature should take steps to resolve the uncertainty as to the recognition of native law and custom. As native law is unwritten, we are witnessing, probably in the only instance in the world at present, the development of judicial law in this respect in its very early stages. Native custom is provable as a fact in each case until established by judicial decision.

It is doubtful whether native law can ever be entirely assimilated by Roman-Dutch law.

'Then customs are so interwoven with the social conditions and ordinary institutions of the Native population, that any premature or violent attempt to break them down, or sweep them away, would be dangerous in the highest degree. The aim should be to wean them gradually from those customs and to provide machinery by which they may be enabled in course of time, to emerge from their uncivilized conditions, and join the ranks of their fellow-subjects, enjoying the benefits of a more enlightened system.'¹

The legislative powers, however, for the reshaping of the native administrative and legal system has been provided by the Native Administration Act, 1927.

Maxims in the Application of Native Law. The following are the more important maxims in the application of native law.

(i) Native law will only apply in disputes between native and native, and not where one of the litigants is a European.²

(ii) Native laws and customs must be proved as facts. The court does not take judicial notice of them.³

(iii) In any matter where native law does not furnish a remedy, the ordinary law will apply.⁴

¹ *Report of the Cape Government Commission on Native Laws and Customs*, 1883.

² *Misinto v. Moraiti*, 16 S C 539.

³ *Sengane v. Gondole*, 1 L D L 195, but see *Ngcobo v. Ngcobo*, [1929] A D. 233.

⁴ *Willie Nguma v. Jemima Koua*, 3 N A C 102.

(iv) The courts will not apply law contrary to public order, public policy, morality, chastity, equity or natural justice ¹

(v) The courts will not enforce any claim which in any way involves a party to the dispute in slavery or immorality ²

(vi) The courts will not recognize customs which are inconsistent with the very essence of the conjugal union, e g incestuous marriages ³

(vii) *The custom by which a woman is treated as a chattel* 'is abhorrent to the spirit of our law and of our constitution

It is nowhere enacted that there is an heritable right in the enforced services of a fellow subject of the crown, much less a right of property in the person of such a subject' ⁴

(viii) Where the plaintiff has contracted a Christian marriage, she falls under the ordinary civil law of the Union, any actions flowing from marital rights, such as damages for adultery, must be dealt with under Roman-Dutch law ⁵

¹ See Whitfield, *South African Native Law*, p 23, and the cases there cited. This is the ordinary rule of public policy

² *Sengane's Case*, *supra*

³ *Nggobela v Sihle*, 10 S C 346

⁴ *Sengane's Case*, *supra*

⁵ Whitfield, *South African Native Law*, p 5, and unreported cases. See also section 22 of Act No 38 of 1927

XIX

ADMINISTRATIVE TRIBUNALS AND ADMINISTRATIVE LAW

THE 'rule of law' as understood by constitutional lawyers is the application of the ordinary law of the land in the ordinary courts of the land.¹ In most countries there now exists a scheme of administrative law and a number of administrative tribunals, and their existence is entirely foreign to the ideas underlying the 'rule of law', as that phrase is commonly understood.

Administrative law comprises that body of rules and regulations drawn up under statutory authority which determines the position and liabilities of state officials, the rights and liabilities of private individuals in their dealings with the state, and the procedure by which these rights and liabilities are enforced.

Administrative law in South Africa has not yet developed to the extent that it has in Europe, but the increasing complexity of the national life has compelled the state to extend its authority and to entrust its officials with new duties of management in every direction. This development has been entirely statutory. It is as foreign to the Roman-Dutch common law as it is to the English common law to have tribunals of semi-judicial jurisdiction, controlling, by means of their powers of punishment, public business, and from which there is no—or only a limited—power of appeal.

In South Africa, the need for governmental intervention by regulation is correspondingly less than in the United Kingdom or the United States or Canada, for the country is not as fully industrialized as are the older countries of the world. Almost all public utility services in South Africa are state-owned, and the great industry of the gold mines of the Witwatersrand is subject to strict governmental supervision. In South Africa, also, magistrates have been given the duty of acting as administrative tribunals, especially in an appellate capacity.

Before discussing administrative law in South Africa, it is proposed to give the reader certain illustrations of administrative

¹ See *infra*, Chapter XXII. For important criticism of the 'rule of law', see W. Ivor Jennings, *The Law and the Constitution* (London, 1933).

tribunals and of administrative powers in the framing of regulations. It is impossible to give more than a brief summary of the provisions of selected acts and regulations. Under the heading of railways and harbours attention is drawn to the immense powers of framing regulations, which bind the ordinary citizen of the country who uses the railways or is upon railway premises. For the breach of these regulations, the citizen can be punished only in the ordinary courts of the land. Administrative tribunals have, however, been set up to try and punish servants of the railway administration who have committed breaches of the regulations. But, be it noted, these servants are not exempt from the ordinary law of the land as far as railway offences cognizable by the law courts are concerned. In South Africa, if such an offence is one cognizable by the courts (e.g. an offence which consists of malicious damage to railway property, negligence causing death or injury, or theft of public money), the offender would be brought before an ordinary law court. There are, however, matters such as indolence on duty or gross discourtesy to the public which are not offences by ordinary law, but which certain railway regulations have made matters of misconduct. These matters are not cognizable by the ordinary courts, but railway administrative tribunals have powers to punish servants of the administration who are guilty of such misconduct, as well as servants who are offenders against those railway regulations which are cognizable in the ordinary law courts. We thus have an illustration of administrative law in the sense that it consists of regulations framed by the railway administration having all the authority of ordinary law and governing the conduct of ordinary citizens on railway premises. This is not administrative law in the sense that it is administered by an administrative tribunal. We have also an illustration of administrative law in the sense that the rules or regulations of this administrative law are made by the railway administration and are enforced by administrative tribunals.

Next we may consider the public service. Here the regulations are framed for the purpose of enforcing discipline in the service, and the regulations are enforced by an administrative tribunal. The personnel of the administrative tribunals referred to above may vary in every case brought before it, it may very often be the permanent head of a department, it is rarely, if ever, a

person outside the railway or public services. There is no appeal to the ordinary law courts from these tribunals.

Under the Mines and Works Act we have administrative or semi-judicial tribunals of another character. A government inspector is appointed and he has certain duties connected with enforcing the safety of employees in mines and factories. Where a regulation, which may be made by government officials or mine managers, is alleged to have been contravened, the inspector of mines or machinery is constituted a court and he tries the offence. An appeal lies from his decision to a magistrate. This court, though it administers administrative law in the sense that the regulations are made by government officials for administrative purposes and not by a legislature in the ordinary sense of the word, more closely approximates to an ordinary law court than an administrative court. It has jurisdiction, not over public servants, but over ordinary citizens working as employees in mines or working with explosives or dangerous machines.

The next illustration of an administrative tribunal is the Miners' Phthisis Board. This board is appointed by the government for three years. Its work is specialized and requires specialized knowledge, dealing as it does with claims for compensation for various stages of phthisis. It is assisted by medical advisers and hears evidence. Its work is partly administrative, partly judicial, it hears claims, it orders the claims to be met, it controls and administers funds. It is a board appointed by the government administering funds in which the government has an interest and regulating the relationship between miners' phthisis claimants and the miners' phthisis funds, in the latter instance acting in a semi-judicial capacity, in the former in a purely administrative capacity.

In the next place we have the Road Transportation Board appointed by a minister to protect the interests of the department over which the minister presides, and in its discretion to restrict the activities of individuals competing with the business of that department. The ordinary courts are invoked to enforce the decisions of this body, but from these decisions itself there is no appeal to the ordinary courts. The Road Transportation Board is an administrative body with semi-judicial powers.

The last illustration given is afforded by the immigration boards established by the Immigrants' Regulation Act of 1913.

Here, for reasons of high state policy, no appeal on the facts is allowed. Immigration is a state matter in which a private individual has no rights and no privileges. The state is, in this instance, in a privileged position far above the ordinary individual.

We do not refer to the defence force and the police and prisons services, for these are governed by special codes of military, police, and prison regulations, which are almost the same as those in the United Kingdom.

1 Illustrations of the Workings of Administrative Tribunals and Administrative Regulations in South Africa

Railways and Harbours Under the Railways and Harbours Regulation, Control and Management Act, No. 22 of 1916 the Railways and Harbours Board has made regulations controlling the speed of trains, the loading and delivery of goods, the manner in which passengers shall travel, the control of ships entering harbours, the duties and conduct of the administration's servants, the crossing of railway lines, and generally 'for the good government' of the railways and harbours, 'and the maintenance of order thereon and therein'. These regulations provide penalties for any contravention thereof and include fines up to £50 and imprisonment up to six months. Any contravention of a regulation by a servant of the administration may be deemed to be misconduct and may be severely punished either by the law courts or by the administration. The act also creates other specific duties, and provides penalties for their contravention. Station-masters, inspectors, ticket examiners, and other railway officials have the power of arresting persons contravening the provisions of the act or the regulations thereunder, but such arrested persons must be handed over to the police immediately to be dealt with according to law. Under the act a whole array of regulations has been framed controlling the actions of persons using the railways and harbours, entering railway stations to welcome arriving friends or to make inquiries regarding trains. These regulations have all the effects of law and are enforced in the ordinary courts of the country, but the regulations are not made by parliament but by officials of the administration, and are framed for the better management, control, and administra-

tion of the railways and harbours. In that they are created and framed by the railway administration and not by the legislature in the ordinary sense they may be included in the term administrative law.

Under the Railways and Harbours Service Act 1925, the governor-general, or some person to whom the authority has been delegated, may appoint so many persons as the service may require. The employment of all permanent members of the service is made secure by this statute, and servants of the administration may not be dismissed save under the provisions of the statute after an inquiry by an administrative tribunal.

The act especially lays down that any servant who is charged with misconduct shall be afforded an opportunity of being heard, and any admission or denial he may make or explanation he may give shall be considered by the officer delegated for that purpose.

A servant who is charged with misconduct of a serious nature may be suspended temporarily from duty. The order of suspension together with the charge on which the order was made shall be delivered in writing to the servant suspended. The servant must immediately state in writing in reply to the charge whether he admits or denies it or he may give an explanation.

When a servant is found guilty of misconduct, he may be fined, or his increments of pay be stopped, or his salary or wages or rank reduced, or he may be ordered to resign, or he may be dismissed. A servant found guilty of a criminal offence in a court of law is *ipso facto* dismissed, if found not guilty he may still be charged with misconduct by the administration.

If the servant denies the charge made against him, an inquiry must be held before an officer of the service. The servant is entitled to be present during the whole of this inquiry and must be afforded an opportunity of cross-examination, and of leading evidence, and he may have the assistance of another railway servant for the conduct of his defence or appeal.

If the servant is found guilty and considers the decision of his superior officer wrong, he may appeal to a tribunal called the Disciplinary Appeal Board for his district which may hear further evidence, and the appellant may be present and may cross-examine the witnesses.

The Disciplinary Appeal Board consists of one servant elected for two years from the class of servants to which the appellant

belongs and one servant nominated by the administration for two years. The decision of this board is communicated to a prescribed officer who reviews the case and gives his decision. If such decision is in accordance with a unanimous decision of the board, it becomes a final decision. If the board has differed, the accused may appeal to the general manager, and if dissatisfied with his decision, he may request the general-manager to forward the records of the case to the railway board for review.

Once the servant has exhausted the avenues of appeal allowed by the act, he has no further redress. Except in the circumstances referred to hereafter, he may not appeal to the courts of law.

*The Public Service*¹ Misconduct by a servant in the public service consists of disobedience to the lawful orders of a superior, negligence or indolence in the discharge of duties, inefficiency or incompetency from causes within an offender's own control, public criticism of the administration, taking part in politics either actively or by merely belonging to a political party, disgraceful behaviour or gross discourtesy in the discharge of duties, intoxication, prodigality resulting in pecuniary embarrassment to the prejudice of the faithful performance of his duties, the disclosing of information otherwise than in the discharge of his duties, the acceptance of a private reward for service, the misappropriation of public money, the commission of a criminal offence, and the absenting himself without cause from his duty.

Any officer of the public service who is charged with misconduct not of a serious character, shall be required to transmit in writing within the time specified in the charge a statement of admission or denial or an explanation in writing. If the charge is denied, the officer charged may be heard in his defence. If he is found guilty, either on his admission or explanation, or after being heard, he may be fined up to five pounds.

The preliminary procedure is the same in the case of misconduct of a serious nature. If the charge is denied an inquiry must be held and evidence produced before a person delegated for such purpose by the Public Service Commission. The finding, on this inquiry, is final, but the finding must be transmitted to

¹ See Public Service and Pensions Act, No. 27 of 1923

the minister of the interior or the administrator of the province, as the case may be with a recommendation of the action to be taken. The offender may be discharged, fined, or reduced in grade.

Mines and Works Act 1911 Under this act the governor-general has made regulations for the proper working and management of all mines, works and machinery, and 'for better carrying out the objects and purposes of this Act. These regulations prescribe penalties for any contravention thereof. As though it were not sufficient to have the law made by government officials, the act gives the manager of a mine power to make special rules for the maintenance of order or discipline and the prevention of accidents in any such mine. The rules, when made, are submitted through an inspector of mines to the government mining engineer who sends them to the minister of mines for his approval. When approved by him and to the extent approved, they are posted at a conspicuous place at the mine for fourteen clear days, and then have the force of law.

An inspector of mines, machinery or explosives may try any breach of a regulation or of any manager-made rule and may impose a fine not exceeding five pounds which may be deducted from the employee's wages. This trial does have the semblance of a trial in an ordinary court. The evidence has to be taken down in writing, an oath has to be administered to witnesses, who are liable under the law of perjury for false evidence, and witnesses have the same privileges in respect of answering questions or producing documents as they have in an ordinary court of law. An appeal from the inspector's finding lies to the magistrate of the district and the magistrate's decision is final.

Miners' Phthisis Acts The Miners' Phthisis Board as at present constituted was established¹ by Act No. 35 of 1925, and consists of a chairman and not less than three nor more than six other members, each of whom is appointed by reason of his special knowledge of the intricate subjects dealt with by the board. The board sits at least once a week, and in its semi-judicial capacity decides upon claims by miners for compensation for having contracted phthisis. The board, for the purpose of deciding claims, may summons witnesses and administer an oath. Regulations governing the board's duties are made by the minister of mines after consultation with the board.

¹ See Acts No. 34 of 1911 and No. 40 of 1919.

Motor Carrier Transportation Act, 1930 This act empowers the governor-general to appoint a road transportation board consisting of three members, and local transportation boards, also consisting of three members. It is the function and duty of these boards to investigate any matter relating to motor carrier transportation and to submit recommendations to the minister of railways, to determine the volume and nature of motor carrier transportation over any proclaimed route, to receive and consider applications for motor carrier certificates over any route, and in its discretion to grant or refuse such applications, or to suspend or revoke certificates given. The decisions of local boards are subject to appeal to the road transportation board.

These road boards have been established in order to restrict the competition which road motor transport has set up against the railways of the Union. The railways in South Africa are state owned, and every effort is being made by the government to prevent the railways running at a loss. (One method of dealing with the problem has been by establishing road boards consisting of members appointed by the government to protect the government's interests by refusing certificates for motor transportation.) The members of the road boards may be dismissed by the government without the government being required to give any cause or reason for the dismissal. The powers of the board are such that they can entirely crush private competition against the railways, the penalties which the law imposes for contraventions of the act are fines up to one hundred pounds and imprisonment up to six months.

Immigrants' Regulation Acts Under the Act of 1913 the governor-general appointed certain immigration boards for the summary determination of appeals by persons who, seeking to enter or being found within the Union, have been detained, restricted or arrested as prohibited immigrants. Each board has jurisdiction in respect of certain ports of entry. The board consists of three members, its chairman is a magistrate, and each member is appointed for a year. The hearing of an appeal against an immigration officer's decision is conducted in the presence of the appellant, who may be represented by legal advisers. The board may summon witnesses to give evidence under oath and to produce documents. The evidence must be taken down in writing, and the majority decision of the board

is final and conclusive. No court of law in the Union, it is specially stated, has jurisdiction to review, quash, reverse, interdict or otherwise interfere with any proceeding, act, or order of a board or the minister in relation to the restriction, detention or removal from the Union of a person dealt with as a prohibited immigrant. But an immigration board has to reserve any question of law which arises, at the request of the parties, for the opinion of the provincial division of the supreme court on a stated case and this opinion may be taken to the appellate division. On the facts, however, as stated above, there is no appeal or review whatsoever.

2 Judicial Control over Administrative Tribunals¹

The exact nature and extent of the discretion exercised by an administrative body depend on the empowering statute, and from this point of view the law by which these bodies are governed is merely part of the ordinary law of the land. The courts may not question the validity of the empowering acts of parliament, but they may question both the validity of the regulations made under these acts, and the validity of the methods by which the administrative bodies exercise their powers. Regulations must not go beyond the limits of authority granted by the empowering acts and the methods of administrative bodies must not be *star chamber* methods. They have to conform to certain principles, not patent on the face of the empowering statutes which the judges of the superior courts have either by a process of interpretation read into the empowering statutes or, by reason of their inherent jurisdiction, have themselves assumed in order to prevent injustice.

The immigration boards, to which we have referred, have in some respects the appearance of courts of inferior jurisdiction, but they are nevertheless very different from courts of law, for the act under which they are established especially lays down that 'no court of law in the Union shall, except upon a question of law reserved by a Board, have any jurisdiction to review, quash, reverse, interdict or otherwise interfere with any proceeding, act or order, of a Board'. These are very strong

¹ See A. Lonie, 'Administrative Law in South Africa' (*South African Law Journal*, 1927, pp. 10 ff.)

provisions and the courts have no option and must act (or refrain from acting) accordingly.¹

The above provisions go farther than do other acts of this type. But even in the absence of such express prohibition, it is nevertheless held implicit in any statute that hands over a matter to the determination of any person or body of persons that the decision given by them shall be final and not subject to appeal. In *Shadiack v Union Government*² this rule is clearly stated. It is settled law that where a matter is left to the discretion or the determination of a public official and where his discretion has been bona fide expressed, the court will not interfere with the result. If he has duly and honestly applied himself to the question which has been left to his discretion it is impossible for a Court of law to make him change his mind or to substitute its conclusions for his own.³ This is true also where an official body has reached a wrong decision on the merits, by its misconception of the facts of the case.⁴

There are, however, certain qualifying rules that have application to the decisions of administrative tribunals. In the first place, an administrative tribunal must act strictly within the scope of its delegated powers, in the second place, it must act in good faith, in the third place, its method of acting or its procedure must not be irregular. Each of these qualifying rules requires explanation.

Jurisdiction. It is the duty of a court to determine in accordance with the established rules of construction the meaning of an empowering enactment. The courts will not read a greater delegation of power into the statute than they can help. Where Parliament takes away the right of an aggrieved person to apply to the only authority which can investigate, and where necessary, redress his grievance, it should do so in the clearest language. Courts of law should not be astute to construe doubtful words in a sense which will prevent them from doing what is prima facie their duty, viz from investigating cases of alleged injustice or illegality.⁵

¹ See *Union Government v Fakir*, [1923] A D 406, *Narainsamy v Principal Immigration Officer*, [1923] A D 673.

² [1912] A D 642.

³ *Doyle v Shenker*, [1915] A D 233, *Hawken v Miners' Phtisis Board*, [1920] W L D 93.

⁴ Per Innes C J in *Re v Padsha*, [1923] A D 281.

Where a statute gave the governor-general power to make regulations for the licensing of jewellers, and he made a regulation which provided that no jeweller's permit or renewal thereof shall be issued unless the commissioner of police certified that the applicant was a fit and proper person to hold such a permit, it was held that in the absence of direct statutory provisions it was not reasonable to suppose that the legislature contemplated entrusting the fortunes and businesses of a large number of persons to the absolute discretion of an individual, without their having an appeal or being able to know on what ground objection is taken to them. If it had intended to confer such a power, the legislature would have said so. This delegation of power to the commissioner of police was not incidental and necessary to the original or main power, and therefore it was held that the powers conferred by the statute had been exceeded and the regulation in question was *ultra vires*.¹

Enactments delegating powers to individuals or administrative tribunals must be strictly construed. If an act provides that a departmental inquiry into a charge against a civil servant shall be ordered by the head of a department, and it is in fact ordered by the assistant general-manager, the whole proceeding is invalidated,² and if an education test is to be to the satisfaction of the minister, it must be to his satisfaction and not to that of an immigration officer.³

The meaning of a statute having been determined, the regulations under that statute must be strictly according to that meaning and strictly within the scope of that meaning. If the regulations themselves are valid, the administrative body has to act within the limits prescribed by the regulations. If the act and regulations lay down principles in accordance with which a discretion is to be exercised, extraneous matters must not be taken into consideration. For example, when a minister is empowered to make regulations for the prevention of stock disease, he must not use those powers to inflict such a punishment as would be a warning to other persons. This was exceeding the powers granted him,⁴ for he was taking into

¹ *Keen v Commissioner of Police*, [1914] T.P.D. 398.

² *Guildford v Minister of Railways and Harbours*, [1920] C.P.D. 606, and see *Bradshaw v Union Government*, [1930] N.P.D. 324.

³ *Shadlack v Union Government*, [1912] A.C. 642.

⁴ *Struben v Minister of Agriculture*, [1910] T.P.D. 903.

consideration a matter which he was not entitled to take into consideration. Powers to prevent a disease cannot be used as a means of punishment. Similarly, the consideration of colour is not one which a statute ordinarily contemplates should be exercised by a body with delegated powers unless the empowering statute grants this power.¹

Under the power of testing the jurisdiction of an administrative body, falls the incidental power of testing the facts upon which the jurisdiction rests. A person born in the Union may not be deported. If an applicant claims he was born in the Union, and the immigration officer rejects that claim, the court has power to correct a decision that would have as its result the exclusion of the court's jurisdiction. The immigration officer has no jurisdiction over a person born in the Union, and however strongly he may decide that the person in question is not born in the Union, if in fact he is so born, no decision of the immigration officer can change that fact. If, however, the court decides that the person in question is not born in the Union, it cannot interfere with the immigration officer's decision.²

Good Faith Any one who is given power to decide anything must listen to and consider both sides of the question. The courts presume that administrative bodies act fairly and impartially.³ They must not act arbitrarily, capriciously, unreasonably or in bad faith.⁴ If any one of these is proved as a fact, the supreme court will set aside the decision of an administrative body arrived at in an arbitrary, capricious or unfair manner.

Procedure Where a statute provides the procedure to be

¹ *Swarts v Pretoria Municipality*, [1920] T P D 187. Under the Immigrants' Regulations Act, 1913, any person or class of persons may on economic grounds or on account of standard or habit of life be deemed a prohibited immigrant. In *Rex v Padsha*, [1923] A D 281, it was held that a notice deeming every Asiatic an unsuitable immigrant on economic grounds was good, as in view of the peculiar economic conditions of the Union the notice was not so unreasonable as to justify the court in doubting that economic and not racial considerations were the basis of the minister's decision.

² *Principal Immigration Officer v Narasamy*, [1916] T P D 274.

³ A refusal to give reasons for the decision might be an important element in deciding whether there has been good faith, though administrative bodies are not compellable to give reasons, they should, however, state why reasons are not given (*Judea v Registrar of Mining Rights*, [1921] T P D 1046, *Jaffer v Parow Village Board*, [1920] C P D 267, *Stewart v Witwatersrand Licensing Court*, [1914] T P D 178, *Jaffer v Wynberg Municipality*, [1915] C P D 153).

⁴ *Garrett v Albany Licensing Court*, [1918] E D L 128.

followed, the statutory body is bound to follow such procedure strictly, and the court will set aside proceedings in which there has been any departure therefrom ¹

Review of the procedure adopted is very different from reviewing the decision arrived at. Setting aside a decision by means of an application to the supreme court on grounds of jurisdiction, bad faith, or irregular procedure, is not a process to declare a decision wrong, but a process to set aside a proceeding which the legislature does not authorize. In the case of wrong procedure, even though the court will not go into the correctness of the decision, it will nevertheless set aside the proceedings on the ground that it is the duty of the supreme court to prevent a course which *might* have led to injustice. Administrative bodies, even where no particular procedure is prescribed, should acquaint the defendant with the nature of the charge he has to meet. He 'must be given a fair opportunity to make any relevant statement which he may desire to bring forward, and a fair opportunity to correct or controvert any relevant statement brought forward to his prejudice' ². Unless the statute so directs, it is within an administrative body's power to refuse to allow legal representation,³ or to insist upon all the evidence being in writing only ⁴. The ordinary rules of evidence have no application before administrative tribunals. They may take into consideration their own knowledge. Here, perhaps, these bodies are most useful. They can quickly dispose of technical matters with which they are acquainted.

The great disadvantage of administrative inquiry and decision is the danger of injustice, not by reason of bad faith, but by reason of lack of judicial-mindedness and absolute independence. The individual citizen does not feel and in fact is not safe and secure in his rights under bureaucracy. The whole question has become a very serious one, especially in view of the increasing powers of administrative tribunals and the existence of the legal principle that the individual has no power of redress for a wrong.

¹ e.g. failure to comply with a statutory requirement as to the giving of a notice (*Hopetown Licensing Court v Hyman*, [1924] C.P.D. 8).

² *De Vertuyl v Knaggs*, [1918] A.C. 579, quoted in *Ross's Case*, [1920] T.P.D. 1.

³ *Dalmer v S.A.R.*, [1920] A.D. 583.

⁴ *Porter v Union Government*, [1919] T.P.D. 234, *Barlin v Cape Licensing Court*, [1924] A.D. 472, *Fernandez v South African Railways and Harbours*, [1926] A.D. 60.

bona fide done to him by an administrative body acting in a semi-judicial capacity. He cannot sue for damages, cannot even recover costs unless he can prove *mala fides*. The official is protected by the law, he stands in a special position as against the ordinary citizen.¹

The truth is that the complications of modern life have necessitated and indeed accelerated the creation and growth of administrative tribunals. That they have come to stay—and that in increasing numbers—it is impossible to deny. On the other hand, no system of jurisprudence has been worked out in South Africa in connexion with them as has been done in France. The dangers, then, lie not in the tribunals themselves, but in the possibility of injustice and arbitrary action under them. Even though it might be impossible to prove that this has taken place, yet the system is so divorced from the general rule of law that there is need for the utmost care on the part of parliament in granting administrative powers and in making provisions for reasonable and adequate judicial review. The system is almost in its infancy in South Africa, and there is therefore opportunity for a thorough examination of its methods and implications.

¹ For the attitude of the courts to administrative law in Canada, see W. P. M. Kennedy, 'Aspects of Canadian Administrative Law', in the *Juridical Review*, Sept. 1934.

PART VI
THE RULE OF LAW

XX

THE RIGHT TO PERSONAL FREEDOM

No man may be arrested or imprisoned except in due course of law. The legal means for the enforcement of this principle are (i) by means of an action for damages, and (ii) deliverance from unlawful imprisonment.

1. Redress for Wrongful Arrest

If a person is wrongfully arrested, he may institute proceedings for the damage inflicted upon him. No matter if he be imprisoned for five days or five minutes his remedy still lies. This is the action for false imprisonment. False imprisonment is the wrongful act of imprisoning, or restraining the liberty of, any person without legal warrant or writ or other legal authority. It is not essential in an action for damages by reason of false imprisonment that the defendant shall have acted maliciously. The mere false imprisonment or illegal arrest is by itself sufficient. The illegal arrest or detention complained of must have been made by or at the instance of the defendant, and the fact that he made a bona fide mistake is no excuse if he did not act according to law. This means that every wrongdoer is individually responsible for every unlawful or wrongful act in which he takes part, nor can he plead in his defence that he did it at the instigation of some one else or the order of a superior.

Wrongs, it is readily seen, may be inflicted either by way of legal proceedings or without legal proceedings. For the latter there is the action of false imprisonment or assault or defamation and the like. But where a person maliciously and without reasonable or probable cause lays a false criminal charge against any one which has led to the prosecution of the latter, even though he be acquitted after a long or short trial, such person is liable in damages, and the principle of law in this, as in the former instances, though the phrase is not used in any of the many decisions upon which these propositions are based, is the individual's right to personal freedom, and so much so is this the case that even a malicious threatening of such right is subject to an action for damages.

But even this right of redress is in law insufficient security for personal freedom. So jealous is the law of the right to personal freedom, that, in addition to punishing every kind of wrongful interference with a man's liberty, it provides adequate security that every one who without legal justification is placed in confinement shall be able to get free. This security is provided by what is known in the United Kingdom as the writ of *habeas corpus* and in South Africa as the writ *de homine libero exhibendo*.

2. The Writ of *habeas corpus* or *de homine libero exhibendo*

The object of this writ is that the person detained may be produced before the court where his detention must be justified by the person detaining him. The writ *de homine libero exhibendo* corresponds very nearly to the English writ of *habeas corpus*. The one was to be found in the principles of Roman-Dutch law, when introduced into South Africa, the other in the common law and parliamentary enactments of England. While the provisions of law in regard to the former writ are still fully applicable they have been amplified by the principles relating to *habeas corpus*. It has been laid down by the courts of South Africa that the rights to personal liberty which South Africans enjoy are substantially the same as those which are possessed by Englishmen, and that it is the bounden duty of the court (and it has inherent jurisdiction) to protect personal liberty wherever it is illegally infringed.¹ From the frequency in which the term *habeas corpus* has been used in our courts and not that of *de homine libero exhibendo* and from the fact that the courts have decided that the principles of *habeas corpus* are applicable in this country, the use of the Roman-Dutch term has fallen into disuse, and that of the English term has taken its place.

The procedure in the South African courts is by way of petition to the court setting out that a person within its jurisdiction has been wrongfully deprived of liberty, and the court issues a writ or order to have that person brought before the court and, if he has a right to liberty, the court sets him free. This order is directed against the person by whom a prisoner is alleged to be kept in confinement, to bring such prisoner before the court to let the court know on what ground the prisoner is

¹ In *re Kok and Bahe*, Buch 1879, p. 64. See Appendix II of this book.

being confined and thus to give the court the opportunity of dealing with the prisoner as the law may require¹ The writ or order of the court can be addressed to any person whatever, be he an official, or a minister of the government, or the governor of a prison, or a private person, who has or is supposed to have another in custody Any disobedience to the writ exposes the offender to summary punishment for contempt of court

It is to be noticed that the Roman-Dutch law required that the detention be made *dolo malo* (with wrongful intent), and without just cause This could obviously lead to injustice as the detention might be made with a bona fide belief as to its necessity The modern practice derived from the principles of *habeas corpus* does not require wrongful intent It is sufficient that the detention is wrongful or unjustifiable

It is thus seen that no arbitrary power can be exercised by anybody within the Union The law is not a respecter of persons Where discretionary power is given, the law guards most jealously the rights to personal liberty The supremacy of the law is not to be questioned Nor does the law in this matter discriminate between foreigner and citizen, between race, creed or colour An instructive and illuminating judgment² was given by the late Mr Justice Mason in the Transvaal supreme court in 1906 A Chinese labourer, Li Kui Yu, was employed as a police sergeant at a certain mine-compound Complaints were made in respect of the conduct of this Chinaman to a government official, the superintendent of the foreign labour department, to whom a request was made that this Chinaman should be repatriated Acting upon that request and in terms of section 7 of the Labour Importation Amendment Ordinance of 1905, the superintendent had the Chinaman brought to his office, after he had been arrested and handcuffed, and he then confined him in a cellar The compound-manager, noticing the absence of the Chinaman, consulted solicitors, and communicated with the superintendent who replied that he intended repatriating the Chinaman under the Ordinance quoted The compound-manager requested to see the Chinaman, but the

¹ It may happen that a prisoner lawfully arrested is detained for an excessive period without being brought to trial In such cases the Criminal Procedure and Evidence Act, 1917, provides for the discharge of the prisoner

² *Li Kui Yu v Superintendent of Labour*, [1916] T S 181

superintendent absolutely refused to allow him to have access to him. When the compound-manager asked to see the Chinaman for the purpose of getting a power of attorney signed in order that the Chinaman might employ legal advisers, the superintendent refused. Before the matter came to court, the Chinaman was sent out of the province to Durban. The learned judge remarked

'I quite recognize that the duties of the Foreign Labour Superintendent are very difficult and very responsible. Where enormous powers such as those contained in the Ordinance are conferred on any official, it is his duty to keep strictly within those powers. The court will see that laws of this kind are not stretched beyond the powers which they really give and are intended to give.

'In the first place the Chinaman was illegally arrested and illegally confined as if he were a prisoner. The provisions of the law with reference to the repatriation of labourers are clear. Under Section 7 of the Labour Importation Amendment Ordinance of 1907, "the Superintendent may order the return to the country of origin of any labourer who he has reasonable grounds for believing is a danger to the exercise of the proper control of labourers on any mine". I do not wish for one moment to suggest that the superintendent did not *bona fide* believe and that he had not very good grounds indeed for believing that this particular labourer was a danger to the exercise of the proper control of the labourers on the mine. But when an order under the Ordinance is given the Ordinance provides how it is to be carried out. Section 28 of Ordinance 17 of 1904 provides that if a labourer refuses to return to his country of origin he may be arrested without warrant and brought before a magistrate, who may punish him for refusing, and only after that punishment can he be forcibly sent back to his country of origin. The reason of that is perfectly clear. If any labourer has any *bona fide* complaint to make about the conduct of the officials, about his treatment or any other matter, he will have an opportunity when he comes before the magistrate to make that complaint and to obtain justice. One can see that a section of this kind is absolutely necessary to protect a labourer against being treated with the grossest injustice. His wages might be due, property of his might be in the country, and there are many conceivable circumstances under which he might have good grounds for objecting to return for the time being. Unless he can come before the Court the whole of those complaints are silenced, and the conduct of the officials can never be scrutinised, and he has no opportunity of getting justice.

'Next, the Superintendent was guilty of what was not perhaps intentionally but was in substance and in fact a tyrannical exercise of power—preventing anybody having access to the Chinaman. The only way of preventing a person being illegally done away with and illegally treated is to uphold to the fullest extent the right of every person to have any

of his friends come and see him who choose to do so. To prevent the access of friends to any person is a most serious infringement of the liberty of any subject. The Superintendent is told that the solicitors wanted to see this man for the purpose of taking instructions from him. It was even more serious for him to decline to allow the man to consult a solicitor or even to say whether he wished to see a solicitor. Even if the man had been a prisoner under legal confinement it would have been a very serious step to take to say that he would not be allowed to take any legal advice, to consult the person likely to help him, or take any steps in order to test whether his confinement or the steps proposed to be taken were legal. The Superintendent must take the consequences of that act of his.

'Lastly, where a person knows or has reason to believe or ought to know that an application is being made to the Court for a certain purpose, if he takes any action before the Court can be approached, the Court will regard that as an interference with the administration of justice, and will exercise its powers to prevent itself being defeated by anything of that kind.'¹

The Chinaman was brought before the court and the superintendent was punished for contempt and ordered to pay the costs of the proceedings.

¹ This statement of the law was queried in *Yamamoto v Albersuch and Another*, [1919] W L D 105, as being too wide. There it was stated that 'wrongful intent is essential to the crime of contempt of court. Where an act is done with the intention of defeating the ends of justice or of obstructing the court in its functions, there is *dolus*, and the act is punishable as contempt of court, whether or not an order of the court is in existence.' See *Marechane's Case*, 1 S.A.R. 27, *Sigcau v The Queen*, 12 S.C. 258.

XXI

MARTIAL LAW AND ACTS OF INDEMNITY

IN the Union there can be no suspension of the Habeas Corpus Acts for the simple reason that the Union has no such acts. In a state of war or emergency a proclamation of martial law is made, and this proclamation has the effect of interrupting or suspending the ordinary functions of the courts in a proclaimed district in respect of the acts of the military or police authorities, and the courts will not interfere with those authorities in regard to acts done by them, e.g. in regard to persons arrested and confined to jail under military authority.

In the privy council case of *Marais v Regina*,¹ the appellant had been arrested near Capetown and detained in custody under military authority during the Boer war. Cape Colony, it must be remembered, was a British colony and the area around Capetown was comparatively peaceful. Marais petitioned the supreme court of the Cape of Good Hope for release on the ground that he had not committed a crime, or otherwise that he should have been arrested and tried according to the ordinary law as the ordinary courts were open. The privy council, refusing leave to appeal from the decision of the Cape court, held that where actual war is raging in the country, acts done by the military authorities are not justiciable by the ordinary tribunals. Martial law had been proclaimed over the district in which Marais had been arrested and in the district to which he had been removed, and in those districts the civil courts had no jurisdiction to call in question the propriety of the action of the military authorities.

It is not to be supposed that martial law proclamations have in any sense the force of law. They cannot of themselves impose upon any persons legal obligations or duties not imposed by common law or by acts of parliament. A proclamation of martial law is a notice to the public and to the courts of law that a state of war or emergency exists and that, therefore, the public must obey the military regulations and instructions and that no court of law must interfere with any acts done by the military until

¹ [1902] A.C. 109

the proclamation of martial law is withdrawn or peace and order restored. The production of the proclamation of martial law to any judge who has not read it is *prima facie* evidence of the existence of a state of war and extreme emergency, though the fact that a state of war or emergency exists may be proved by other evidence as well. The courts, however, would take notice of the proclamation of martial law, and its production would be a complete answer to any action brought against the authorities. The court would immediately declare that it has no jurisdiction to interfere with the acts of the military authorities during a time of war or emergency.

An act of indemnity is something of an entirely different character.

'An act of indemnity,' says Dicey, 'though it is the legislation of illegality, is also, it should be noted, itself a law. It is something in its essential character, therefore very different from the proclamation of martial law, the establishment of a state of siege or any other proceeding by which the executive government at its own will suspends the law of the land. It is no doubt an exercise of arbitrary sovereign power, but where the legal sovereign is a parliamentary assembly, even acts of state assume the form of regular legislation, and this fact of itself maintains in no small degree the real no less than the apparent supremacy of law.'¹

The nature of an act of indemnity, its recognition of the common law principle that every man is responsible for his own acts and cannot plead the orders of any one else in justification of wrongful acts committed, be he the governor-general or a cabinet minister, is best illustrated from Act No. 6 of 1922.

ACT

To provide for the withdrawal of martial law from operation in certain districts of the Transvaal, to indemnify the government, its officers and other persons in respect of acts advised, ordered or done in good faith in relation to measures taken for the prevention and suppression of disorder or disturbance, the maintenance of good order and public safety and in the administration of martial law, and further to enable special criminal courts constituted under the existing law to try certain classes of offences committed during the disturbances in those districts.

(Assented to 13th May, 1922)

(Signed by the Governor-General in English)

¹ A. V. Dicey, *Law of the Constitution* (London, 1916), appendix x.

Preamble

WHEREAS, in order that special precautions might be taken in certain districts of the Transvaal for the prevention and suppression of disorder and the maintenance of public safety, the Governor-General, with the advice of the Executive Council, did on the tenth day of March, 1922 by Proclamation No 50 of 1922, place those districts under martial law as martial law is understood and administered in His Majesty's dominions

AND WHEREAS it is desirable that martial law should now be withdrawn from operation in the said districts and that the government, its officers, and persons acting under them or upon their orders should be indemnified in respect of acts and things in good faith advised, commanded, ordered, directed or done for the purposes for which martial law was so proclaimed

AND WHEREAS it is further desirable to make special provision whereby persons charged with certain classes of offences committed in the course of disturbances prior to and after the proclamation of martial law as aforesaid may be tried by special criminal courts constituted as in the Criminal Procedure and Evidence Act 1917 is provided for the trial of other similar offences

BE IT ENACTED by the King's Most Excellent Majesty, the Senate and the House of Assembly of the Union of South Africa, as follows

Withdrawal of Martial Law

1 As from the date of the promulgation of this Act in the *Gazette*, martial law is withdrawn from operation in every magisterial district which was placed under martial law by Proclamation No 50 of 1922 and thereupon that Proclamation and any regulations, orders, and instructions issued under the authority of martial law and for the purposes of its administration shall, in respect of each such district, cease to be of force and effect

*Indemnity of Government and its officers &c,
for certain acts*

2 (1) No action, indictment, or any other legal proceeding whatever shall be brought or instituted in any court of law in the Union against—

- (a) His Royal Highness the Governor-General, or
- (b) any member of the Executive Council of the Union, or
- (c) any control officer or commissioned officer, as defined in the regulations published under government notice No 428 of 1922, or
- (d) any person employed in the public service or the railways and harbours service or in the police forces or defence forces or in any special police force or in the prisons service of the Union, or
- (e) any person acting under, or by the direction or with approval of, any officer, member or person aforesaid in any position or capacity, civil or military,

for, or on account of or in respect of, any act or thing whatsoever, in good faith advised, commanded, ordered, directed or done on or after the tenth day of March 1922, and prior to the promulgation of this Act for the purposes of preventing or suppressing disorder in any such district or to maintain good order and public safety therein, or before that date, if such act or thing were necessary in relation to the preparatory measures for the purposes aforesaid

Any such action, indictment, or any other legal proceeding whatever which may have been commenced prior to the promulgation of this Act shall be discharged and shall become and be made void

(2) Every such person as is described in sub-section (1) by whom any such act or thing has been in good faith advised, commanded, ordered, directed, or done, for the purposes in that sub-section described shall in respect thereof be freed, acquitted, discharged, released, and indemnified against all persons whomsoever

(3) Every act or thing referred to in sub-section (1) shall be presumed to have been advised, commanded, ordered, directed, or done (as the case may be) in good faith or, as far as it concerns acts done prior to the tenth March, 1922, to have been necessary until the contrary is alleged and proved by the party complaining

*Sentences pronounced and arrests made under Martial Law
confirmed and rendered lawful*

3 (1) The several convictions obtained before and the sentences passed by magistrates under the jurisdiction conferred by the regulations published under Government notice No 428 of 1922 or any amendment of those regulations for offences thereunder are hereby confirmed in so far as the same shall not have been set aside or reduced by or under the authority of the Minister of Defence, and every person undergoing such a sentence and confined to any prison, gaol, or lock-up or any other place whatsoever shall continue to be confined therein or elsewhere as the Minister of Justice may direct, until the expiration of the sentence or until released by the Governor-General in the exercise by him of the Royal mercy, or until otherwise discharged under lawful authority. Every such conviction and sentence shall be deemed for all purposes to be a conviction and sentence of a duly and legally constituted court of law in the Transvaal, shall be carried out accordingly, and shall have the same consequences and effect

(2) Every person who, during the existence of martial law has in good faith and upon the authority of a control officer or commissioned officer (as defined in the said regulations) been arrested or committed to or detained in any prison, gaol, or lock-up or in any other place whatsoever in respect of an alleged criminal offence (whether statutory, or at common law or against the regulations aforesaid) shall be deemed to have been as lawfully arrested, committed, or detained as if the arrest, committal, or detention had been under a warrant or order issued in accordance with law

(3) Every recognizance taken during the existence of martial law upon which a person accused of any offence mentioned in sub-section (2) has been admitted to bail shall be and is hereby declared to be in full force and effect

Certain offences which may be tried before special criminal courts constituted under Act No 31 of 1917

4 If the Attorney-General of the Transvaal, upon a consideration of any preparatory examination where an accused person has been committed for trial, decides to indict such person upon a charge of murder, or assault with intent to commit murder or assault with intent to do grievous bodily harm, or arson, or malicious injury to property, and states in writing to the Minister of Justice that the act alleged to constitute such offence appears to have been committed in one of the districts which was placed under martial law as aforesaid and appears also to have been committed in connexion with the disorder hereinbefore referred to or in connexion with the industrial dispute from which such disorder arose, the Governor-General may constitute a special criminal court to try such offence referred to in section two hundred and fifteen of, and specified in the second Schedule to, the Criminal Procedure and Evidence Act, 1917, and the provisions of that Act relating to trials by a superior court shall in all respects apply to the trial of any such offence

Short Title

5 This Act may be cited for all purposes as the Indemnity and Trial of Offenders Act, 1922

It must be noticed, first, that martial law is withdrawn by the act of parliament providing the indemnity so that there is no period of time allowed to exist between the withdrawal of martial law and the passing of an act of indemnity during which aggrieved persons could institute proceedings for false imprisonment or other wrongful acts. Secondly, the preamble recognizes martial law only as it is 'understood and administered in His Majesty's dominions'. Thirdly, the government, its officers and persons acting under them or upon their orders, are indemnified in respect of acts done in good faith and for the purpose for which martial law was proclaimed, that is, for the prevention and suppression of disorder and the maintenance of public safety. So that any person who wantonly and in bad faith commits a wrongful and illegal act such as an assault upon an officer of the crown or a soldier carrying out government instructions, or who commits highway robbery (all of which acts would

obviously not fall under the phrase 'done for the purposes for which martial law was so proclaimed'), would be liable under the ordinary criminal and civil law. Fourthly, sentences of imprisonment imposed during martial law are confirmed. Lastly, it is to be noted that even the governor-general and the members of the executive council, as also persons acting under the direction or with the approval of the authorities, are indemnified under the act, an illustration of the principle that all persons are subject to and under the law.

There is an essential legal distinction between acts done in good faith to suppress rebellion or maintain order though those acts were not strictly necessary, and strictly necessary acts so done. In the language of Dicey, 'a general is entitled to use any land which he requires for the purpose of military operations. It is again his right, and indeed his duty, when the necessity arises, to inflict instant punishment upon, and even, if need be, put to death, persons aiding and abetting the enemy. It is indeed difficult to picture to oneself any legitimate warlike operation or measure which, while war is raging in England, a general cannot carry out without any breach of the law whatever.'¹ The principle upon which a general acts in circumstances such as these is the maintenance or restoration of order and the safety of the realm. His acts are usually justified by strict necessity. If he allows a civil court to remain open it is to allow it jurisdiction in matters which do not affect his main endeavour to maintain order or restore peace. By the strict necessity of the situation he takes upon himself and his officers and military courts the duty of maintaining order. Acts done by him in such circumstances are protected by the ordinary common law by reason of their strict necessity. Any person whatsoever who does an act with the object of preventing riots, murder, or arson, if that act were strictly necessary, is protected under the common law. But it is not always certain that acts done by the authorities in good faith are strictly necessary. To a jury, *ex post facto*, such acts may appear in a different light. Therefore, again using the words of Dicey, 'whenever, at periods of national danger, a breach of law is demanded by considerations of political expediency, the law breaker whether he be a general or any other servant of the Crown, who acts *bona fide* and solely

¹ A. V. Dicey, *Law of the Constitution*, Appendix X.

with a view to the public interest, may confidently count on the protection of an act of indemnity ¹

This, then, is the chief object of an act of indemnity to protect acts done in good faith though they were not strictly necessary. Strictly necessary actions are protected by common law, but acts not strictly necessary, when done in good faith and in times of extreme national emergency certainly merit protection. It is in order to protect such acts, to quieten doubts and to legalize any sentence of imprisonment imposed during the existence of martial law, that an act of indemnity is required.

¹ A. V. Dicey, *Law of the Constitution*, Appendix X.

XXII

DEPARTURES FROM THE RULE OF LAW

DICEY, in his *Law of the Constitution*, remarks that 'two features have at all times since the Norman Conquest characterised the political institutions of England. The first of these features is the omnipotence or undisputed supremacy throughout the whole country of the central government. The second of these features, which is closely connected with the first, is the rule or supremacy of law.' The same features, generally, may be said to be true of the political institutions of South Africa. With the first we have already dealt. The second provides some interesting data for ethical comment.

Explaining what he means by the 'rule of law', Dicey says

'(1) We mean, in the first place, that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land

'(2) We mean, in the second place, when we speak of the "rule of law", as a characteristic of our country, not only that with us no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm, and amenable to the jurisdiction of the ordinary tribunals.'

It is our intention to discuss various aspects of South African legislation in their relation to the features of British constitutional law as outlined by Dicey when dealing with the principles underlying the use of the phrase 'the rule of law'. In doing so, we shall confine ourselves to a discussion of the following propositions:

- (1) A person residing within the Union may lawfully be punished without any trial before the courts.
- (2) A person residing within the Union may lawfully be punished by a court which is not an ordinary court of the country, but a special court, specially constituted to try a particular person for a particular offence.

PROPOSITION I *A person residing within the Union may lawfully be punished without any trial before the courts.*

As a result of the industrial disturbances in South Africa in 1913, the riotous assemblies laws were amended and codified

in the Riotous Assemblies and Criminal Law Amendment Act, No 27 of 1914. Intended at first to deal only with industrial disturbances, it was amplified and amended to deal with the relationship between the black and white races of South Africa by the Riotous Assemblies Amendment Act, No 19 of 1930, and the Native Administration Act, No 38 of 1927.

The first section of the Riotous Assemblies Act, 1914, provides that whenever a magistrate acting under special authority of the minister of justice has reason to apprehend that the public peace would be seriously endangered by the assembly of a particular public gathering in any public place, he may prohibit the assembly of that public gathering in any public place in his district either by publication or by oral public announcement. Any person who thereafter takes part in such a prohibited public meeting, either by speaking or listening or remaining at that public place, may be arrested and punished, and the meeting may be dispersed by the police, who, as a last resource may use fire-arms.

The Act of 1930 amplified this section by adding the following subsections

- (12) Whenever the Minister is satisfied that any person is in any area promoting feelings of hostility between the European inhabitants of the Union on the one hand and any other section of the inhabitants of the Union on the other hand, he may by notice under his hand, addressed and delivered or tendered to such person prohibit him, after a period stated in such notice, being not less than seven days from the date of such delivery or tender, and during a period likewise stated therein, from being within any area defined in such notice.
- (13) If any person to whom a notice has been delivered or tendered under sub-section (12) requests the Minister in writing to furnish him with the reasons for such notice, and with a statement of the information which induced the Minister to issue such notice, the Minister shall furnish such person with a statement in writing setting forth his reasons for such notice and so much of the information which induced the Minister to issue such notice as can, in his opinion, be disclosed without detriment to public policy.
- (14) Subject to the proviso to sub-section (12) any person who contravenes or fails to comply with any notice delivered or tendered to him in terms of sub-section (12) shall be guilty of an offence and liable on conviction to the penalties provided in sub-section 2) and he may at any time after the expiration of the period of

not less than seven days stated in such notice be removed by any member of the police force duly authorized in writing by any commissioned police officer from any area wherein he is prohibited to be in terms of sub section (12)

- (15) Whenever any person who has received a notice in terms of sub-section (12) is necessarily put to any expense in order to comply with such notice, the Minister may in his discretion cause such expense, or any part thereof, to be defrayed, out of public funds and may further, in his discretion, cause to be paid out of such funds to such person a reasonable subsistence allowance during any period whilst such notice applies to him

It is in subsection (14) that the departure from the rule of law as understood by Dicey is seen. A person may be removed out of a district or even a province without any trial whatsoever.¹ He has no redress at all. It is true that a person may be charged and convicted for failing to obey the minister's order, but the only purpose of such conviction would be extra punishment or deportation out of the country under subsection (16), and not for purposes of removal out of the district, for subsection (14) gives the minister such right of removal without any conviction. Dicey's first principle is violated because 'a man is punishable or can be lawfully made to suffer in body or goods without a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land'. Under this act a man has no trial at all, he cannot claim to be heard in self-defence.

The Riotous Assemblies (Amendment) Act, 1930, introduces into South African constitutional law certain provisions somewhat related to what is known as the press law of certain European countries. Writing in 1886, Dicey stated 'In France, literature has for centuries been considered as the particular concern of the State. The prevailing doctrine, as may be gathered from the current of French legislation, has been, and still to a certain extent is, that it is the function of the administration not only to punish defamation, slander, or blasphemy, but to guide the course of opinion, or at any rate to adopt preventive measures for guarding against the propagation in print of unsound or dangerous doctrines'.² The press laws went much farther than the attempt to prevent the publication of seditious literature, a restriction which exists also in South Africa and in

¹ Cf. the provisions of the Natal Native Code, *supra*, Chapter I 2 (v2), *infra*, Chapter XXV 1

² *Law of the Constitution* (London, 1915), p. 250

the United Kingdom. They were a genuine attempt to control the expression of opinion. In some European countries it is a punishable offence, and a ground for the suspension of the publication of a newspaper, to print articles which may engender ill feeling between sections of the community. It is this latter aspect of the press laws which have appeared in South Africa.

Section 1 of the Riotous Assemblies (Amendment) Act, 1930, adds the following subsections to Section 1 of Act No. 27 of 1914

- (7) Whenever the Governor-General is of opinion that the publication or other dissemination of any documentary information (as defined in sub-section (11)) is calculated to engender feelings of hostility between the European inhabitants of the Union on the one hand and any other section of the inhabitants of the Union on the other hand, he may by a notice published in the *Gazette* and in any newspaper circulating in the area where the said documentary information is made available to the public, prohibit any publication or other dissemination thereof
- (9) Any person affected by a prohibition under sub-section (7) may, within fourteen days after the first publication of the notice containing such prohibition, apply to the provincial or local division of the supreme court having jurisdiction within the areas referred to in sub-section (7) to set such prohibition aside, and if he proves to the satisfaction of such division that the documentary information to which such prohibition applies is not of such a nature that the natural and probable result of its publication or other dissemination will be to engender feelings of hostility between the European inhabitants of the Union on the one hand and any other section of the inhabitants of the Union on the other hand, such Division may set such prohibition aside

Closely akin to the provisions of the law set out above, are the provisions of the Native Administration Act, No. 38 of 1927. Section 29 lays down that

- (1) Any person who utters any words or does any other act or thing whatever with intent to promote any feeling of hostility between Natives and Europeans shall be guilty of an offence and liable on conviction to imprisonment for a period not exceeding one year or to a fine of one hundred pounds, or both
- (2) If it appears to a Magistrate on information made on oath that there are reasonable grounds for suspecting that there is upon any premises within his jurisdiction—
 - (a) anything as to which there are reasonable grounds for believing that it will afford evidence as to the commission of any such offence, or

- (b) anything as to which there are reasonable grounds for believing that it is intended to be used for the purpose of committing any such offence,

he may issue his warrant directing a policeman or policemen named therein or all policemen to search such premises and to seize any such thing if found and take it before a magistrate. If any magistrate before whom any such case is brought is satisfied that it is anything which may reasonably be calculated to cause or promote any feeling of hostility between Natives and Europeans he may by writing authorise the destruction thereof or its confiscation to the Crown but no such order shall be carried into effect until a period of one month has elapsed after the date of such order and the decision of the magistrate in that behalf shall be subject to review.

- (3) The Governor-General may order that, during a period specified in the order, a person convicted under sub-section (1)—

(a) if he is not a Native, and if the offence was committed in any area included in the Schedule to the Natives Land Act, 1913 (Act No. 27 of 1913), or any amendment thereof, shall not enter or be in any such area, or

(b) if he is a Native, and if the offence was committed outside any such area, shall not enter or be in any place outside any such area.

A conviction for a contravention of any of the provisions of section 1 of the Riotous Assemblies (Amendment) Act or of section 29 of the Native Administration Act, 1927, renders the offender, if not born within the Union, liable to deportation.

We see from the above that there exist side by side in South Africa legal provisions of two kinds for the prevention of the dissemination of written or spoken opinions or statements which may be calculated to cause feelings of hostility between the Europeans and the natives. The prevention of these prohibited doctrines may be enforced either by a court of law or by the executive government without recourse to a court of law. In the latter case we have a departure from Dicey's first illustration of his conception of the rule of law, that no man may be punished without proof of a breach of law in the ordinary courts of the country. In itself, this departure is not a breach of the rule of law, for the law itself (which is a law created by the supreme legislature and illustrates the sovereignty of parliament) empowers and authorizes the minister of justice to act without first bringing the alleged offender before a court of law. This, possibly, is not a very serious departure from Dicey's rule of law, or rather from a conception of what the rule of law should

be, but it nevertheless is an illustration of the tendency to that effect in South African enactments

PROPOSITION II *A person residing within the Union may lawfully be punished by a court which is not an ordinary court of the country, but a special court, specially constituted to try a particular person for a particular offence*

There are certain kinds of offences for which the offenders may be brought before special courts. Juvenile offenders are brought before a juvenile court, certain native offences are tried before certain native courts, and certain administrative offences in the public services are punished by administrative courts. But all the above courts, to use a wide enough description, are permanent courts functioning continuously or from time to time, with regularly appointed officers. There exists in South Africa, however, another kind of court, which, as its name implies, is a special criminal court. The Riotous Assemblies Act, 1914, created this special criminal court.

This act considered that there were certain offences, which, taken together with particular circumstances, made it inadvisable to have them tried before a jury. Contraventions of the law relating to riotous gatherings, the dissemination of seditious propaganda as described above, and contraventions of the law relating to the use of violence in industrial disputes, are not fit subjects, in the excited state of public feeling, to be brought before a jury for the reason that a sufficiently impartial jury may not be found. The attorney-general may inform the minister of justice that if an accused person were tried by a jury, the ends of justice may be defeated, and the governor-general may thereupon constitute a special criminal court to sit without a jury. This court consists of either two or three judges of the supreme court, whose decision shall be unanimous when there are two judges, or by a majority when there are three judges constituting the court. The court is created to sit at a specified time and place and to try certain specified offences, when its specified labours have been completed, it ceases to function. The fact that it has been created must be reported to parliament by the minister of justice.¹

¹ See substantially the same provisions in section 4 of Act No. 6 of 1922 (murder, assault, arson, in a district where martial law has been proclaimed) and in

It is quite possible in view of the conditions of the country and because juries in the country districts will not convict persons trapped under the diamond laws, that special courts will be set up to deal with such offences. These courts however, will differ from the kind of special court which we have considered because they will have a permanent existence and will not be set up to try a particular offender or offenders for particular offences, and then cease their existence.

This departure from a conception of the rule of law is also not a very serious matter, and is given as an illustration of the steps taken by the government to deal with offences in times of tumult.¹

section 215 of the Criminal Procedure and Evidence Act, 1917 (treason, sedition, public violence, offences against the laws for the prevention of illicit dealing in precious metals and stones, and the supply of liquor to natives and coloured persons)

¹ The two principles of Dicey, as quoted on p. 435, have been subjected within recent years to important criticisms. In this connexion, reference may be made *inter alia* to W. Ivor Jennings, *The Law and the Constitution* (London, 1933), pp. 44-51, 205-210, 252-263.

PART VII
THE GOVERNMENT OF THE NATIVES

INTRODUCTION

WE have already dealt with the administration of justice as specifically affecting the native population and with the application of native law. We propose, in this part of the work, to discuss the executive administration of the native population which numbers about five and a half millions, to examine the extent to which local government has been granted to them, their system of land tenure and land administration as it affects them, and the manner in which they are taxed.

The most striking characteristic of legislation by the Union parliament is the differentiation, often most necessary, which is made between the European and the non-European races. It is impossible in a work dealing only with constitutional law to deal exhaustively with the many laws which discriminate against the native and coloured races. We can give only a few examples to show the nature of that discrimination. Most of these examples are not given in a spirit of criticism, for this is a legal and not a political work. But where glaring examples of injustice are disclosed, such as in the provisions of the Native Service Contract Act, 1932, attention is drawn to such injustices. At the same time, those who do not understand the native races of the Union and the problems created by the presence of a numerically predominant element in the population which is entirely different in habits of life and in the standard of living from the European population, should be extremely cautious in criticism. The vast majority of natives are still so backward in all the attributes of civilization, so easily influenced to mischief and agitation, so lacking in a sense of responsibility, that they may rightly be described as children who require not only the guidance of the European but often his firm direction in their own affairs.

In order to avoid confusion, it is well to explain in what sense the term 'non-European' is used in South Africa. There is constant use in South Africa of the terms 'non-Europeans', 'natives', 'coloured persons', and 'coloured races', and these terms need explanation. There have been a number of judicial definitions of the above expressions, but the best guide to their

meaning is to be found in the Natives Taxation and Development Act, No 41 of 1925, and the Liquor Act, No 30 of 1928. Using these statutory definitions as a basis, we may define the various terms as follows 'native' means any member of an aboriginal race or tribe of Africa, and includes a Bushman, a Hottentot, and an American negro,¹ 'coloured person' means any person who is not entirely European or entirely native, and the term excludes an Asiatic but includes the class of persons known as Cape Malays,² 'coloured or non-European races' includes all persons who are not European or 'white'. The difference between a person classed as a 'coloured person' and one who is a member of the 'coloured races' is simply that the latter includes Indians, Chinese, Japanese, &c, whereas a 'coloured person', except for the inclusion of Cape Malays, does not include an Asiatic but refers particularly to the persons who are a mixture of European and native. Brand says, 'A coloured person is not a Kaffir. He is a person of mixed white and black blood. Coloured men vary in colour between all the shades which are not quite white or quite black.'

Now, in South Africa, there apply, in greater or less degree, certain statutory restrictions upon the liberty of all persons who are 'not quite white' or European, a certain differentiation of legal status which prevents them from enjoying the privileges ordinarily enjoyed by Europeans. As far as Asiatics are concerned, we may dismiss the topic by stating that generally speaking they have all the restrictions which the natives have, and very stringent provisions are contained in the law to prevent them from circumventing it. For example, Asiatics or companies which are controlled by Asiatics cannot own immovable property, and if any person holds shares or land in trust for Asiatics, he is liable to the heaviest penalties.³

¹ 'The best test of whether a person is an aboriginal native is appearance. A person whose general appearance is that of an aboriginal native must be held to be such despite traces of European blood' (*Rea v Willett*, 19 S C 168, and see *Rea v Perrott*, 16 S C 452).

² 'It is in the gradations of colour between black and white that difficulties may occur, but when once it is established that one of a man's nearest ancestors, whether male or female, was black like a negro or Kaffir, or yellow like a Bushman or Hottentot or Chinaman, he is regarded as being of other than European descent' (and therefore coloured) (*per de Villiers CJ in Moller v Keimoes School Committee*, [1911] A D at p 643).

³ See Transvaal Asiatic Land Tenure Act, No 35 of 1932.

We have already seen that natives are excluded from electoral privileges¹ The next instance is their exclusion from liquor privileges Under the Liquor Act of 1928 (except for certain exempted non-Europeans) only white persons may purchase, sell consume or be in possession of intoxicating liquor The third instance of non-equality under the law is to be found in the prohibition of any person save a European from owning land or residing in certain areas in the Union² The fourth restriction upon the native population may be called a restriction upon their freedom of movement and is to be found in the Pass Laws and in the Natives (Urban) Areas Act, which are discussed in Chapter XXV 2 (ii) Another impost upon natives will be found in the Native Service Contract Act, 1932³ Some of these restrictions are necessary not only for the good government of the whole population but also for the protection of the morals and health of the natives themselves The natives are unaccustomed to the consumption of liquor, which not only makes them more irresponsible than it does Europeans and therefore more dangerous, but may easily, if unchecked, destroy the whole native population They do not understand the proper use of fire-arms, and if natives were allowed to possess them, they would use them on the slightest provocation They are not, generally, educated for electoral privileges, though in matters of local government which closely concern their daily lives, they show quite an aptitude with a little European guidance However, they are under the laws peaceful and anxious to progress

¹ See Chapter X 2 (b) and Chapter XXIII 1

² See Chapter XXVI 1

³ See Chapter XXV 2 (iii).

XXIII

REPRESENTATION OF THE NATIVES

1. Parliament

WE have already dealt with the representation of the natives in the parliament of the Union¹ We pointed out that four senators were appointed by the governor-general-in-council on the ground mainly of their thorough acquaintance, by reason of their official experience or otherwise, with the reasonable wants and wishes of the coloured races in South Africa² Further, the South Africa Act preserves in the election of members for the house of assembly the franchise laws of the different colonies.

In the Cape province no distinction was made before the Union between European and native, and a large number of natives who are qualified in respect of property or salary, as well as educationally, are included in the electoral rolls. In Natal natives are entitled to become parliamentary voters only with the specific authority of the governor-general. The number so authorized is negligible. In the Transvaal and Orange Free State the natives have no franchise, nor have they the franchise in South-West Africa. The franchise laws for the provincial councils are the same as those for parliament, but in the Cape province natives and coloured persons, if qualified to be voters, may be elected to the provincial council.

2 The Native Affairs Commission

In order to compensate for the lack of any voice in the government of the country, the Native Affairs Act, No. 23 of 1920, established a native affairs commission, which consists of three to five European members holding office for an indefinite period and presided over by the minister for native affairs. The members, though in receipt of salaries as commissioners, may sit in either house of parliament. The functions and duties of the commission include the consideration of any matter relating to the general conduct of the administration of native affairs, or to

¹ See *supra*, Chapter X. 2 (b)

² Section 24 of the South Africa Act, 1909

legislation in so far as it may affect the native population, and the submission to the minister of its recommendations in any such matters. Its functions are thus merely advisory, but adequate means are reserved to it of placing its views before the cabinet and parliament should its recommendations not be accepted. For example, the commission may require the minister to place its recommendation together with a memorandum of its views on any action of the minister contrary to such recommendation, before the governor-general-in-council, and thereafter all the papers must be laid before parliament, as well as the views of any dissenting member of the commission.

The principles which the commission considers should underlie its duties are the following: (i) that it is established primarily and essentially to be the friend of the native peoples, and, as such, the needs, aspirations, and progress of the natives should be considered sympathetically by it; (ii) that it is the adviser of the government in matters affecting the interests of the natives; (iii) that it should endeavour to win the confidence of the natives; and (iv) that it should strive to educate public opinion so as to bring about the most harmonious relations possible between the white people and the black people in South Africa. The commissioners have travelled widely throughout the Union for the purposes of the closer study of native problems and of coming into contact personally with native points of view. They have dealt with a number of specific matters of native administration, and have investigated certain general questions of native policy, such as native taxation and education, the pass laws, the control of natives in urban areas, land administration, and the extension of the system of local native councils as contemplated by the Native Affairs Act, 1920. They have, in addition, conducted inquiries into special matters of native interest referred to them by the government for investigation and report.

3. Native Conferences

The Native Affairs Act, 1920, also provided for the summoning of conferences of native persons and bodies representative of native opinion, with the object of enabling the government to gauge more accurately the state of native thought and feeling, and of affording to those not otherwise represented the opportunity of expressing their views. The first of such conferences,

which was attended also by the native affairs commission, was held in 1922. Subsequent conferences have discussed principally proposed legislation affecting natives, submitted to them by the government.¹

The section of the Native Affairs Act, 1920, regarding native conferences reads as follows

- 16 (1) The Governor-General may, upon the recommendation of the Commission, convene conferences of chiefs, members of native councils and prominent natives, and of native delegates invited from any association or union purporting to represent any native political or economic interest, with a view to the ascertainment of the sentiments of the native population of the Union or of any part thereof, in regard to any measure in so far as it may affect such population

(2) Such conferences shall be assisted in their deliberations by persons to be designated by the Minister of Native Affairs who is hereby empowered to authorise any expenditure which he may consider desirable in this connection from moneys appropriated by Parliament for the purpose

The representation of native opinion in the government of the country is entirely inadequate. Even the native affairs commission, invaluable as it is, does not supply the need of a permanent body of native representatives who could represent the native point of view through either the minister or the native affairs commission.

The affairs of the natives in matters of local government, where that has been allowed them, have been conducted so well that a little more may be done in the way of having a non-European native commission, who would possibly exercise an enormous influence for good amongst the natives.

¹ Conferences have been held annually from 1922 until 1927, one was held in 1930. It was not considered necessary to convene conferences in 1928, 1929, 1931-3.

XXIV

LOCAL GOVERNMENT OF THE NATIVES

1. Local Councils

UNDER the Native Affairs Act, 1920, the governor-general, on the recommendation of the native affairs commission, established local councils over areas set apart for natives. These councils consist entirely of natives and have not more than nine members. An officer of the public service is designated by the minister of native affairs to preside at the meetings of a local native council and generally to act in an advisory capacity to it.

Any local council may, within the area for which it is established, provide (a) for the construction and maintenance of roads, drains and furrows and for the prevention of erosion, (b) for an improved water supply, (c) for the suppression of diseases of stock by the construction and maintenance of dipping tanks and in any other manner whatsoever, (d) for the destruction of noxious weeds, (e) for a suitable system of sanitation, (f) for the establishment of hospitals, (g) for the improvement in methods of agriculture, (h) for afforestation, (i) for educational facilities, and generally for such purposes which can be regarded as proper to local administration as may be committed to it by direction of the governor-general. A local council may acquire and hold land or an interest in land for carrying out any of the above-mentioned purposes. It is the duty of each local council to advise the native affairs commission in regard to any matters which may affect the general interests of the natives represented by such local council, and to furnish its views on any matter upon which the minister of native affairs or the native affairs commission may request its advice.

Each local council may make by-laws in regard to any matter entrusted to its care, and may prescribe the fees payable for the services it renders. The by-laws have to be approved by the governor-general and published in the *Gazette* and they then have the force of law. Contraventions of the by-laws are punishable at the instance of the crown, but the fines imposed are paid over to the local council concerned. Each local council may levy a rate not exceeding one pound in any year upon each adult male

native ordinarily resident within the area for which it is constituted. If any native upon whom such rate is levied is liable to any direct tax to the government specially imposed upon natives, such government tax is abated by the amount of the rate levied by a local council. The revenue of each local council thus consists of the rates levied, the fees collected under by-laws, the fines recovered for contraventions of by-laws, as well as donations or grants of public moneys by the government and others. If the application of the Native Affairs Act is found to conflict in any area with the ordinary system of local government, the governor-general may by proclamation in the *Gazette* declare the extent to which the system of local government shall apply in that area, and he may make such further provision as in the circumstances may be expedient for reconciling the conflict between the local councils and the ordinary system of local government. Local councils are designed to be real local government bodies, independent of European control in their deliberations. The officials of the government act in an advisory capacity only. More than fifteen local councils have been established and their work has given much satisfaction both to the government of the country and to the natives themselves.

The most famous of the local councils is the Glen Grey District Council, which was established under the provisions of the Glen Grey Act (Cape), No. 25 of 1894. It consists of the magistrate of Lady Frere as chairman, six natives nominated by the government, and six natives elected by the location boards established under the act. The revenues of the council are derived from the rates levied in terms of the act and are spent, subject to the approval of the government, in the interests of the natives, on dipping tanks, roads, the encouragement of agriculture, irrigation, and public health.

2 General Councils¹

Whenever it appears that any of the powers conferred upon local councils can, in any two or more areas for which local councils have been established, be more advantageously exercised by a single body with jurisdiction over all those areas, the governor-general may, with the approval of the native

¹ A great portion of this section is taken from the *Official Year Book of the Union*, Chapter XXVI.

affairs commission, establish such a body to be called the general council of such areas. This general council consists of such number of representatives from each of the local councils as the governor-general, with the advice of the native affairs commission, may determine. An officer of the public service may be designated by the minister of native affairs to act as chairman of the general council. The chairman of each of the local councils shall, if required by the minister, attend the meetings of the general council in an advisory capacity. The general council so established has such powers as the governor-general, on the advice of the native affairs commission, may allocate to it, and the local councils shall upon such allocation cease to exercise the powers so allocated.

The establishment of general councils under a formal constitution dates from the beginning of 1895, when district councils were created in four districts of the Transkeian territories, the four being united in what was called the Transkeian General Council. In 1903 the system was extended to the seven districts of Tembuland and East Griqualand, when the name of the larger body was changed to Transkeian Territories General Council. By 1924, with one exception, the mainly European district of Mount Currie, all districts within the Transkeian Territories, excluding Pondoland, had accepted the council system and fell under the jurisdiction of the Transkeian Territories General Council. In 1911, the council system in a somewhat modified form was extended to Western Pondoland, and the Pondoland General Council was established, and in 1927 its jurisdiction was extended to Eastern Pondoland.

Under the provision of Proclamation No. 279, November 18, 1930, the Transkeian Territories General Council and the Pondoland General Council were amalgamated, with effect from January 1, 1931, into a general council styled the United Transkeian Territories General Council, and the combined organization now functions for all districts in the Transkeian Territories, except Mount Currie. Proclamation No. 279 of 1930 laid down that the seat of the Transkeian Territories General Council should be at Umtata, and that its meetings should be convened at that place from time to time by the chief magistrate of the Transkeian Territories upon dates to be fixed by him. It vested in the amalgamated body all powers previously enjoyed

by the constituent councils in their respective areas of jurisdiction and provided for the transfer of all property, assets, and liabilities of the old councils to the new body, it prescribed that all officers and employees of the Transkeian Territories General Council and the Pondoland General Council should become officers and employees of the United Transkeian Territories General Council, and that as such they should retain all their existing and accruing rights

Each district council in the Transkeian Territories, with the exception of Lusikisiki, Libode, and Umtata, consists of the magistrate of the district and six members and is constituted in the following way. Two members of each council are nominated and appointed by the governor-general. For the appointment of the other four, each district is divided into four electoral areas known as sections, and the local taxpayers and native quitrent payers in each section elect three representatives. Thereafter these representatives nominate, in the territories other than Pondoland, four of their number, and in the territory of Pondoland, two of their number, to be recommended to the governor-general for appointment as district councillors. The chiefs of Eastern and Western Pondoland nominate two local nominees for appointment by the governor-general as members of each district council within their respective areas. The chiefs of Eastern Pondoland, Western Pondoland, and Tembuland are *ex officio* members of the Lusikisiki, Libode, and Umtata district councils respectively. Each district council meets in the ordinary course six times a year but special meetings may at any time be summoned by the magistrate of the district.

A revision of the constitution was undertaken in 1932 and was in due course given the force of law under Proclamation No. 191 of October 24, of that year. Provision was made therein for the constitution of an executive committee consisting of the chief magistrate, three magistrates appointed from time to time by the chief magistrate, and four native members of the general council, elected annually by the council for appointment by the governor-general. The executive committee is responsible for the administration and control of the following council affairs: appointment, discipline, and dismissal of pensionable officers; scholarships; the establishment of new agricultural institutions; new agricultural institution buildings; acquisition and disposal

of farms, establishment, acquisition, and disposal of plantations, consideration of tenders for any service, the lowest tender for which is over £100 and the institution of legal proceedings.

The United Transkeian Territories General Council consists of three native members from each council district, nominated and appointed in a prescribed manner, together with the chiefs of Eastern and Western Pondoland and Tembuland. The magistrates of the council districts are entitled to attend and to take part in the deliberations at all meetings of the general council. The chief magistrate is the chairman and chief executive officer of the council.

The councils are constituted as advisers to the administration associating the people with the control of local funds, giving them a voice in the disposal of affairs intimately affecting their own interest, training them to constitutional methods of expressing their wishes in regard to local and general policy, and also keeping the government in touch with native feeling. Debates cover a wide range of subjects, including the revision of laws particularly affecting the native population, such as native marriages and inheritance, education, diseases amongst stock, control of commonages, forests, &c. Questions come before the general council directly by motions introduced by magistrates or members, and also on submission from district councils and references from the government, frequent use being made of the committee system. The resolutions of the councils having been taken on the subjects placed before them, the responsibility for action thereon rests on the magistrates, the treasurer, the chief magistrate, the minister, or the governor-general, according to the importance of the matters involved.

In local administration the various district councils stand to the general council in the relation of individual parts of a single body. They are the executive organs of the general council, which distributes amongst them such duties as dipping operations, road maintenance, and supervision of commonages, but remains financially responsible for their actions. Strictly speaking they have no separate income or expenditure, but there is one common treasury into which all revenues flow and which is chargeable with the cost of the different services authorized. This arrangement has the twofold merit of allowing for local variations and ensuring, under better control, the accumulation

of funds which enables the undertaking of projects beyond the means of any single district organization.

Prior to 1926 the main source of revenue was a rate levied annually by the governor-general and capable of variation in amount according to the advice of the general council. It was, however, always fixed at 10s payable by every male adult in the area under the council's jurisdiction.

The Native Taxation and Development Act, 1925, supersedes all previous systems of native taxation. Under the provisions of the act the general council receives the quitrents collected in all council districts, which were hitherto paid to the government, and in addition, the local tax of 10s payable in respect of every hut or dwelling in a native location, according to the number of wives, not exceeding four, for whom the taxpayer is responsible. Quitrent payers are exempted from local tax.

In general, the district councils are responsible for the initiation of expenditure proposals which are collated and laid before the general council in the form of annual estimates of expenditure. After revision by the treasurer the votes of the council are taken thereon, and they are then submitted for the approval of the governor-general. Council operations embrace the maintenance of roads and the construction of new ones, the construction and repair of dipping tanks, bridges and causeways, the provision and upkeep of wattle plantations, prevention of soil erosion, the dipping of large stocks, grants in aid of fencing of arable allotments and of hospitals, and lastly, its own institutions for the teaching of agriculture, and for the improvement of stock breeding amongst natives and experimenting in and encouraging the cotton-growing industry. As a general rule the council is not in receipt of government or provincial grants: nor does it, within its area, levy rates upon Europeans, who nevertheless share in most of the benefits accruing to ratepayers from council expenditure.

3. Orange Free State Native Reserves¹

In connexion with other areas of the Union, there are in the Orange Free State three areas reserved for the exclusive occupation of natives. In the Witzieshoek Reserve, the chief of the tribe who is appointed by the government, exercises a limited

¹ This section is taken from the *Official Year Book of the Union*, Chapter XXVI.

jurisdiction in civil cases but none in criminal cases, is exempt from tax, and is bound to give all the required assistance for the preservation of order and peace within the territory. The representative of the government, who is responsible for the administration of the reserve, is known as the commandant and is an officer of the native affairs department. In civil cases there is an appeal from the decision of the chief to the commandant, and in criminal cases the commandant has all the powers granted to courts of resident magistrates. The commandant must reside within the reserve, and is charged with the collection of native taxes therein. He keeps a register of all male persons in the reserve as well as of the number of huts, and exercises a general oversight over the affairs of the reserve.

In addition to these officials, there is a board constituted under Ordinance No. 6 of 1907, consisting of seven members. Five of these are natives of the reserve and two—the chairman and the vice-chairman—are Europeans. All the members are nominated by the government. The powers and duties of the board include the maintenance and repair of roads (other than main roads), the provision of water supply and sanitary services, and the establishment and support of schools in consultation with the education authorities. The board is empowered, subject to the approval of the government, to make such regulations as may be necessary for carrying out these functions, and for other purposes connected with the management of the reserve.

In the Thaba 'Nehu and Schiba Reserves, an officer of the native affairs department, with the rank of assistant native commissioner, is responsible for the administration of the reserves, each of which has, moreover, a local board constituted under the provisions of the Native Reserves Ordinance, No. 6, of 1907 (Orange Free State).

The various native reserve boards in the Orange Free State are under the provisions of the Native Taxation and Development Act, 1925, paid the local tax collected from natives within their respective areas of jurisdiction.

4. Mission Stations¹

Under Act No. 29 of 1909 (Cape), certain mission stations, in which land was held in trust by the missionary body for the

¹ See footnote, page 456

native and coloured occupants, were brought under a system in which a definite grant of land was made to the missionary body for the purposes of its work, and the remainder of the station was demarcated and reserved for the registered occupiers. For the control and regulation of the native or coloured community thus established, a board of management is provided by the act. The board consists of six members elected by the registered occupiers and three appointed by the governor-general, and is presided over by the magistrate of the district. The board is endowed with certain of the duties and functions of a village management board, mainly the control of roads, fences, sanitation, water supply, and the use of the commonage, and it has power to make regulations in regard to those matters, subject to the approval of the governor-general. The board may levy a rate of not less than 10s per year on each registered occupier for the purpose of defraying the cost of administration.

XXV

THE EXECUTIVE ADMINISTRATION OF NATIVE AFFAIRS

WE have already seen that the natives are without any direct representation in the government of the Union. They do not elect any representatives to parliament and are consulted, if at all seriously, in a very indirect manner. Parliament, therefore, is not responsible, in the usual political sense of the word, to the natives for the legislative enactments which it imposes upon them.

There is even less direct control, either by the elected representatives of the European population in parliament, or by the natives outside parliament, over the executive administration of native affairs. The minister for native affairs carries out administratively the decisions of the governor-general, made through the cabinet. In so far as the natives are concerned, the governor-general is the supreme chief. In practice as well as in theory, the cabinet exercises for the governor-general a despotic power of administration as well as of legislation which has no parallel in any democratic country anywhere in the world. Executive despotism in South Africa is not the result of the absence of political representation for the natives, nor has the absence of political representation made executive despotism necessary. The two problems are entirely unrelated to each other. Both executive despotism and political representation could exist side by side without any conflicting results, and in the best interests of the native population. For, though a considerable number of natives may in time emerge from the black mass of the native population as civilized as ordinary Europeans, the vast majority of the native population is still in its political infancy. It is impossible to apply an eighteenth-century European philosophy of democracy to a population which has hardly emerged from a twelfth-century system of serfdom. Nowhere in the world, we venture to suggest, does there exist a system of executive despotism similar to the executive administration of native affairs in South Africa. In other portions of Africa we may see an absolute control of the native population, but this

control is control by an external power, there is no pretence to parliamentary government. In the Union, however, we see all the trappings of parliamentary government side by side with the absolute and autocratic power of a despotism.

1. The Governor-General as Supreme Chief of the Natives

The South Africa Act provides that

- 147 The control and administration of native affairs and of matters specially or differentially affecting Asiatics throughout the Union shall vest in the Governor-General-in-Council, who shall exercise all special powers in regard to native administration hitherto vested in the Governors of the Colonies or exercised by them as supreme chiefs, and any lands vested in the Governor or Governor and Executive Council of any Colony for the purpose of reserves for native locations shall vest in the Governor-General-in-Council, who shall exercise all special powers in relation to such reserves as may hitherto have been exercisable by any such Governor and Executive Council, and no lands set aside for the occupation of natives which cannot at the establishment of the Union be alienated except by an Act of the Colonial Legislature shall be alienated or in any way diverted from the purposes for which they are set apart except under the authority of an Act of Parliament.

Section 147 does not affect the legislative authority of parliament or of the provincial councils. It refers only to the administrative powers of the governor-general respecting natives and Asiatics.¹ For example, the making of regulations for the supervision of native locations falls within the powers of the governor-general-in-council under this section.²

Section 1 of the Native Administration Act, 1927, provides that

- 1 The Governor General shall be the supreme chief of all Natives in the provinces of Natal, Transvaal, and Orange Free State, and shall in any part of the said Provinces be vested with all such rights, immunities, powers, and authorities in respect of all Natives as are vested in him in respect of Natives in the Province of Natal.³

The powers of the supreme chief are to be found in that remarkable document, the Natal Code of 1891. The relevant sections of the code are the following

¹ *Rez v Amod*, [1922] A D 217

² *Sdumbu v Benoni Municipality*, [1923] T P D 289

³ As amended by section 2 of Act 9 of 1929

- 32 The Supreme Chief for the time being exercises in and over all Natives in the Colony of Natal all political power and authority.
- 33 The Supreme Chief appoints all Chiefs to preside over tribes or sections of tribes, and also divides existing tribes into two or more parts, or amalgamates tribes or parts of tribes into one tribe *as necessity or the good government of the Natives may, in his opinion, require*
- 34 The Supreme Chief-in-Council may remove any Chief found guilty of any political offence, or for incompetency or other just cause, from his position as such Chief, and also order his removal with his family and property, to another part of the Colony
- 35 The Supreme Chief has absolute power to call upon Chiefs, District Headmen, and all other Natives, to supply armed men or levies for the defence of the Colony, and for the suppression of disorder and rebellion within its borders, and may call upon such Chiefs, District Headmen, and all other Natives to personally render such military and other service
- 36 The Supreme Chief has power to call upon all Natives to supply labour for public works, or for the general need of the Colony. This call or command may be transmitted by any person authorised so to do, and each Native so called upon is bound to obey such call, and render such service in person, unless lawfully released from such duty
- 37 The Supreme Chief, acting in conjunction with the Natal Native Trust, may, when deemed expedient in the general public good, remove any tribe or tribes, or portion thereof, or any Native, from any part of the Colony or Location, upon such terms and conditions and arrangements as he may determine ¹
- 38 The orders and directions of the Supreme Chief, or of the Supreme Chief-in Council, may be carried into execution by the Secretary for Native Affairs, or by the Administrators of Native Law, or by other officers authorised for the purpose, and in respect of all such acts the various officers so employed shall be regarded as the deputies or representatives of the Supreme Chief, or of the Supreme Chief-in Council, as the case may be
- 39 The Supreme Chief, in the exercise of the political powers which attach to his office, has authority to punish by fine or imprisonment, or by both, for disobedience of his orders or for disregard of his authority
- 40 The Supreme Chief is not subject to the Supreme Court, or to any other Court of Law in the Colony of Natal, for, or by reason of, any order or proclamation, or any other act or matter whatsoever committed, ordered, permitted, or done either personally or in Council

¹ Cf the provisions of the Riotous Assemblies Amendment Act, 1930, which are dealt with *supra*, Chapter XXII

The supreme chief acts administratively through the minister of native affairs

Nowhere else in the British Empire does such an arbitrary code exist. In the Cape, there is in the Transkeian Territories, a purely native area in the eastern portion of the province, a chief magistrate at the head of the natives, and he possesses wide administrative and judicial powers. He occupies the position of a paramount chief, all executive and nearly all judicial power being concentrated in his hands, and a good deal of legislative or quasi-legislative authority also vests in him. In the Ciskei (which is a native territory to the west of the Kei river) there is a chief native commissioner who exercises the powers and duties which the minister from time to time may prescribe. In Natal, the chief native commissioner deals administratively with native affairs throughout the province including Zululand.

In the other districts of the Union there are either magistrates or native commissioners who exercise the powers and perform the duties which the minister may from time to time prescribe. The minister may also appoint superintendents to control native locations.

Regarding chiefs, the governor-general may recognize or appoint any person as a chief or headman in charge of a tribe or location, and he may at any time depose him. There are regulations prescribing the duties, powers, and privileges of such chiefs and headmen. A great number of chiefs and headmen are subsidized by the government. In some cases a fairly substantial allowance is paid according to the services rendered, but in most cases the allowance is small, and is made as a token of recognition rather than as a remuneration for services. Their powers, duties, and jurisdiction vary in different parts of the country. All serve under district officials (magistrates or native commissioners) and are in charge of tribes or locations, for whose conduct they may be held responsible.

The most remarkable feature of the Native Administration Act, 1927, is the extension of the powers of the supreme chief regarding legislation by proclamation. The governor-general is empowered to alter any existing laws and make new laws for the native areas included in the schedule to the Natives Land Act, 1913, or any future designated native area. Every proclamation issued by the governor-general under the act must be

laid upon the table of both houses of parliament, and parliament may alter or repeal such proclamation by resolution of both houses. The governor-general may also by proclamation amend the Natal code of native law, but such a proclamation can only take effect a month after publication. The governor-general may also make regulations for the prevention of misconduct and disorders, the control of the movements of natives, and for such purposes 'as he may consider necessary for the protection, control, improvement, and welfare of the natives, and in furtherance of peace, order and good government'. Regulations may also be made for the control of certain native villages and townships.

2 The Control of Natives

(1) *The Natives (Urban Areas) Act, 1923* Section 85 of the South Africa Act granted to the provincial councils power to make ordinances in relation to local authorities and all matters which in the opinion of the governor-general-in-council were of a merely local or private nature. Section 147 of that act, however, as we have seen, vested in the governor-general-in-council the control and administration of native affairs throughout the Union. The native affairs department has, therefore, since 1910 been concerned in this connexion with the oversight of all regulations submitted for approval and the preparation of legislation affecting natives. The conditions prevailing in the urban native locations in all the provinces of the Union had been far from satisfactory. This may be attributed to the attitude of local authorities toward the native, the passive indifference or occasionally active hostility of the natives themselves, and the admitted inadequacy of the existing native legislation. Local authorities derived their powers of native regulation in native matters from laws which were characterized by a wide divergence of policy between the legislatures of the pre-Union colonies. It was not until 1923 that appropriate legislation was passed to deal with the problem of natives in urban areas. The Natives (Urban Areas) Act, No. 21 of 1923 is a comprehensive enactment providing, in terms of its title 'for improved conditions of residence for natives in or near urban areas and the better administration of native affairs in such areas, for the registration and better control of contracts of service with

natives in certain areas and the regulation of the ingress of natives into and their residence in such areas, for the exemption of coloured persons from the operation of pass laws, for the restriction and regulation of the possession and the use of Kaffir beer and other intoxicating liquor by natives in certain areas and for other incidental purposes' Generally it defines and describes the powers and the duties of urban local authorities in respect of the native population within their areas, requiring them to set aside land for the accommodation of the natives who are legitimately within their boundaries. It provides in cases where it may be expedient, for the compulsory residence of natives, with certain exceptions in locations, native villages, or hostels, and gives to the local authority powers of expropriating land and borrowing money to meet the responsibility thrown upon it. It lays down certain principles to be followed in the administration of native affairs, such as the establishment of a native revenue account and of native advisory boards and makes provisions for government inspection. In view of the responsibility thrown upon local authorities the governor-general is authorized to confer or exercise by proclamation certain powers of control, whereby the native population may be limited to the number legitimately required for the needs of the community. These powers may also be exercised in industrial areas other than those under the jurisdiction of an urban local authority. The act prohibits the introduction of intoxicating liquor into locations, native villages, or hostels, but allows, subject to varying circumstances, the private brewing of Kaffir beer or its manufacture and sale by the local authority. (This privilege has not yet been exercised by local authorities.) It further limits the right of trading in a native village or location to native enterprise or, if that should not be adequate, it authorizes municipal trading in these areas.

(11) *Pass Laws* Pass laws based on various statutes are in operation throughout the Union, with the exception of the Cape Province (excluding the Transkei), where the natives (unless accompanied by live stock) enjoy entire freedom of movement. The pass system is one under which every native must possess a document of identification issued by the native affairs department. This document describes the native's tribe, father, place of birth, &c. The argument in favour of the retention of this

system, which has earned the bitter hostility of the natives, is that it is the only means of reference which the European has in regard to the illiterate and ignorant type of native, and the only means of identifying criminals and controlling the movements of natives ¹ In most urban areas a curfew system prevails, and natives are prohibited from being in a public place after nine o'clock, as their free movement during the night, it is thought, encourages and facilitates theft and other crime

Under the Natives (Urban Areas) Act, 1923, particular areas or districts may be proclaimed 'curfew areas' The following is a curfew proclamation

PROCLAMATION²

URBAN AREA OF MALVERN (NATAL) CURFEW

Under and by virtue of the powers vested in me by sub-section (1) of section *nineteen* of the Natives (Urban Areas) Act, 1923, Amendment Act, 1930, I do hereby proclaim, declare and make known that from and after the 1st day of July, 1931, no native, male or female, not being exempted under paragraph (b) of sub-section (4) of the said section, shall, between the hours of 11 p.m. and 4.30 a.m., be in any public place within the area controlled by the Malvern Local Administration and Health Board, unless such native be in possession of a written permit signed by his employer or by a person authorized by such employer to issue such permit to such native or by some person authorized by the Malvern Local Administration and Health Board to issue such permits or by the officer in charge of any police station within such area

GOD SAVE THE KING

Given under my Hand and the Great Seal of the Union of South Africa at Capetown this Twenty sixth day of May One thousand Nine hundred and Thirty one

CLARENDON,

Governor-General

By Command of His Excellency the
Governor General-in-Council

E. G. JANSEN

¹ The Pass Laws provide that failure to produce a pass or exemption certificate when required to do so by a police officer is a criminal offence

² By His Excellency the Governor General, &c. In nearly every urban area in the Transvaal, Natal, and Orange Free State, no unexempted native may be upon the public highway without being in possession of a written permit or 'special pass' (as it is commonly termed) signed by his employer or some person authorized by law to issue such permit For regulations regarding exemptions see *Government Gazette* of 17 August, 1934

(iii) *The Native Service Contract Act, 1932* This act, which was passed in 1932, has given rise to much controversy, and requires examination. The act provides that no person shall employ any male native unless the latter produces to him a document of identification, and if a native is under the age of eighteen, the native, male or female, must produce the consent of his or her guardian as well as that of the owner of the land upon which such native is domiciled. Any owner of land to whom the native is required to render services, must, under penalty of punishment in a magistrate's court, give the native the consent when he is requested by him to do so. Guardians of natives under eighteen and above the age of ten years may bind their wards by service contracts. These contracts must be made before a competent officer appointed by the government under the Native Regulation Act, 1911, before a magistrate, a police officer in charge of a police station, or a justice of the peace. Such officer must fully explain the meaning and effect of the service contract to the parties, and if satisfied that the parties desire to enter into the contract as recorded, he must sign the contract and make an endorsement of his official capacity of the duration of the contract, and of the name and residence of the employer.

These provisions apply also to a labour-tenant contract. A labour-tenant is a native who wishes to give or gives his services to the owner of land in return for the right of occupation and use of the land. These contracts may not be for a period longer than three years. Three months before expiration, either party may give notice of his intention to terminate the contract on its expiration, otherwise the contract shall be deemed to be renewed for a period of one year. When a labour-tenant contract does not define the particular period in any year during which the native bound by that contract shall render service to his employer but provides that such native shall render such service whenever called upon to do so by his employer, the latter may, apart from any other ground of terminating the contract, regard such contract as having been terminated if during a period exceeding three months, he has been precluded from calling upon such native to render such service in full by reason of the absence of such native from the employer's land without the latter's permission.

If, on the termination of a labour-tenant contract from whatever cause, the labour-tenant has any crop standing on the land which he was entitled to cultivate by virtue of such contract, he shall be entitled to tend such crop till it matures and thereafter to reap and remove it. If he has erected any buildings or other structures on the land from his own materials, he may remove the buildings and materials, unless he has obtained the materials free of charge from the owner of the land.

Whenever two or more natives belonging to the same kraal or household are bound under any labour-tenant contract, any ground for terminating a contract with one native shall bind the whole kraal or household.

There is one section of the act namely section 9, which was the subject of bitter controversy. The governor-general has power to define by proclamation in the *Gazette* any area to which the section shall apply. The section provides that if any native male other than a chief or headman between the ages of eighteen and sixty, and physically and mentally fit to perform manual labour, residing in a proclaimed area outside a location or an urban area, has not during a period of not less than six months in the aggregate or not less than three months, as the governor-general may determine, rendered service to the owner of the land on which he resides, such owner shall be liable to a tax of five pounds annually for every such non-serving native. The effect of this section is regarded by some as imposing compulsory or forced labour upon the natives, by others as compelling owners of the land to give work to those residing on their land, without any remuneration for such work.

Its effect can only be to force the natives to work whether or not they or the owners of land desire it. Although the section has not been applied in any area up to the present, yet it is to be hoped that public opinion, within a short time, will demand the repeal of this retrogressive enactment.

XXVI

NATIVE LAND TENURE AND LAND ADMINISTRATION¹

1. The Natives Land Act, 1913

NATIVE land administration is governed by the Natives Land Act, 1913. This act laid down that, except with the approval of the governor-general, a native might not acquire from a person other than a native, or a person other than a native from a native, any land or interest in land in any area outside of the native areas described in the schedule to the act, and that without such approval no person other than a native might acquire any land or interest in a scheduled native area. The purpose of the act was to maintain the *status quo* as regards the ownership and occupation of land in the Union relatively by natives and Europeans 'until Parliament should make other provision'. So far nothing definite has been done in this direction.

In 1926, the prime minister, General Hertzog, laid upon the table of the house his series of bills, generally known as the 'native bills', consisting of the Representation of Natives in Parliament Bill, the Union Native Council Bill, the Natives Land (Amendment) Bill, and the Coloured Persons Rights Bill. These bills were, with certain minor modifications, formally introduced into parliament, and read a first time in 1927. After the first reading they were referred to a select committee. In 1929 three of the bills, The Natives Parliamentary Representation Bill, The Coloured Persons Rights Bill, and the Natives Land (Amendment) Bill, were introduced and read a first time. The first two, having regard to their provisions, were required to be dealt with by both houses of parliament sitting together in accordance with sections 35 and 152 of the South Africa Act, 1909, and were passed on second reading. At the third reading, before the joint session, however, the Natives Parliamentary

¹ This chapter is based on Chapter XXVI of the *Official Year Book of the Union*. The natives of the Union, who form 80 per cent of the population, own 8 per cent of the land.

Representation Bill failed to secure the requisite two-thirds majority, and under the circumstances, the Coloured Persons Rights Bill and the Natives Land (Amendment) Bill were not proceeded with. The cardinal feature of the Natives Land (Amendment) Bill is that it makes provision for the removal, in respect of certain areas defined in the first schedule to the bill and termed 'released areas', of the restrictions imposed by the Natives Land Act, 1913, upon the acquisition of land by natives.

The present position is that the government readily recommends for the approval of the governor-general, under section one of that act, transactions whereby natives are to acquire, by purchase or lease, land or an interest in land within the areas defined in the first schedule to the Natives Land (Amendment) Bill, 1929. Thus, in so far as those areas are concerned, relief is afforded from the restrictions imposed by section one of the 1913 Act.

2. Individual Tenure

In the early days the necessity of inculcating amongst the natives, by a gradual process, European methods and ideas in respect of the ownership and occupation of land does not seem to have been sufficiently realized, with the result that individual tenure of land, which was entirely foreign to native ideas, was introduced before the people were ripe for it, or understood its implications, and in a form unsuitable for natives in their then stage of development, allotments being granted on the same basis and more or less subject to the same conditions as applied in the case of Europeans. These conditions naturally militated against the success of the earlier native location surveys.

A better appreciation of conditions existed when the Cape Act, No. 40 of 1879, was passed 'to provide for the disposal of the lands forming native locations'. This act contemplated the division of each location into a sufficient number of arable and residential allotments, to enable grants to be made to the location residents, and the reservation of the remaining extent as commonage for the use of the registered holders. The act provided that the grants should be made, subject to conditions to be approved by both houses of parliament, and from time to time, as fresh grants were made, advantage was taken of this

provision to insert in the title deeds conditions which experience had shown to be desirable and necessary

The greatest defect in the system of individual tenure applied in native locations prior to the passing of the Glen Grey Act, 1894, lay in the fact that no provision was made for a simple and inexpensive method of transfer, so that these small holdings, on the average not more than five morgen in extent, could be transferred only by means of a formal deed in the ordinary course, a procedure involving in many instances the payment of legal fees amounting to more than the actual value of the land. Further, the natives themselves refused to appreciate the necessity, when transferring their land, of doing more than hand over the actual title deed to the new owner. The result was that in the great majority of cases transfer of land not held under the Glen Grey system was never registered, though the allotments frequently changed hands. The confusion arising out of this state of affairs was such that it became necessary, by legislation, to create a special machinery to deal with the position. To this end provision was made in section 8 of the Native Administration Act, No 38 of 1927, first for the appointment of commissioners to investigate and determine the rights of occupation and ownership in all such cases, and secondly, on payment of a fee of £1 for the transfer of the holdings concerned direct to the respective owners, as determined by the commissioners.

The principles embodied in the Glen Grey Act, 1894, constitute the best methods yet devised of applying the European system of individual tenure to the requirements of the native people. The essential features of the Glen Grey system are (a) perpetual quitrent grants, (b) the land granted is inalienable, save with the consent of the governor-general, (c) it is hereditary according to the law of primogeniture as observed by the natives themselves, (d) a simple and inexpensive method of transfer, by endorsement on the title-deed is provided, (e) the land is subject to forfeiture under certain circumstances. Provision is contained in section 6 of the Native Administration Act, 1927, for the establishment by governor-general's proclamation of special deeds registries for the registration of deeds relating to immovable property owned by natives in scheduled native areas. The Glen Grey system of individual tenure has been

extended to districts of the Transkeian Territories. The cardinal features of the system have already been indicated, but it should be mentioned, in so far as the Transkeian Territories are concerned, that by taking advantage of the edictal system of legislation operative there, it has been practicable to introduce modifications and improved methods from time to time with a readiness which would not have otherwise been possible. During 1918 the first definite step was taken towards introducing individual tenure of land into the native areas of Natal. No system of individual tenure has been introduced in the Transvaal and Orange Free State Native Locations and Reserves, where the land is still occupied by the people under the communal or tribal system.

3. The Natal Native Trust

The Natal Native Trust was constituted under letters patent in 1864. In this body are vested over two million acres of location land, which are administered by the trust for the benefit of the natives living thereon. No rent is payable by natives living on location land, who are liable for the general tax of £1 per annum and for the local tax of 10s per annum in respect of each hut or dwelling.

Prior to the constitution of the Union the members of the executive council for the time being were *ex-officio* members of the Natal Native Trust, but Act No. 1 of 1912¹ makes provision for the delegation by the governor-general to the minister of native affairs of the administration of all such matters as were on May 3, 1910, and since that date, administered by any legally constituted native trusts. Both locations and mission-reserves are held under deeds of grant from the government, the latter being tracts of land in various parts of the country set apart in order that the missionary bodies referred to in the deeds of grant may have a fixed population among which to carry on their labours. These grants were made between 1862 and 1887. Up to 1890 no rents were collected in the mission-reserves except for a few store-sites. The rule of requiring payment of rent from new tenants as a condition of allowing them to come on the reserves was passed in 1888, but no rents were collected before 1890. The rent varied from time to time and in different

¹ Natal Native Trust and Native Administration Act, 1912

reserves, but was fixed in 1919 at a uniform rate of £1 per annum payable by the occupier of each hut

4. The Zululand Native Trust

The Zululand Native Trust was constituted under deed of grant in 1909, the trustees being the governor and the executive council of Natal. Since the passing of Act No. 1 of 1912, the Zululand Native Trust has been administered in the same way as the Natal Native Trust, i.e. by the minister of native affairs, acting under a delegation of authority made by the governor-general in terms of section 2 of the act.

In the Zululand Native Trust are vested by the deed of grant, the twenty-one Zululand native reserves, measuring nearly three million acres. The inhabitants of these reserves do not pay rental, but are liable to general and local tax under the provisions of Act No. 41 of 1925.

XXVII

THE TAXATION OF NATIVES

1 Individual Taxation

NATIVE taxation, apart from the ordinary taxation levied on the whole population of South Africa, is regulated by the Natives Taxation and Development Act, 1925¹ Few natives earn sufficient income to fall within the provisions of the income tax acts, and special legislation had to be passed in order to tax the majority of natives, who, unlike the majority of Europeans, do not fall within the provisions of the income tax acts The provincial councils may not impose special or differentiating taxation on natives Under the Natives Taxation and Development Acts, every male native, who has reached the age of eighteen years, pays a personal tax, known as the general tax, of £1 per annum, and in addition, the occupier of every hut or dwelling in a native location pays a local tax of 10s per hut per annum The maximum amount payable as local tax by any native is £2, and the tax is not payable by natives holding land on quitrent tenure Provision is made for the exemption of indigent natives not able to earn, of natives whose permanent residence is outside the Union, and of natives attending approved educational institutions and thus not earning any wages which would enable them to pay the tax

If a native pays income tax amounting to not less than one pound to the government of the Union, he is exempted from paying the general tax, if he pays income tax amounting to less than one pound, his general tax is reduced by the amount so paid by him

The amounts collected from native taxation are allocated as follows local taxes and quitrent in the particular areas in which they are collected are paid to the native local councils within those areas If there is no local council in any area, the local taxes and quitrent are paid into an account styled the native development account Into this account, also, is paid one-fifth of the amount of the general tax

The object of the native development account is to apply the amounts standing to the credit of the account, at the discretion

¹ As amended by Acts No 28 of 1926 and No 37 of 1931

of the minister, in consultation with the native affairs commission, to the maintenance, extension and improvement of educational facilities amongst natives and to their further development advancement and welfare

2. Tribal Levies

Prior to 1925 there had been a system in the Transvaal whereby the government could make a levy on all members of a tribe, at the request of the majority of that tribe, to subscribe towards a trust fund for the purposes of the tribe, usually the purchase of land or stock. This system became very popular amongst and had the most beneficial results for the natives, and has been extended to the whole of the Union by section 15 of the Natives Taxation and Development Act, 1925. The section reads as follows:

15 (1) Whenever a native tribe or community voluntarily makes application for the levy of a special rate for the benefit of such tribe or community and the Minister is satisfied that the majority of taxpayers of such tribe or community desires such a levy and the Minister approves the purpose for which it is to be imposed, the Governor-General may levy such rate upon the whole tribe or community and such rate shall be recoverable as if it were a tax imposed under this Act.

(2) The proceeds of any such rate as is levied under sub-section (1) of this section shall be paid into a special account in the name of the tribe or community concerned to be administered by the Minister in accordance with regulations made under this Act.

The minister causes a publication to be made in the *Gazette* of the decision to make a levy, and the following is the form in which the proclamation is made:

PROCLAMATION

BY LIEUTENANT-COLONEL HIS EXCELLENCY THE RIGHT HONOURABLE THE EARL OF CLARENDON, A MEMBER OF HIS MAJESTY'S MOST HONOURABLE PRIVY COUNCIL, KNIGHT GRAND CROSS OF THE MOST DISTINGUISHED ORDER OF SAINT MICHAEL AND SAINT GEORGE, GOVERNOR-GENERAL AND COMMANDER-IN-CHIEF IN AND OVER THE UNION OF SOUTH AFRICA

[No. 233, 1931]

LEVY OF SPECIAL RATE ON COMMUNITY OF NATIVES UNDER HEADMAN CETYWAYO BOYANA

WHEREAS the community of natives under Headman Cetywayo Boyana resident in the location called Bolotwa, in the District of

THE TAXATION OF NATIVES

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Glen Grey, have made application for the levy of a special rate for the purpose of providing funds for the fencing of arable allotments in that location,

AND WHEREAS the Minister of Native Affairs is satisfied that the majority of the taxpayers of the community desire such a levy and approves of the purpose for which it is to be imposed,

Now, therefore, I, under and by virtue of the powers vested in me by section *fifteen* (1) of the Natives Taxation and Development Act, No 41 of 1925, do hereby proclaim, declare and make known, that a special rate of £4 sterling is hereby levied on every taxpaying member of the said community

The special rate hereby levied shall be payable in three annual instalments of two pounds (£2) one pound (£1) and one pound (£1) respectively, and the first instalment shall be due and payable on the 1st October, 1931, the second instalment on the 1st October, 1932, and the third instalment on the 1st October, 1933

GOD SAVE THE KING

Given under my Hand and the Great Seal of the Union of South Africa at Capetown this Twenty-sixth day of May One thousand Nine hundred and Thirty one

CLARENDON,

Governor General

By Command of His Excellency the
Governor-General-in-Council

E G JANSEN

PART VIII

THE EXTERNAL RELATIONS OF THE UNION

XXVIII

RELATIONS WITH THE BRITISH COMMONWEALTH NATIONS AND FOREIGN NATIONS

1. Status

WE have already seen that there formerly existed certain limitations on the sovereignty of the Union parliament, and that the Statute of Westminster removed those limitations and placed the dominions as near as may be on a footing of equality with the United Kingdom. Up to the Peace Treaty of 1919, the status of the dominions was that between absolute subordination and sovereign independence. It was a great deal above the former and a long way from the latter. Slow but inevitable changes, however, were taking place in the constitutional relations of the dominions with the mother country. The dominions kept on asking from time to time for a greater degree of autonomy, and this was always granted when the demand appeared to be serious. The practical situation was that the dominions could obtain any amount of autonomy which they earnestly desired. It was perfectly understood that neither the cabinet nor the parliament at Westminster would resist such a demand, and hence the nature of the connexion with the United Kingdom was inevitably determined by the progressive wishes of the dominions themselves.

Whenever any dominion obtained a concession or right, the concession was automatically extended to all the other dominions. It is important to understand that this extension was based not so much on the fact that a precedent had been created, but on the principle of the equality of status of the dominions. Whatever tended to raise the status of one dominion operated in an equal degree to raise the status of each of the other dominions. This equality of status of all the dominions was rigidly and jealously maintained. It was in each dominion held to be a cardinal principle. But it did not apply to the United Kingdom, whose status, definitely, was higher than that of a dominion.

The Peace Treaty, 1919, marked the beginning of the new

status, that is, of a status equal to that of the United Kingdom. The rise in status, like economic development, is a process of growth. Originally a savage wilderness each dominion had become a populous, thriving community, to which the great war had given an impetus in constitutional and economic development. The dominions emerged from that war not only wealthier and more independent economically than they had ever been before, but also with a new sense of nationhood born of their sacrifices. At the peace conference they considered themselves of an international status at least equal to that of the minor belligerent states. Depleted as were the resources of the greater powers, it became more difficult for them to resist the demands for recognition of these vigorous young communities beyond the seas who had contributed so much to the allied cause in every arena of the world.

The peace treaty was signed by the United Kingdom generally for the British Empire and by the dominions specifically for themselves. The signature for the British Empire represented older ideas of sovereignty, while the separate signatures for the dominions marked the beginning of a new idea—the real sovereignty and national independence of each dominion.

The period from 1919 to 1926, from the signing of the peace treaty by the dominions to the publication of the Inter-Imperial Relations Report, was a period of transition from dominion status to independent status. The dominions had ceased to be colonies in any sense of the word; they were transition states. Transition states must be described, rather than defined. There is a passage in the third edition of Oppenheim's work on international law, written before the Inter-Imperial Relations Report which aptly describes this last stage of transition.

'Formerly the position of self governing Dominions, such as Canada, Newfoundland, Australia, New Zealand, and South Africa, did not in international law present any difficulties. They had no international position whatever, because they were, from the point of view of international law, mere colonial portions of the mother country. It did not matter that some of them, as, for example, Canada and Australia, flew as their own flag the modified flag of the mother country, or that they had their own coinage, their own postage stamps or the like. Nor did they become subjects of international law (although the position was somewhat anomalous) when they were admitted, side by side with the mother country, as parties to the administrative unions, such as

the Universal Postal Union. Even when they were empowered by the mother country to enter into certain treaty-arrangements of minor importance with foreign states, they still did not thereby become subjects of international law, but simply exercised for the matters in question the treaty-making power of the mother country which had been to that extent delegated to them. But the position of self-governing Dominions underwent a fundamental change at the end of the World War. Canada, Australia, New Zealand, South Africa, and also India, were not only separately represented within the British Empire delegation at the Peace Conference, but also became, side by side with Great Britain, original members of the League of Nations. Separately represented in the Assembly of the League they may, of course, vote there independently of Great Britain. Now the League of Nations is not a mere administrative union like the Universal Postal Union, but the organised family of Nations. Without doubt, therefore, the admission of these four self-governing Dominions and of India, to membership, gives them a position in international law. But the place of self-governing Dominions within the family of Nations at present defies exact definition, since they enjoy a special position corresponding to their special status within the British Empire as "free communities, independent as regards all their own affairs, and partners in those which concern the Empire at large." Moreover, just as, in attaining to that position, they have silently worked changes, far-reaching but incapable of precise definition, in the constitution of the Empire, so that the written law inaccurately represents the actual situation, in a similar way they have taken a place within the family of Nations which is none the less real for being hard to reconcile with precedent. Furthermore, they will certainly consolidate the position which they have won, both within the Empire and within the family of Nations.¹

Bound up with the discussion of status are the questions of independence and neutrality. With the passing of the Statute of Westminster the dominions may be deemed for all purposes but war to be independent states.

"The marks of an independent state are, that the community constituting it is permanently established for a political end, that it possess a defined territory, and that it is independent of external control. So soon as a society can point to the necessary marks, and indicates its intention of conforming to law it enters of right into the family of states, and must be treated according to law. The simple facts that a community in its collective capacity exercises undisputed and exclusive control over all persons and things within the territory occupied by it, that it regulates its external conduct independently of the will of any other community, and in conformity with the dictates of international law, and, finally, that it gives reason to expect that its existence will be permanent, are sufficient to render it a person in law. A state

¹ L. Oppenheim, *International Law* (3rd ed., London, sections 94 a and 94 b.)

in its perfect form has, in virtue of its independence, complete liberty of action, subject to law, in its relation with other states. This applies to states linked by a personal union. A personal union exists, as in the instance of Great Britain and Hanover from 1714 to 1837, when two states, distinct in every respect, are ruled by the same prince and they are properly regarded as wholly independent states who merely happen to employ the same agent for a particular class of purposes, and who are in no way bound by or responsible for each other's acts. But it does not apply to members of a federal state, because the distinguishing marks of a federal state upon its international side consist in the existence of a central government to which the conduct of external relations is confided.¹

The dominions in every way conform to the requirements of independent states as laid down in this statement. They are permanently established for a political end: they each possess a defined territory; they are independent of external control; they may be expected to exist for an indefinite period of time. And it does not matter that some functions are carried on for the dominions by the United Kingdom, such as legislation by the British parliament for some dominions or communication with foreign powers through the secretary of state for the dominions and the British ambassadors. The exercise of these functions by delegation, is a matter of convenience, of consent, of mutual agreement, and not evidence of subordination on the part of one partner in the empire to another.² For states may curtail their external or international functions by an alliance, or by a treaty of protection or by an understanding to conform to a certain course of action, as in the case of the Britannie states, without thereby ceasing to be sovereign.³

According to international law, therefore, the dominions are independent because they are at liberty, if they so wish, to exercise every function of national or international right. It remains to be shown how their independence has been recognized. Once independence is recognized such recognition is absolute and irrevocable. It marks the beginning of a state in international law. Although the right to be treated as a state

¹ W. E. Hall, *International Law* (8th ed., ed. Higgins, Oxford, 1924) pp. 16 ff. For a federal state as referred to by Hall, the United States and the German empire under the constitution of 1871 afford examples.

² Secretary of state for the dominions, Hansard, March 8, 1928. Cf. A. B. Keith, *The Constitutional Law of the British Dominions* (London, 1933).

³ Cf. Bodin, *De la republique*, Book I, chapter viii; Grotius, *De jure Belli ac Pacis*, I, 317.

is independent of recognition recognition is the necessary evidence that the right has been acquired

Hall's latest edition states the position with clarity

'The commencement of a state dates from its recognition by other powers that is to say from the time at which they accredit ministers to it, or conclude treaties with it, or in some other way enter into such relations with it as exist between states alone For though no state has a right to withhold recognition when it has been earned, states must be allowed to judge for themselves whether a community claiming to be recognized does really possess all the necessary marks, and especially whether it is likely to live The admission of a state to

membership of the League of Nations carries with it *de jure* recognition by all other members Poland and Czechoslovakia received recognition by being admitted as parties to the Treaty of Versailles in 1919

New states generally come into existence by breaking off from an actually existing state Recognition is accorded either by the parent country or by a third power Recognition by a parent state, by implying an abandonment of all pretensions over a community, is more conclusive evidence of independence than recognition by a third power, and it removes all doubts from the minds of other governments as to the propriety of recognition by themselves But it is not a gift of independence, it is only an acknowledgment that the claim made by the community to have definitely established its independence, and consequently to be in possession of certain rights, is well founded¹

Thus it would appear that the dominions received recognition as independent states by being admitted as parties to the Treaty of Versailles in 1919 Admission to the League of Nations also was a certain measure of recognition of independence The appointment of ministers plenipotentiary by Canada, the Union of South Africa and the Irish Free State was recognition of independence. Finally, the Statute of Westminster, 1931, was an abandonment by the United Kingdom of all pretensions over the dominions and an outright declaration to the world of their independence To the argument that the parliament of the United Kingdom

cannot limit the powers of a successor', the obvious answer is that legal impossibility is made ineffectual if the Commonwealth is to endure In the Union it is fully recognized that, as Professor Kerth says, the Dominions are sovereign international states in the sense that the King in respect of each of his Dominions is such a state in the eyes of international law' and that by enacting the Statute of Westminster the parliament of the United Kingdom has declared a constitutional principle which

¹ Hall *International Law*, p. 104

will be far more binding than any mere law'¹ The Commonwealth has not been weakened by the passing of the Statute of Westminster. It is a vital and living association of states which will develop by the driving forces of circumstances, tradition, and relationship into an empire far nobler than any the world has known.

The questions of secession of a dominion from the British Empire and of neutrality are not legal but political questions. In the theory of law no dominion can declare itself free from the control of the British parliament, and no British subject can do any act weakening the King's power, but in a time of political revolution theories of law go by the board, and no purpose would be served in discussing them here. With regard to the right of a dominion to remain neutral while the rest of the Empire is at war, it is sufficient to state that when the King declares war, all his territories and dominions are at war. There is no recognition of the divisibility of the legal position of the King.²

The status of the dominions is dealt with in the Inter-Imperial Relations Report of 1926 as follows:

'They are autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the crown, and freely associated as members of the British Commonwealth of Nations. Every self-governing member of the Empire is now the master of its destiny. In fact, if not always in form, it is subject to no compulsion whatever. Equality of status, so far as Britain and the Dominions are concerned, is thus the root principle governing our inter-Imperial relations. But the principles of equality and similarity, appropriate to status, do not universally extend to

¹ A. B. Keith, *Speeches and Documents on the British Dominions 1915-1917 From Self Government to National Sovereignty* (The World's Classics, Oxford, 1932), p. xxx.

² It is the opinion of General Hertzog that the Union has the right of secession and of neutrality when Great Britain is at war. He also thinks that the crown is divisible, and that the position is not unlike that during the personal union of the crowns of Great Britain and Hanover from 1714 to 1837. See H. J. Schlosberg, *The King's Republics*, p. 20, where this view is developed. General Smuts disagrees with General Hertzog on each of the three points. In view of the conflict of opinion held by authorities, the authors have preferred to state the position according to the conservative view and have purposely refrained from entering into what still must be a political discussion. The most that can be said is that it is possible that the divisibility of the crown may be illustrated if another European war should take place.

function. Here we require something more than immutable dogmas. For example, to deal with questions of diplomacy and questions of defence, we require also flexible machinery—machinery which can from time to time be adapted to the changing circumstances of the world’.

In the preamble of the Status of the Union Act, 1934, which is printed in Appendix VII of this book, the first sentence of the above statement is cited, and the phrase ‘sovereign independent state’ is used.

2 The Imperial Conferences

The representatives of the Britannic states and India meet at intervals of about four years to discuss or consult on questions affecting the Empire.

‘They meet there on terms of equality under the presidency of the first minister of the United Kingdom. They meet there as equals, he is *primus inter pares*, ministers from six nations sit around the council board, all of them responsible to their respective parliaments and to the people of the countries which they represent. Each nation has its voice upon questions of common concern and highest importance as the deliberations proceed, each preserves unimpaired its perfect autonomy, its self-government, and the responsibility of its ministers to its own electorate’.

In these words of Sir Robert Borden can be seen the real reason of the impotency of the Imperial Conferences. They have no power, for they have no instruments for executive action. They can do nothing more than recommend, and any dominion that chooses to pursue some particular course of its own, and to disregard the recommendations of a particular Imperial Conference, can do so with impunity.

An Imperial Conference has only an indirect influence on the legislative and executive bodies of the states represented there. An endeavour has always been made to carry the resolutions submitted to the conference unanimously. Up to the present, there has only been one important exception to unanimity. This occurred in 1921 when South Africa dissented from the Indian Resolution. General Smuts then expressed the view that it was of fundamental importance that none but unanimous resolutions should be carried. If a conference could not arrive at unanimity on any resolution, it should not pass that resolution.

But even when a resolution is passed unanimously it may still fail to be effective. As Mr Baldwin said, on November 9, 1923

'The purpose of the Imperial Conference is not to frame absolute and binding resolutions. The conclusions reached are naturally subject to any action which may be taken later on.' At the Economic Conference of 1923, sitting in conjunction with the Imperial Conference, a scheme was devised and unanimously approved for granting a limited measure of imperial preference. All the representatives pledged themselves to submit this scheme to their respective parliaments for adoption but before most of the dominion representatives had reached home a general election in the United Kingdom brought a new government into office with a policy directly in opposition to that of granting preferences. The pledge of submitting the scheme to parliament was fulfilled, but parliament refused to adopt the proposal, for the general election was fought and lost on that issue.

The risk of the non-ratification of the resolutions is the greater because the prime minister whom each dominion sends as its representative is a party leader though at the Imperial Conference he represents not his own party but his whole country, yet he cannot always rely on the support of any party but his own. It would perhaps add much to the value of any future Imperial Conferences if it were found practicable for each prime minister to be accompanied by some trusted member selected by the opposition. Political jealousies and party differences should not interfere with high and creative purposes. However local exigencies seem too often to obscure wider horizons.

The Imperial Conference meets at long intervals. No machinery for continuous consultation to deal with urgent matters as they arise has yet been devised except that Mr. Baldwin, on November 20, 1924, on taking office as prime minister, said that he would periodically assemble the dominion high commissioners in London to meet the foreign secretary, the colonial secretary and himself, so as to keep the dominions authoritatively informed of the progress of foreign affairs.¹ There is interchange

¹ The dominions have never claimed any position to advise or to be consulted in connexion with the colonies and protectorates. Cf. the Duke of Devonshire at the Imperial Conference, 1923. The Colonies and Protectorates are the immediate responsibility and trust of the British Government. The Irish Free State representative added 'the Mandated Territories and Protectorates which are controlled by the British Government give no responsibility to the Imperial Conference'.

of views between the government of Great Britain and the dominions, but the difficulty is that the dominions are mainly negative in their attitude to all which do not directly affect them, and thus render action difficult. It is desirable to arrange a closer personal touch between Great Britain and the dominions, and between the dominions *inter se*. Such contact alone can convey an impression of the atmosphere in which official correspondence is conducted. A new system of consultation is urgently required.

'By reason of his constitutional position', declares the Inter Imperial Relations Report 1926, 'the Governor-General is no longer the representative of His Majesty's Government in Great Britain. There is no one, therefore, in the Dominion capitals in a position to represent with authority the views of His Majesty's Government in Great Britain. The Governments represented at the Imperial Conference are impressed with the desirability of developing a system of personal contact, both in London and in the Dominion capitals, to supplement the present system of inter-communication and the reciprocal supply of information on affairs requiring joint consideration. The manner in which any new system is to be worked out is a matter for consideration and settlement between His Majesty's Governments, with due regard to the circumstances of each particular part of the Empire, it being understood that any new arrangements should be supplementary to, and not in replacement of, the system of direct communication from Government to Government, and the special arrangements which have been in force since 1918 for communications between Prime Ministers.'¹

3. The Principle of Consultation

In law the crown acts as the delegate or representative of the state in the conduct of foreign affairs, and what is done in such matters by means of the royal prerogative is the act of the state, and, according to international law, is binding upon the latter without further sanction. The crown enjoys the sole right of appointing ambassadors, diplomatic agents, consuls and other officers, through whom intercourse with foreign nations is conducted, of making treaties, declaring peace and war, and generally of conducting all foreign relations. Such matters are entrusted to the absolute discretion of the sovereign acting through the recognized constitutional channels upon the advice of the cabinet, whether that of the United Kingdom or of a dominion, unfettered by any direct supervision, parliamentary or otherwise.

¹ *Inter Imperial Relations Report, 1926, part vi*

An indirect means of control is, however, supplied by the customary or conventional law of the constitution relating to the cabinet system, the doctrine of ministerial responsibility, and the fear of loss of office or national censure. Moreover, it is recognized as a constitutional maxim or convention that declarations of peace and war and the conduct of foreign relations must be in conformity with the wishes of parliament, and in certain cases treaties require special parliamentary sanction.¹ This is the position which governs the foreign relations of the British Commonwealth of Nations. Each dominion is generally free to conduct its own foreign policy, to negotiate its own treaties, and generally to act in relation to foreign states in any way it pleases, except with regard to a declaration of war. But it is the policy of each dominion and of the United Kingdom to act in such a way as to maintain as far as possible a common policy. This has become an understanding or convention. This convention or understanding is based upon the principle that diplomatic unity ought to be maintained. 'Understanding' is a better term to use than 'convention', for this 'understanding', unlike 'conventions of the constitution', has no real sanction. If it is not adhered to, there is nothing to force any British state to adhere to it.

At one time the unity of the Empire in foreign affairs was complete. No foreign power recognized a dominion as a political state, no foreign power approached a dominion government to obtain redress for any injury done. When the Vancouver riots in 1907 resulted in damage to Japanese and Chinese property, the formal request for redress was made, not direct to Canada, but to the British government. In 1905, and in the following years, when the government of Newfoundland interfered with the fishing rights of the United States, the government of that country addressed its representation to London. This diplomatic unity of the British Empire prevailed up to the end of the Great War. But there had been growing in the dominions certain misgivings of definite commitments by the British Government. The dominions, not really menaced by any external militarist danger, began to examine a system of inter-imperial relations which might commit them to European entanglements, even though they generally approved of the efforts of the United

¹ Cf. notes A and B at the end of this chapter.

Kingdom to maintain peace in Europe. The dominions were perhaps unconscious of international responsibility. They were preoccupied with their own domestic problems and intent on the development of their own empty spaces. The problems of Europe presented no aspect which vitally affected them.

At first the dominions were content to allow the British government to conduct foreign affairs on its own responsibility. Then a demand arose that where the special interests of a dominion were concerned, no action should be taken until there had been consultation with the dominion concerned. Thus arose the understanding of 'consultation'. But it soon came to pass that where any matter concerned a dominion more vitally than even the United Kingdom, that dominion demanded a liberty of action in such matter equivalent to the liberty of action of the United Kingdom in Europe. The dominions resented the interference of the British foreign office in those regions of international politics where they alone were concerned. There thus arose a conflict of interests.

The British government in London must inevitably think more about peace and co-operation throughout its vast field of contacts than of the interests of any particular dominion. The dominions, on the other hand, are really more concerned about being left out of international affairs unless their own interests are directly affected, and then they prefer to manage them in their own way. They are not anxious to assume obligations in which they have no interests, whereas the United Kingdom, with her wide and complex connexions, cannot limit her engagements to what the dominions will accept. Each Britannie state, therefore, finds no alternative but that of complete liberty and independence of action in foreign affairs. The diplomatic unity of the Empire is thus no longer a fixed and immutable principle. But there continues to exist a generally prevailing desire that there should be a joint foreign policy for the British Commonwealth.

At the first meeting of the imperial war cabinet of 1917, it was agreed that the policy of the British Empire should be one, and should be the outcome of consultation between the six governments of which the imperial war cabinet was composed. Since the Peace Conference it has been a primary axiom of British external policy that the British government could not

enter into engagements of imperial concern without the consent of the other Britannic states. The failure by the British government to act in accordance with this understanding was the cause of the controversies about Chanak and the Lausanne Treaty. But however desirable such a state of affairs might be, the difficulty arose as to how a dominion should act if it could under no circumstances accept a treaty or obligation accepted by the rest of the Empire. The solution was provided in the Locarno Treaty of 1925. This treaty was a departure from the theory of diplomatic unity enunciated by the imperial war cabinet in 1917. It was a departure in favour of the system contemplated in the Anglo-American Treaty of Guarantee to France in 1919, never actually brought into force. The system contemplated in 1919 was that the United Kingdom, in matters affecting Europe, even of the first importance, will proceed, no doubt after giving all information possible to the dominions by cable and dispatch, to negotiate treaties which were to be binding on herself, but which impose no obligation on any dominion unless the dominion afterwards accepted the treaty. Article 9 of the Locarno Treaty provided that 'The present treaty shall impose no obligation upon any of the British Dominions, or upon India, unless the Government of such Dominion, or of India, signifies its acceptance thereof.' Though the Locarno system was severely attacked, it has provided the formula by which only dominions may be bound by a treaty entered into by the United Kingdom.

The understanding or the principle of consultation has not been abandoned. The Inter-Imperial Relations Report contains the following important paragraph

'It was agreed in 1923 that any of the governments of the Empire contemplating the negotiation of a treaty should give due consideration to its possible effect upon other governments and should take steps to inform governments likely to be interested of its intention. This rule should be understood as applying to any negotiations which any government intends to conduct, so as to leave it to the other governments to say whether they are likely to be interested. When a government has received information of the intention of any other government to conduct negotiations, it is incumbent upon it to indicate its attitude with reasonable promptitude. So long as the initiating government receives no adverse comments, and so long as its policy involves no active obligations on the part of the other governments, it may proceed on the

assumption that its policy is generally acceptable. It must, however, before taking any steps which might involve the other government in any active obligations, obtain their definite assent. Where by nature of the treaty it is desirable that it should be ratified on behalf of all the governments of the Empire the initiating government may assume that a government which has had full opportunity of indicating its attitude and has made no adverse comments will concur in the ratification of the treaty. In the case of a government that prefers not to concur in the ratification of a treaty unless it has been signed by a plenipotentiary authorized to act on its behalf, it will advise the appointment of a plenipotentiary so to act.¹

These rules have been amplified in the *Report of the Imperial Conference of 1930*

'Previous Imperial Conferences have made a number of recommendations with regard to the communication of information and the system of consultation in relation to treaty negotiations and the conduct of foreign affairs generally. The main points can be summarized as follows

- (1) Any of His Majesty's governments conducting negotiations should inform the other governments of His Majesty in case they should be interested and give them the opportunity of expressing their views, if they think that their interests may be affected
- (2) Any of His Majesty's governments on receiving such information should, if it desires to express any views, do so with reasonable promptitude
- (3) None of His Majesty's governments can take any steps which might involve the other governments of His Majesty in any active obligations without their definite assent

'The Conference desired to emphasize the importance of ensuring the effective operation of these arrangements. As regards the first two points, they made the following observations

'(1) The first point, namely, that of informing other governments of negotiations, is of special importance in relation to treaty negotiations in order that any government which feels that it is likely to be interested in negotiations conducted by another government may have the earliest possible opportunity of expressing its views. The application of this is not, however, confined to treaty negotiations. It cannot be doubted that the fullest possible interchange of information between His Majesty's governments in relation to all aspects of foreign affairs is of the greatest value to all the governments concerned

'In considering this aspect of the matter, the Conference have taken note of the development since the Imperial Conference of 1926 of the system of appointment of diplomatic representatives of His Majesty representing in foreign countries the interests of different members of the British Commonwealth. They feel that such appointments furnish

¹ *Inter-Imperial Relations Report, 1926*, part v (a)

a most valuable opportunity for the interchange of information, not only between the representatives themselves but also between the respective governments

'Attention is also drawn to the resolution quoted in Section VI of the Report of the Inter-Imperial Relations Committee of the Imperial Conference of 1926 with regard to the development of a system to supplement the present system of inter-communication through the official channel with reference not only to foreign affairs but to all matters of common concern. The Conference have heard with interest the account which was given of the liaison system adopted by His Majesty's government in the Commonwealth of Australia, and recognized its value. Their attention has also been called to the action taken by His Majesty's government in the United Kingdom in the appointment of representatives in Canada and the Union of South Africa. They are impressed with the desirability of continuing to develop the system of personal contact between His Majesty's governments, though, of course, they recognize that the precise arrangements to be adopted for securing this development are matters for the consideration of the individual governments with a view to securing a system which shall be appropriate to the particular circumstances of each government.

'(ii) As regards the second point, namely, that any of His Majesty's governments desiring to express any views should express them with reasonable promptitude, it is clear that a negotiating government cannot fail to be embarrassed in the conduct of negotiations if the observations of other governments who consider that their interests may be affected are not received at the earliest possible stage in the negotiations. In the absence of comment the negotiating government should as indicated in the Report of the 1926 Conference, be entitled to assume that no objection will be raised to its proposed policy.'¹

The present position is a direct consequence of the theory of full ministerial responsibility in the dominions. If it was open to a dominion government to reply to a request from the British government for redress to a foreign state with the answer that the ministry would not accord it but would resign, and that no other ministry would take office, no other alternative was left but to grant the dominions full liberty in their international relations. But, using the words of Professor Keith 'If it is the duty of a Dominion not to adopt the policy of a California and defy imperial obligations, it is no less the duty of the British government to see that none of its actions shall run counter to the interests of a Dominion, nor in truth can the British government be fairly charged with lack of appreciation of this view. The fact that Canada and the other Dominions respect the

¹ *Report of the Imperial Conference, 1930*

obligations of treaties as religiously as the Imperial government itself is indeed a good augury for the future of the Empire.¹

Each Britannie state informs the others constantly as to the trend of foreign events and invites from them by this system of voluntary information any representations which they may wish to make.

4. The Channels of Communication between Dominion Governments and Foreign Governments

The department of external affairs is the channel of communication between the government of the Union of South Africa and the governments of other countries. In the case of the United Kingdom, communications are sometimes addressed by the minister of external affairs to the secretary of state for the dominions, sometimes communications are sent through the Union high commissioner in London or through the high commissioner for the United Kingdom in Pretoria. Communications with other governments of the British Commonwealth are addressed by the minister of external affairs to the prime minister or the minister of external affairs of the dominion concerned. Communications with foreign governments are directed by the minister of external affairs to the government concerned through (a) the Union minister in such foreign country, or (b) the diplomatic representative of such foreign country in the Union, or (c) His Britannic Majesty's diplomatic representative in such foreign country where the Union is not represented in such foreign country.²

Communications relating to the native territories in South Africa are directed by the department of external affairs to the British High Commissioner for South Africa in Pretoria. Communications with South-West Africa or the League of Nations regarding the administration of the mandate are sent through the prime minister's department the administration of the mandate being a function of that department. Communications with His Majesty the King, such as the tendering of advice in matters affecting the Union are sent to the governor-general of the Union, who, as we have stated, is the king's personal representative in the Union.

¹ *Responsible Government in the Dominions* (London, 1909), p. 288.

² *Report of the Imperial Conference, 1930*, part vi (1).

The Imperial Conference, 1930, laid down some working principles

'At the Imperial Conference of 1926 it was agreed that, in cases other than those where Dominion ministers were accredited to the heads of foreign states, it was very desirable that the existing diplomatic channels should continue to be used, as between the Dominion governments and foreign governments, in matters of general and political concern. While the Conference did not wish to suggest any variation in this practice, they felt that it was of great importance to secure that the machinery of diplomatic communication should be of a sufficiently elastic and flexible character. They appreciated that cases might arise in which, for reasons of urgency, one of His Majesty's governments in the Dominions might consider it desirable to communicate direct with one of His Majesty's ambassadors or ministers appointed on the advice of His Majesty's government in the United Kingdom on a matter falling within the category mentioned. In such cases they recommended that the procedure just described should be followed. It would be understood that the communication sent to the ambassador or minister would indicate to him that, if practicable, he should, before taking any action, await a telegram from His Majesty's government in the United Kingdom, with whom the Dominion government concerned would simultaneously communicate. As regards subjects not falling within the category of matters of general and political concern, the Conference felt that it would be to the general advantage if communications passed direct between His Majesty's governments in the Dominions and the ambassador or minister concerned. It was thought that it would be of practical advantage to define, as far as possible, the matters falling within this arrangement, the definition would include such matters as, for example, the negotiation of commercial arrangements affecting exclusively a Dominion government and a foreign power, complimentary messages, invitations to non-political conferences, and requests for information of a technical or scientific character. If it appeared hereafter that the definition were not sufficiently exhaustive it could of course be added to at any time. In making the above recommendations, it was understood that, cases might also arise in which His Majesty's governments in the Dominions might find it convenient to adopt appropriate channels of communication other than that of diplomatic representatives. The Conference were informed that His Majesty's government in the United Kingdom were willing to issue the necessary instructions to the ambassadors and ministers concerned to proceed in accordance with the above recommendations.'

5. Diplomatic Representation

Ministers-plenipotentiary are formally appointed by His Majesty the King. In accordance with diplomatic practice a minister is appointed by means of a letter of credence from His

Majesty to the head of the state concerned. In the Union of South Africa a foreign ambassador presents his credentials to the governor-general as the personal representative of the King. For example, the procedure in the case of the minister from the United States was as follows:

'The American Minister was received by His Excellency the Governor-General at Government House, Pretoria on the 8th September, 1930. The American Minister presented his Letters of Credence addressed by the President of the United States of America to His Majesty the King, and as from 8th September, 1930, assumed his duties and functions as Envoy Extraordinary and Minister Plenipotentiary of the United States of America in the Union of South Africa'.¹

The Union has, at the moment, ministers-plenipotentiary at Washington, Rome, The Hague, Paris and Berlin.

Foreign consuls within the Union present no credentials personally to the Governor-General, but they require recognition in a formal manner. The method of such recognition is by a formal notice in the *Gazette* in the following terms:

'His Excellency the Governor-General has been pleased to approve of the grant of recognition to Monsieur Vladas Karolis Rackauskas as Consul of Lithuania at Capetown with jurisdiction over the Union of South Africa and the Mandated Territory of South-West Africa'.²

Diplomatic immunity is granted in the Union of South Africa to the diplomatic agents of foreign countries by express enactment, which provides that no diplomatic agent, his family, staff and their families and his alien servants, shall be subject to the civil and criminal jurisdiction of any court in the Union, and all legal processes sued out against the person or property of any diplomatic agent shall be void.³ Immunity, however, does not extend to diplomatic agents engaged in trade or other callings in the Union in so far as transactions in that trade or calling are concerned. Diplomatic agents are entitled to waive the immunity granted them under the statute. The proper minister may exempt diplomatic persons and official legation buildings and residences from taxes and rates if a reciprocal exemption is granted to the diplomatic agents of the Union. Diplomatic immunity is further protected by the fact that if any person without reasonable care sues out a legal process against a foreign

¹ *The Government Gazette*, September 12, 1930.

² Diplomatic Immunities Act, No. 9 of 1932, as amended by Act No. 19 of 1934.

diplomatic agent accredited to the Union such person may suffer severe criminal punishment

The Union maintains a high commissioner and staff in London and the United Kingdom has a high commissioner at Pretoria, who is also high commissioner for the native territories. Communications from the Union government are occasionally addressed to either of these high commissioners for transmission to the British government.

The status of high commissioners was reviewed by the Imperial Conference 1930

The question of precedence of High Commissioners for the Dominions in London was raised at the Imperial Conference of 1923 by the then Prime Minister of Canada. As a result of the discussion at that Conference and subsequent correspondence with the Prime Minister of the Dominions, a proposal was submitted to and approved by the King, that the Dominion High Commissioners should be given precedence on ceremonial occasions after any members of the United Kingdom or Dominion Cabinets who might be present on any given occasion, but not in any case given a position superior to that accorded by the United Kingdom Table of Precedence to Secretaries of State.

At the present Conference the question was raised whether it might be possible in any way to improve the status accorded as a result of the 1923 discussion to Dominion High Commissioners in London in order to emphasize the importance of their position as the representatives in London of other governments of His Majesty. The desirability of such action if it were possible, was generally recognized, more particularly in view of the constitutional position as defined by the Imperial Conference of 1926.

On the other hand, there was obvious difficulty in according to the representatives in London of any of His Majesty's governments a status which would place them in a position higher than that accorded, not only to His Majesty's principal Ministers in the United Kingdom but also to the members of the respective Dominion governments when they were visiting the United Kingdom.

As the result of the discussion His Majesty's government in the United Kingdom intimated that they were prepared to recommend to the King that the Dominion High Commissioners should on all ceremonial occasions (other than those when Ministers of the Crown from the respective Dominions were present) rank immediately after Secretaries of State, that is, before all Cabinet Ministers in the United Kingdom except Secretaries of State and those Ministers who already have higher precedence than Secretaries of State. It had been ascertained that if such a recommendation were made to the King, His Majesty would be graciously pleased to approve it. As regards the position of the representative of a Dominion in relation to a Minister of the Crown visiting

the United Kingdom from that Dominion the existing position would remain unaltered, that is normally a Minister of the Crown from a Dominion visiting the United Kingdom would be given precedence immediately before the High Commissioner concerned.

The representatives of the United Kingdom at the Conference expressed the hope that His Majesty's governments in the Dominions would consider the question of recommending equivalent precedence for any High Commissioner appointed by His Majesty's government in the United Kingdom in a Dominion.

6 Treaties

The dominions, as have seen, have long possessed the undisputed control of their own internal affairs. But one cannot draw an absolute line between what is domestic and what is foreign. In 1859 the province of Canada passed an act increasing the duties on imported goods including those coming from the United Kingdom. This, of course, affected not only the people of Canada, but also those of the Empire as a whole, as well as foreign countries. In spite, however, of the strenuous opposition of certain British manufacturers, the British government, after a firm protest from the Canadian ministry, consented to the imposition of the tariff and the right of a self-governing colony to determine the tariff on both foreign and British goods was thereby established. In 1854 a reciprocal trade-treaty between Canada, acting as British plenipotentiary, and the United States had already been concluded, but this treaty was directly arranged by the governor general of Canada and all interests were considered. It however formed a precedent, and together with the act of 1859 laid foundations for the principle of leaving the self-governing colonies free to manage their own trade relations.

But this right of controlling their own commercial relationship with the outside world had always been subject to an important reservation or understanding. The colonies had outgrown the condition in which each of them could be regarded as an isolated community. Trade ramifications became too complicated not to be affected by any single treaty. An understanding arose that in any commercial treaty in which a Britannic state took part, the other Britannic states not parties to the treaty, should always receive equal treatment with any other nation. No foreign country was to receive more favourable concessions than any of His Majesty's dominions might receive.

From the very first the British government regarded it essential that any tariff concessions conceded by a dominion to a foreign country should be extended to the United Kingdom and to the rest of his majesty's dominions. When Newfoundland in 1890 had made arrangements for a treaty with the United States which would have accorded preferential treatment to that power, the secretary of state for the colonies, in a dispatch of March 26, 1892, informed the government of Canada, in reply to its protest that it might rest assured 'that Her Majesty will not be advised to assent to any Newfoundland legislation discriminating directly against the products of the Dominion.'

In 1894 the Colonial Conference held at Ottawa discussed the principles which were to apply to commercial treaties. They were definitely laid down by the colonial secretary, Lord Ripon, in a dispatch dated June 28, 1895.

'Any agreement made must be an agreement between Her Majesty and the sovereign of a foreign state, and it would be to Her Majesty's government (in the United Kingdom) that the foreign states would apply in case of any questions arising out of the agreement. To give the colonies power of negotiating treaties for themselves without reference to Her Majesty's government would be to give them an international status as separate and sovereign states, and would be equivalent to breaking up the Empire into a number of independent states, a result injurious to the colonies and to the mother country, and one that would be desired by neither party. The negotiations, therefore, between Her Majesty and the foreign sovereign must be conducted by Her Majesty's representative at the foreign court, who would keep Her Majesty's government informed of the progress of the discussion, and seek instructions from them as necessity arose. In order to give due help in the negotiations, Her Majesty's representative should, as a rule, be assisted by a delegate, appointed by the colonial government, either as plenipotentiary or in a subordinate capacity, as the circumstances might require. If, as a result of the negotiations, any arrangements were arrived at, they would require approval by Her Majesty's government and by the colonial government, and also by the colonial legislature if they involved legislative action, before the ratification could take place. This procedure has been in the past adopted, and Her Majesty's government had no doubt as to its propriety, as securing at once the strict observance of existing international obligations, and the preservation of the unity of the Empire.'

Since 1894 the dominions have moved onward in their commercial relations. They now negotiate commercial treaties by dealing direct with the foreign country concerned. The United

States deals directly with Canada in commercial matters, and so does Portugal with South Africa, while the recent trade agreement between Germany and South Africa was entered into without the intervention of the United Kingdom.

It is true that in the past the British government has intimated that she would not agree to a colony asking from foreign powers concessions hostile to the interests of the other parts of the Empire.¹ If, therefore, a preference were sought by or offered to a dominion in respect of any article in which a foreign country competed seriously with other portions of the Empire, the British government would feel it to be a duty to use every effort to obtain an extension of the concession to the rest of the Empire. But the understanding to afford all parts of the Empire the benefit of favoured-nation treatment has been carefully observed by the dominions in commercial negotiations affecting the trade of the dominions. All concessions made to foreign powers have always been extended to all parts of the Empire.²

Regarding the form and signature of treaties the Inter-Imperial Relations Report 1926 stated

'Some treaties begin with a list of the contracting countries and not with a list of heads of states. In the case of treaties negotiated under the auspices of the League of Nations adherence to the wording of the Annex to the Covenant for the purpose of describing the contracting party has led to the use in the preamble of the term "British Empire" with an enumeration of the Dominions and India if parties to the Convention, but without any mention of Great Britain and Northern Ireland and the Colonies and Protectorates. These are only included by virtue of their being covered by the term "British Empire". This practice, while suggesting that the Dominions and India are not on a footing of equality with Great Britain as participants in the treaties in question, tends to obscurity and misunderstanding and is generally unsatisfactory.

'As a means of overcoming this difficulty it is recommended that all treaties (other than agreements between governments) whether negotiated under the auspices of the League or not should be made in the name of heads of states, and if the treaty is signed on behalf of any or all of the governments of the Empire, the treaty should be made in the name of the King as the symbol of the special relationship between the different parts of the Empire. The British units on behalf of which the treaty is signed should be grouped together in the following order: Great Britain and Northern Ireland and all parts of the British Empire.

¹ See *Parliamentary Papers*, 1910, House of Commons, 129.

² e.g. the Union of South Africa-German Treaty, 1928, article 9, see note A at the end of this chapter.

which are not separate members of the League, Canada, Australia, Newfoundland, New Zealand, South Africa, Irish Free State, India. A specimen form of treaty as recommended is attached as an appendix to the Committee's report.

'In the case of a treaty applying to only one part of the Empire it should be stated to be made by the King on behalf of that part. The making of the treaty in the name of the King as the symbol of the special relationship between the different parts of the Empire will render superfluous the inclusion of any provision that its terms must not be regarded as regulating inter se the rights and obligations of the various territories on behalf of which it has been signed in the name of the King. In this connexion it must be borne in mind that the question was discussed at the Arms Traffic Conference in 1925, and that the legal committee of that Conference laid it down that the principle to which the foregoing sentence gives expression underlies all international conventions.

'In the case of some international agreements the governments of different parts of the Empire may be willing to apply between themselves some of the provisions as an administrative measure. In this case they should state the extent to which, and the terms on which, such provisions are to apply. Where international agreements are to be applied between the different parts of the Empire, the form of a treaty between heads of states should be avoided.

'The plenipotentiaries for the various British units should have full powers, issued in each case by the King on the advice of the government concerned, indicating and corresponding to the part of the Empire for which they are to sign. It will frequently be found convenient, particularly where there are some parts of the Empire on which it is not contemplated that active obligations will be imposed, but where the position of the British subjects belonging to these parts will be affected, for such government to advise the issue of full powers on their behalf to the plenipotentiary appointed to act on behalf of the government or governments mainly concerned. In other cases provision might be made for accession by other parts of the Empire at a later date.

'In the cases where the names of countries are appended to the signatures in a treaty, the different parts of the Empire should be designated in the same manner as is proposed in regard to the list of plenipotentiaries in the preamble to the treaty. The signatures of the plenipotentiaries of the various parts of the Empire should be grouped together in the same order as is proposed above.

'The signature of a treaty on behalf of a part of the Empire should cover territories for which a mandate has been given to that part of the Empire, unless the contrary is stated at the time of the signature.'

Because legally the crown has the absolute power of concluding treaties, and has in the past always been advised by the British government, there has been no case known in which any

¹ *Int. Imperial Relations Report, 1926*, part v (a). For the specimen form of treaty referred to, see note C at the end of this chapter.

treaty proper has been made without the consent of the British government. Treaties made by the crown were binding upon colonies whether such treaties were ratified by the colonial parliaments or not. Prior to 1882 all treaties concluded by the crown, *ipso facto*, applied to the colonies, unless they were specially excluded. In 1882 a treaty was entered into between the United Kingdom and a country hardly as large as an insignificant South African magisterial district, which contained the first 'colonial clause', a clause permitting the self-governing colonies to adhere to the treaty within a fixed period.¹ The right of separate withdrawal from a treaty on the part of a colony first appeared in 1889. The separate adherence to and withdrawal from treaties were at first considered possible only where a differentiation of treatment could be based upon a differentiation of locality. The practice of consulting the colonies was not introduced in political treaties of general or world-wide application nor, indeed, had the colonies put forward any formal claim, up to the time of the Great War, to be given an option as to adherence in the case of general political treaties. Yet where dominion interests were directly affected in a regional treaty, it had become a fixed rule that the dominion government concerned should be consulted. In the General Arbitration Treaties with the United States in 1908 and 1911 the United Kingdom expressly reserved the right to obtain the concurrence of any dominion whose interests were directly affected by the treaty before any issue affecting it was submitted to arbitration.

Ratification of a treaty, in the absence of special agreement, is concluded by representatives accredited for the purpose. Ratification may be withheld for various reasons, as when the constitution of a state requires a treaty concluded by plenipotentiaries to be sanctioned by an elected or appointed body, such as the senate in the United States. In such cases it is an implied condition of negotiation that an absolute right of rejecting a treaty is reserved to the body the sanction of which is needed. It is now the practice in South Africa to make an express reservation of the right of ratification either in the full powers given to the negotiators or in the treaty itself.² Ratifica-

¹ Treaty with Montenegro, 1882.

² See, for example, the South Africa-German Treaty, 1928, in note A at the end of this chapter.

tions are signed by the person invested with the supreme treaty-making power (the King in the case of the Britannic states) Article 18 of the Covenant of the League of Nations provides that every treaty or international engagement entered into by any member of the League shall forthwith be registered with the secretariat of the League, and shall, as soon as possible, be published by it. No such treaty or international agreement is binding until so registered. But in other cases, as soon as ratification is completed, the treaty comes into definite operation.

In the case of the dominions, most treaties come into effect on the passing of legislation by the Dominion parliaments concerned. For example, in 1857, France concluded a treaty with the United Kingdom regarding French fishery rights in Newfoundland. The Newfoundland parliament declined to pass legislation approving the treaty, and it therefore never came into force.

The Imperial Conference of 1923 laid down certain rules for the ratification of treaties which still hold good:

- (a) The ratification of treaties imposing obligations on one part of the Empire is effected at the instance of the government of that part.
- (b) The ratification of treaties imposing obligations on more than one part of the Empire is effected after consultation between the governments of those parts of the Empire concerned. It is for each government to decide whether parliamentary approval or legislation is required before despatch or concurrence in ratification is intimated by that government.

Parliamentary approval may be signified by resolutions of both houses of parliament, or by a resolution of the elected house only.¹ Many treaties require legislation to render them effectual, e.g. a commercial treaty involving tariff concessions would usually require an act of parliament to bring the tariff concessions into effect.

The Inter-Imperial Relations Report, 1926, contains the following provision regarding the coming into force of multi-lateral treaties:

'In general, treaties contain a ratification clause and a provision that the treaty will come into force on the deposit of a certain number of ratifications. The question has sometimes arisen in connexion with treaties negotiated under the auspices of the League whether for the purpose of making up the number of ratifications necessary to bring the treaty into force, ratifications on behalf of different parts of the Empire which are separate members of the League should be counted

¹ Cf. note B at the end of this chapter.

as separate ratifications. In order to avoid any difficulty in future, it is recommended that when it is thought necessary that a treaty should contain a clause of this character, it should take the form of a provision that the treaty should come into force when it has been ratified on behalf of so many separate members of the League. We think that some convenient opportunity should be taken of explaining to the other members of the League the change which it is desired to make in the form of treaties and the reasons for which they are desired. We would also recommend that the various governments of the Empire should make it an instruction to their representatives at international conferences to be held in future that they should use their best endeavours to secure that effect is given to the recommendations contained in the foregoing paragraphs.¹

It had been contended by General Smuts that at the Peace Conference and the Washington Conference the dominions were represented by distinct delegations. Sir John Salmond contended that there was but a single Empire delegation, and the Inter-Imperial Relations Report of 1926 seems to confirm this view.²

After the Great War the controversy over Chanak arose. When the question was raised by the British government of preventing by force the Turks from crossing into Europe, the prime minister of Canada replied that the Canadian parliament must determine whether that country should take an active part in a war in which the United Kingdom was involved. Later, when the Treaty of Lausanne was concluded with Turkey, the King having signed for the whole Empire, the Canadian government recognized that it was bound by the treaty but declared that it was a bilateral treaty imposing active obligations on one part of the Empire only. In 1923 Canada claimed that her representative alone should sign the treaty between herself and the United States regulating the halibut fisheries on the North Pacific coast. The treaty was negotiated on behalf of Canada by her representative, acting, with the full approval of the British government, through the British ambassador at Washington, and was signed by the Canadian representative alone under full powers issued in the usual manner by the King on the advice of the British government.³

¹ *Inter-Imperial Relations Report 1926*, part v (a).

² See *The Times*, July 18, 1921. On August 10, 1934, General Smuts stated that the South African plenipotentiaries were appointed by the King in his government of the Union, and that the appointment was countersigned by the Prime Minister of the Union—*Rand Daily Mail*, August 11, 1934.

³ See *Foreign Affairs*, vol. v, pp. 382 ff. for a full discussion, and Keith, *Responsible Government in the Dominions*, 2nd ed., p. 905.

This practice of signing a treaty by the dominion representative alone under powers issued on the advice of the King's British ministers was followed in 1924 in the commercial treaty negotiated between Canada and Belgium.

Once separate diplomatic representation was conceded to one dominion it naturally had to be conceded to all the other dominions. The British government showed great hesitation in allowing a dominion to sign a treaty alone even though the powers for signing such treaty were given on the advice of the British ministry but its attitude with regard to the appointment of ministers to foreign courts was different. In his statement regarding the appointment of a Canadian minister at Washington Mr. Bonar Law stated: 'It has been agreed that His Majesty on the advice of his Canadian ministers, shall appoint a minister-plenipotentiary who shall take charge of Canadian affairs at Washington.' The sole responsibility for such an appointment rested with the Canadian government. It is true that in that instance the Canadian secretary of state did not personally advise the King, but had he been in England at the time there is no doubt that he would have done so. As it happened the advice to the King was by order-in-council cabled to the secretary of state for the colonies, who acted and advised the King purely as the representative in this matter of the Canadian government. In 1924 the Irish Free State appointed a minister to the United States.

Negotiations between the United States and Canada are now conducted directly with the Canadian representative who informs the British ambassador in accordance with well-established convention so that the latter may decide whether the matter of negotiation interests other parts of the Empire. If another part of the Empire is involved such part may leave it to the Canadian representative to protect its interests or to the British ambassador or it may negotiate directly by its own representative. The most cordial interchange of views and information exists between the British ambassador at Washington and the dominion representatives.

7. Representation at International Conferences

In connexion with representation at international conferences, the Inter-Imperial Relations Report of 1926 stated

We also studied in the light of the resolutions of the Imperial Conference of 1923 to which reference has already been made, the question of the representation of the different parts of the Empire at international conferences. The conclusions which we reached may be summarized as follows:

1. No difficulty arises as regards representation at conferences convened by or under the auspices of the League of Nations. In the case of such conferences all members of the League are invited, and if they attend are represented *pari passu* by separate delegations. Co-operation is ensured by the application of paragraph 1 (1) (c) of the Treaty Resolution of 1923.

2. As regards international conferences summoned by foreign governments, no rule of universal application can be laid down, since the nature of the representation must in part depend on the form of invitation issued by the convening government.

- (a) In conferences of a technical character it is usual and always desirable that all different parts of the Empire should (if they wish to participate) be represented separately by separate delegations, and where necessary efforts should be made to secure invitations which will render such representation possible.
- (b) Conferences of a political character called by a foreign government must be considered on the special circumstances of each individual case.

'It is for each part of the Empire to decide whether its particular interests are so involved specially having regard to the active obligations likely to be imposed by any resulting treaty, that it desires to leave the negotiation in the hands of the part or parts of the Empire more directly concerned and to accept the result.'

'If a government desires to participate in the conclusion of a treaty, the method by which representation will be secured is a matter to be arranged with the other Governments of the Empire in the light of the invitation which has been received.'

Where more than one part of the Empire desires to be represented, three methods of representation are possible:

- (i) By means of a common plenipotentiary or plenipotentiaries, the issue of full powers to whom should be on the advice of all parts of the Empire participating.
- (ii) By a single British Empire delegation composed of separate representatives of such parts of the Empire as are participating in the Conference. This was the form of representation employed at the Washington Disarmament Conference of 1921.
- (iii) By separate delegations representing each part of the Empire participating in the Conference. If, as a result of consultation, this third method is desired, an effort must be made to ensure that the form of invitation from the convening government will make this method of representation possible.

Certain non-technical treaties should, from their nature, be concluded

in a form which will render them binding upon all parts of the Empire, and for this purpose should be ratified with the concurrence of all the governments. It is for each government to decide what extent its concurrence in the ratification will be facilitated by its participation in the conclusion of the treaty, as, for instance, by the appointment of a common plenipotentiary. Any question as to whether the nature of the treaty is such that its ratification should be concurred in by all parts of the Empire is a matter for discussion and agreement between the governments.¹

In this division of the subject it has been necessary to confine our attention to general principles and to common conventions which carry with them some kind of formal agreement within the British Commonwealth. These principles and conventions command respect in the Union of South Africa where, however, occasions have not arisen to provide numerous illustrations of their workings. There is, however, no reason to believe that they cannot be applied without friction and with the generous co-operation of the Union. They imply a spirit of co-operation which need never be wanting if goodwill and statesmanship are forthcoming in the future as in the past.

8. A Commonwealth Tribunal for the Solution of Inter-Commonwealth Disputes

The Imperial Conference Report, 1930, dealt with this matter in the following manner:

"The Report of the Conference on the Operation of Dominion Legislation contains the following paragraph (paragraph 125):

"We felt that our work would not be complete unless we gave some consideration to the question of the establishment of a tribunal as a means of determining differences and disputes between members of the British Commonwealth. We were impressed with the advantages which might accrue from the establishment of such a tribunal. It was clearly impossible in the time at our disposal to do more than collate various suggestions with regard first to the constitution of such a tribunal, and secondly, to the jurisdiction which it might exercise. With regard to the former, the prevailing view was that any such tribunal should take the form of an *ad hoc* body selected from standing panels nominated by the several members of the British Commonwealth. With regard to the latter, there was general agreement that the jurisdiction should be limited to justiciable issues arising between governments. We recommend that the whole subject should be further examined by all the governments."

"This matter was examined by the Conference and they found themselves able to make certain definite recommendations with regard to it

¹ *Inter-Imperial Relations Report, 1926*, part v (b)

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'Some machinery for the solution of disputes which may arise between the members of the British Commonwealth is desirable. Different methods for providing this machinery were explored and it was agreed, in order to avoid too much rigidity, not to recommend the constitution of a permanent court, but to seek a solution along the line of *ad hoc* arbitration proceedings. The Conference thought that this method might be more fruitful than any other in securing the confidence of the Commonwealth.

'The next question considered was whether arbitration proceedings should be voluntary or obligatory, in the sense that one party would be under obligation to submit thereto if the other party wished it. In the absence of general consent to an obligatory system it was decided to recommend the adoption of a voluntary system.

'It was agreed that it was advisable to go further, and to make recommendations as to the competence and the composition of an arbitral tribunal in order to facilitate resort to it, by providing for machinery whereby a tribunal could, in any given case, be brought into existence.

'As to the competence of the tribunal, no doubt was entertained that this should be limited to differences between governments. The Conference was also of opinion that the differences should only be such as are justiciable.

'As to the composition of the tribunal it was agreed

- (1) The Tribunal shall be constituted *ad hoc* in the case of each dispute to be settled.
- (2) There shall be five members, one being the Chairman, neither the Chairman nor the members of the Tribunal shall be drawn from outside the British Commonwealth of Nations.
- (3) The members, other than the Chairman, shall be selected as follows:
 - (a) One by each party to the dispute from States Members of the Commonwealth other than the parties to the dispute, being persons who hold or have held high judicial office or are distinguished jurists and whose names will carry weight throughout the Commonwealth.
 - (b) One by each party to the dispute from any part of the Commonwealth, with complete freedom of choice.
- (4) The members so chosen by each party shall select another person as Chairman of the Tribunal as to whom they shall have complete freedom of choice.
- (5) If the parties to the dispute so desire, the Tribunal shall be assisted by the admission as assessors of persons with special knowledge and experience in regard to the case to be brought before the Tribunal.

'It was thought that the expenses of the tribunal itself in any given case should be borne equally by the parties, but that each party should bear the expense of presenting its own case.

'It was felt that details as to which agreement might be necessary might be left for arrangement by the governments concerned.'

It is difficult to arrive at any definite opinion on these recommendations in the Union of South Africa, as there has been little if any discussion of the proposals. It would seem, however, that they do not create anything like a judicial procedure. Doubtless, as far as one can learn, they were the product of compromises. It is, however, suggested that they do not represent any real solution of the problem concerned. Without going into detail, it is obvious that an *ad hoc* tribunal is least likely to establish rules of law, because it partakes too much of a system of arbitration in which the chairman perhaps alone brings to the issues involved anything like a judicial mind. We can only speak theoretically with no experience to guide us, but the recommendations as a whole do not inspire confidence. They certainly do not envisage a court and judicial methods as these are commonly conceived. If that be so, they are of little import, as naturally in any inter-commonwealth dispute arbitration would be sought. The problem yet remains as to the real judicial solution of such disputes, governed by judicial methods, obligation to proceed, and respect for the court. If it is to remain the rule that inter-commonwealth disputes are not to go to the Permanent Court of International Justice, then it would seem that ordinary arbitration must govern them, as there seems at present little likelihood that an inter-commonwealth court will emerge for such purposes.¹

NOTE A

*Formal Portions of Treaty of Commerce and Navigation
between the Union of South Africa and the German Reich*

HIS Majesty the King of the United Kingdom of Great Britain, Ireland, and the British Dominions beyond the Seas, Emperor of India, for and on behalf of the Union of South Africa, and the President of the German Reich, being desirous of further facilitating and extending the commercial relations already existing between the Union of South Africa and the German Reich, have resolved to conclude a treaty of commerce and navigation for that purpose and to that end, and have appointed their plenipotentiaries, that is to say

HIS Majesty the King of the United Kingdom of Great Britain, Ireland, and the British Dominions beyond the Seas, Emperor of India

¹ Compare, however, on this subject, *British Commonwealth Relations, Proceedings of the first unofficial conference at Toronto, 11-21 September, 1933*, (Ed Toynbee, Oxford, 1934)

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The Honourable Frederick William Beyers, K C , M L A , a Member of the Executive Council and Minister of Mines and Industries for the Union of South Africa

The President of the German Reich Herr Otto Sarnow, Ministerialrat in the German Ministry of Finance,

Who, having satisfied themselves as to their respective full powers, have agreed as follows

Article 26

The present treaty, after having been approved by the competent legislative authorities of the contracting parties, shall be ratified and the ratifications shall be exchanged in Berlin as soon as possible. It shall come into force on the day of the exchange of ratifications and shall be binding for two years from that date. This treaty shall thereafter remain in force until the expiration of six months from the date on which either of the contracting parties shall have denounced it.

In witness whereof the respective plenipotentiaries have signed the present treaty and have affixed thereto their seals.

Done at Pretoria in duplicate in English, Afrikaans, and German texts, the 1st of September, 1924

(Signed) F W BEYERS

(Signed) O SARNOW

NOTE B

BILL

To provide for the approval by both Houses of Parliament of treaties and international agreements

BE IT ENACTED by the King's Most Excellent Majesty, the Senate and House of Assembly of the Union of South Africa, as follows

Approval of both Houses of Parliament required in respect of treaties and international agreements

1 (1) No treaty or international agreement entered into between the Union and any other State shall be ratified unless both Houses of Parliament have, by resolution, approved of the same.

(2) (a) If the House of Assembly passes a resolution approving of any treaty or international agreement and if the Senate rejects or fails to pass it and if the House of Assembly in the next session again passes such resolution and the Senate rejects or fails to pass it, the Governor-General may during that session convene a joint sitting of the members of the Senate and the House of Assembly. Provided, that if the Senate shall reject or fail to pass any treaty or international agreement dealing with the taxation of the Union, such joint sitting may be convened during the same session in which the Senate so rejects or fails to pass such treaty or international agreement.

(b) If the resolution is passed by a majority of the members present

at such joint sitting it shall be taken to have been duly passed by both Houses of Parliament

Short title

2 This Act may be cited as the Treaties Act, 1930.

The bill was not proceeded with, as the government of the day were of opinion that it was sufficient approval of a treaty if the house of assembly only passed a resolution approving of it

NOTE C

*Specimen form of Treaty approved by Inter-Imperial
Relations Report, 1926*

The President of the United States of America, His Majesty the King of the Belgians, His Majesty the King (*here insert His Majesty's full title*), His Majesty the King of Bulgaria, &c, &c,

Desiring

Have resolved to conclude a treaty for that purpose and to that end have appointed as their Plenipotentiaries—

His Majesty the King (*title as above*)

for Great Britain and Northern Ireland and all parts of the
British Empire which are not separate members of the
League (of Nations),

AB

for the Dominion of Canada,

CD

for the Commonwealth of Australia,

EF

for the Dominion of New Zealand,

GH

for the Union of South Africa,

IJ

for the Irish Free State,

KL

for India,

MN

who, having communicated their full powers, found in good and due form, have agreed as follows

In faith whereof the above-named Plenipotentiaries have signed the present treaty

AB CD EF GH IJ KL MN

(or, if the territory for which each Plenipotentiary signs is to be specified

(for Great Britain, &c)

AB

(for Canada)

CD

(for Australia)

EF

(for New Zealand)

GH

(for South Africa)

IJ

(for the Irish Free State)

KL

(for India)

MN

XXIX

THE MANDATED TERRITORY OF SOUTH-WEST AFRICA

1. The Nature of the Mandate

WHEN the Great War came to an end it was not possible, on account of the prevailing public feeling and the many statements as to a peace of justice, to carry out an open policy of annexation as established by war-time arrangements. The mandatory system was thus invoked as a new contrivance for ordinary annexation.

With such a basis constituting mandates, a mandatory power must necessarily have complete sovereignty over a mandated territory. As far as legislation is concerned the relationship of South-West Africa to the Union is one of complete subordination.¹ The South African courts have held that in consequence of the intimate relations existing in law between the Union and South-West Africa by virtue of the mandate, a conviction in the high court of South-West Africa in respect of a matter which is also a crime in the Union, cannot be disregarded by the other South African courts, and such a conviction cannot be treated as a foreign judgment.² In 1919, the Union parliament gave the governor-general full power to make appointments, establish offices, and issue proclamations repealing, altering, or amending the laws in force in South-West Africa.³ The territory of South-West Africa was thereby placed in the first stage of government, namely, under the complete control of an external power, and its form of government closely resembled that of crown colony government. In 1925, the territory was granted a constitution, which was a compromise between the constitution of the senate of the Union and of the provincial councils.⁴ The members of the legislative assembly, consisting of six members appointed by the administrator and twelve directly chosen by the electorate,

¹ See the Union Nationality and Flags Act, 1927, which includes South-West Africa as a portion of the Union.

² *Cape Law Society v. van Aardt*, [1926] C.P.D. 312.

³ Treaty of Peace and South West Africa Mandate Act, No. 49 of 1919.

⁴ South-West Africa Constitution Act, No. 42 of 1925.

must take the oath of allegiance to the King as holding on behalf of the government of the Union the mandate for the territory of South-West Africa¹ The Union parliament retains its full power to make laws for the territory as an integral portion of the Union² The appellate division of the supreme court of South Africa is the court of appeal from the high court of South-West Africa in the same circumstances and subject to the same conditions as it is the court of appeal from a provincial division of the supreme court of South Africa³ The Union considers itself the sovereign of the territory of South-West Africa and looks on the territory itself as an integral portion of the Union.

By Article 119 of the Treaty of Versailles Germany renounced in favour of the Principal Allied and Associated Powers—that is in favour of the United States, the British Empire, France, Italy, and Japan—all rights and titles over her overseas possessions, in order that all necessary steps might be taken for their administration on a mandatory basis the general principles of which were enumerated by Article 22 of the Covenant of the League of Nations.

Article 22 lays down certain principles applicable to territories inhabited by peoples not as yet able to stand by themselves, who have ceased to be under the sovereignty of the states which formerly governed them. Their well-being and development were to form a sacred trust of civilization. Practical effect is given to these principles by entrusting the tutelage of such peoples to advanced nations who are in a position to undertake the responsibility such tutelage to be exercised by them as mandatories on behalf of the League. There are territories, Article 22 provides such as South-West Africa, which owing to the sparseness of their population or their geographical contiguity to the territory of the mandatory and other circumstances can be best administered under the laws of the mandatory as integral portions of its territory subject to the safeguards above mentioned. The safeguards referred to relate to the prohibition of the slave trade, the traffic in arms and liquor and the training of natives for other than defensive and public purposes. The degree of authority, control or ad-

¹ South-West Africa Constitution Act, No. 42 of 1925, section 20.

² *Ibid.* section 44 and Act No. 49 of 1919.

³ Section 3 of Act No. 12 of 1920. See *Rex v. Offin* A.D., September 1934.

ministration to be exercised by the mandatory is to be defined by the council, and the mandatory is to make an annual report to the council in reference to the territory committed to its charge', which report is to be examined by a permanent commission constituted to advise the council on all matters relating to the observance of the mandate

The mandate for South-West Africa is as follows

THE MANDATE FOR SOUTH-WEST AFRICA

The Council of the League of Nations,

WHEREAS by Article 119 of the Treaty of Peace with Germany, signed at Versailles on 28th June, 1919, Germany renounced in favour of the Principal Allied and Associated Powers all her rights over her oversea possessions including therein German South-West Africa, and

WHEREAS the Principal Allied and Associated Powers agreed that, in accordance with Article 22 Part I (Covenant of the League of Nations) of the said Treaty, a Mandate should be conferred upon His Britannic Majesty to be exercised on his behalf by the Government of the Union of South Africa to administer the Territory aforementioned and have proposed that the Mandate should be formulated in the following terms, and

WHEREAS His Britannic Majesty, for and on behalf of the Government of the Union of South Africa has agreed to accept the Mandate in respect of the said territory and has undertaken to exercise it on behalf of the League of Nations in accordance with the following provisions, and

WHEREAS, by the aforementioned Article 22, paragraph 8, it is provided that the degree of authority, control, or administration to be exercised by the Mandatory, not having been previously agreed upon by the members of the League, shall be explicitly defined by the Council of the League of Nations,

Confirming the said Mandate, defines its terms as follows

Article 1

The territory over which a Mandate is conferred upon His Britannic Majesty for and on behalf of the Government of the Union of South Africa (hereinafter called the Mandatory) comprises the territory which formerly constituted the German Protectorate of South-West Africa

Article 2

The Mandatory shall have full power of administration and legislation over the territory subject to the present Mandate as an integral portion of the Union of South Africa, and may apply the laws of the Union of South Africa to the territory, subject to such local modifications as circumstances may require

The Mandatory shall promote to the utmost the material and moral

well being and the social progress of the inhabitants of the territory, subject to the present Mandate

Article 3

The Mandatory shall see that the slave trade is prohibited, and that no forced labour is permitted, except for essential public works and services, and then only for adequate remuneration

The Mandatory shall also see that the traffic in arms and ammunition is controlled in accordance with principles analogous to those laid down in the Convention relating to the control of the arms traffic, signed on 10th September, 1919, or in any convention amending the same

The supply of intoxicating spirits and beverages to the natives shall be prohibited.

Article 4

The military training of the natives, otherwise than for purposes of internal police and the local defence of the territory, shall be prohibited. Furthermore, no military or naval bases shall be established or fortifications erected in the territory

Article 5

Subject to the provisions of any local law for the maintenance of public order and public morals the Mandatory shall ensure in the territory freedom of conscience and the free exercise of all forms of worship, and shall allow all missionaries, nationals of any state, members of the League of Nations, to enter into, travel, and reside in the territory for the purpose of prosecuting their calling

Article 6

The Mandatory shall make to the Council of the League of Nations an annual report to the satisfaction of the Council, containing full information with regard to the territory, and indicating the measures taken to carry out the obligations assumed under Articles 2, 3, 4, and 5

Article 7

The consent of the Council of the League of Nations is required for any modifications of the terms of the present Mandate

The Mandatory agrees that, if any dispute whatever should arise between the Mandatory and another Member of the League of Nations relating to the interpretation of the application of the provisions of the Mandate, such dispute, if it cannot be settled by negotiation, shall be submitted to the Permanent Court of International Justice, provided for by Article 14 of the Covenant of the League of Nations

The present Declaration shall be deposited in the archives of the League of Nations. Certified copies shall be forwarded by the Secretary-General of the League of Nations to all Powers Signatories of the Treaty of Peace with Germany

Made at Geneva, the 17th day of December, 1920

The introduction of a system of mandates by the League of Nations is not quite a new notion. There is, for instance, the

case of the Belgian Congo and the practice of granting corporate bodies a charter, conferring on them authority to govern and administer certain territories in Asia, Africa, or elsewhere, is well known. There are, no doubt, important differences between protectorates and colonies between both of these and a territory mandated by the Council of the League. But between all there is this essential agreement: the grant or charter to the corporate body, the commission to the governor, like the mandate, is but a written instrument conferring authority to execute powers of government and administration in the territory to which it relates, and it carries with it and creates rights and obligations.

When, by the Treaty of Versailles, Germany renounced all right to the territory known as South-West Africa, German sovereignty disappeared from that territory. Some other sovereignty must have replaced the German sovereignty. This sovereignty could be only the allied and associated powers of the treaty of Versailles, or the League of Nations, or the Union of South Africa.

The allied and associated powers do not constitute a state or a sovereign power. They are merely certain sovereign states which have mutually agreed to recognize certain political conditions created by the Treaty of Versailles.

Nor is the League of Nations a state, but it nevertheless has *a persona and rights and duties*. Whether these rights include allegiance and the right of sovereignty need not be considered, because, so far as the government of the mandated territory of South-West Africa is concerned, the League can neither prescribe nor dictate to the mandatory in regard to the framing, making, and repealing of the laws which are to apply to the territory. It cannot give directions to the mandatory in respect of the establishment of judicial tribunals and the administration of justice, nor in respect of the appointment of officials, the raising and spending of revenue, and the like. Subject therefore, to the restrictions imposed, the mandatory has full right and power over the mandated territory.

The term 'mandatory power' may seem to imply that the mandatory acts as the agent of the allied and associated powers or of the League of Nations, but neither by the Treaty of Versailles nor by the mandate of the League of Nations has the Union of South Africa been appointed as a mere agent. The allied

and associated powers, through the League of Nations, have, by treaty between themselves, entrusted the complete government of South-West Africa to His Britannic Majesty through the Union of South Africa. The Union of South Africa determines by what laws South-West Africa is to be governed and how these laws are to be enforced. Once having elected to hand over South-West Africa to the Union, the League of Nations has no power to dictate how that territory is to be governed. The fact that the mandatory is required to report to the League what its political actions are in the mandated territory, makes no difference. It is a treaty obligation, which does not negative the Union's rights and powers. The full power of legislation and administration over the territory is therefore vested in the Union of South Africa and there is no other power which can enforce law there. Even the United Kingdom stands in the same relation to the Union in this matter as any other power, for she was one of the powers that agreed that the Union shall be the mandatory power. The Union, therefore, has sovereign power over the territory, and it has power to make laws and enforce them over the whole sphere of government.¹ This is the official view taken by the government of the Union, though it recognizes that it must administer the territory in the spirit in which the mandate was granted and endeavour by its administration to retain the confidence of the Council of the League of Nations.

The administration of the mandate is a function of the Union prime minister's department, and all official communications between the Union and South-West Africa go through that department to the administrator.

2 The Constitution of South-West Africa

(1) *Nature of the Constitution* Under Union Act No 49 of 1919, the exercise of the mandate was vested in the governor-

¹ *Rex v. Christian*, [1924] A.D. 101. The view stated in the text is not taken by E. van Maanen Helmer in *The Mandates System* (London, 1929), Chapter III, but that author ignores *Christian's Case* on which the text is based, and on that case also does the Union government take its stand regarding the question of sovereignty over the mandated territory. See also N. Bentwich, *The Mandates System* (London, 1930), p. 126, Gey van Pittius, *Nationality within the British Commonwealth of Nations* (London, 1930), pp. 180 ff. The Union, however, has modified its claim in some degree to meet League criticism. See Koith's *Constitutional Law of the British Dominions*, pp. 370 ff., 452 ff. See *Rex v. Offen*, A.D. September, 1934.

general of the Union, who, by Union Proclamation No 1 of 1921, delegated his powers to the administrator appointed by the Union government. In 1925, by Act No 42 of the Union parliament, a constitution was granted to South-West Africa. Under this constitution the territory received an executive committee similar to the executive committee of a province of the Union, an advisory council, consisting of the administrator, the four members of the executive committee (who are elected by the legislative assembly) and three appointed members, and a legislative assembly, one-third of the members of which is appointed by the administrator.

It must be carefully noted that the constitution does not provide a two-chamber legislature. The advisory council is not a legislative body, it merely advises the administrator, and has no executive functions or powers. The legislature is the legislative assembly and the administrator.

Where the assembly differs from the provincial councils of the Union is that the latter have been granted specific and positive powers, whereas the assembly of South-West Africa has been granted power to make laws for the territory 'subject to the restrictions, reservations and exceptions contained in this Act'. The restrictions are to be found in sections 26 and 27 of the act, and are dealt with hereafter. The Union parliament has full power of legislation over South-West Africa, and subject to the enactments of the Union parliament, the governor-general has the power of legislating for the territory by proclamation, and, in that manner, may override and nullify all the legislation of the territory's legislative assembly and administrator.¹

(2)² *Executive Committee* This body consists of five members, one of whom is the administrator (who, also, is chairman). The remaining four persons are to be chosen by the assembly from among its own members or otherwise at its first meeting after any general election. The election of members, whenever such an election is contested, is held according to the principle of proportional representation, each voter having one transferable vote. All members other than the administrator hold office for

¹ Act No 49 of 1919, section 44 of Act No 42 of 1925

² The rest of this chapter is based on the South West Africa Constitution Act, No 42 of 1925, and Chapter XXVII of the *Official Year Book of the Union*.

the duration of the assembly and until their successors are chosen. The administrator in executive committee carries on the administration of those matters in respect of which it is competent for the assembly to make ordinances. All matters are determined by a majority of votes of the members present, and in case of equality the administrator has a casting vote. Three members of the committee (of whom the administrator or the person appointed by the governor-general to act as administrator or to be the deputy-administrator is one) constitute a quorum at any meeting of the committee. The remuneration of the members of the committee, other than the administrator, is determined by the governor-general-in-council. The Constitution Act, as amended by Act No. 38 of 1931, provides for the vacation of their seats by ordinary members of the executive. If a member ceases to be qualified for election to the assembly, or resigns, or if, being a member of the assembly when chosen for the executive committee, he vacates his seat in the assembly, or if he is absent from four consecutive meetings of the executive without the administrator's consent, or if he vacates his seat on the advisory council, he ceases to be a member of the executive.

(3) *Advisory Council* This body consists of eight members, namely, the administrator (who is chairman), the other members of the executive committee, and three members appointed by the administrator, subject to the approval of the governor-general. One member so appointed by the administrator must be an official selected mainly on the ground of his thorough acquaintance, by reason of his official experience or otherwise with the reasonable wants and wishes of the non-European races in the territory.¹

The council meets at such times and places as may from time to time be determined by the administrator, and four members form a quorum. The duties and functions of the council are to advise the administrator in regard to (a) those matters in respect of which the assembly is not competent to make ordinances, including matters of general policy and administration apart from routine matters of administration, (b) his assent to an ordinance passed by the assembly or its reservation for the signification of the pleasure of the governor-general, and (c) any

¹ Cf. section 24 of the South Africa Act

other matter upon which its advice may be requested by the administrator. Members of the council hold their seats thereon for the duration of the assembly, and continue to hold their seats until after a general election of the assembly a new council can be constituted. Every member of the council, except the administrator, receives such remuneration as the governor-general prescribes.

(4) *Legislative Assembly.* The assembly consists of eighteen members, twelve of whom are elected by the voters of the territory and six appointed by the administrator, subject to the approval of the governor-general. The duration of the assembly is three years from the date of its first meeting after each general election.

Any person who is for the time being enrolled as a voter and who is not subject to the disqualifications prescribed by the act, is eligible for election or for appointment as a nominated member. A person is disqualified who (a) has at any time been convicted of a crime or offence for which he has been sentenced to death or to imprisonment without the option of a fine unless he has received a grant of amnesty or a free pardon, or unless the imprisonment has expired at least five years before the date of nomination or election (b) is an unrehabilitated insolvent; (c) has been declared by a competent court to be of unsound mind, (d) holds any office of profit under the administration of the territory or of the government of the Union (e) ceases for any other reason to be qualified to be enrolled as a voter.

There must be a session of the assembly at Windhoek at least once in every financial year, the interval between the last sitting in one session and the first sitting in the next session being not more than twelve months. Every member of the assembly must take an oath or make an affirmation of allegiance. The assembly must choose a chairman who has no deliberative vote, but only a casting vote in the event of equality of votes, on any question to be determined by the assembly. The administrator or any member of the executive committee who is not a member of the assembly has a right to take part in the proceedings of the assembly, but may not vote. The presence of nine members of the assembly is necessary to constitute the sitting thereof. The official languages are English and Dutch including Afrikaans, but any member may address the assembly in the German language.

The remuneration of members of the assembly is fixed by the governor-general-in-council

(5) *Reservation of Legislative Powers* The assembly has power to legislate by ordinance upon all matters except those which have been expressly reserved. The reservations are contained in sections 26, 27, and 28 of the act. These sections are important enough to be given *verbatim*

26 Except with the consent of the Governor-General previously obtained on any particular occasion and communicated to the Assembly by message from the Administrator, it shall not be competent for the Assembly to make an ordinance in relation to any subject falling within the following classes of matters, that is to say—

- (a) native affairs or any matters especially affecting natives including the imposition of taxation upon the persons, land, habitations, or earnings of natives. Whenever any Ordinance of the Assembly imposes taxation upon the persons, lands, habitations, or incomes or earnings generally, natives and their lands, habitations, and earnings shall be exempt from its provisions,
- (b) mines, minerals, mineral oils, and precious stones or the moneys derivable therefrom, or payable to the Administration in respect of licences for prospecting or winning the same or as share of the produce thereof or any taxation in connexion therewith,
- (c) the acquisition, construction, management, regulation, control, and working of railways and harbours in the territory and the organization, discipline, and conditions of employment of and the payment of pensions, retiring allowances, and financial benefits to persons in the employment of the Railways and Harbours Administration,
- (d) the organization of, and discipline and conditions of employment of persons in the public service who are serving in the Territory, and the payment of pensions, retiring allowances, and financial benefits to such persons,
- (e) the constitution and jurisdiction of courts of justice, whether superior or inferior, and the practice or procedure to be observed therein,
- (f) the administration, management, and working of the postal, telephone, and telegraph services,
- (g) the establishment or control of any military organization in the territory,
- (h) the movements or operations of any unit of the South African Defence Forces within the territory,
- (i) the entry of immigrants into the territory or of other persons,

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- (j) tariffs of customs and excise duties and the control and management of customs and excise,
 - (k) currency and banking and the control of banking institutions
- 27 (1) Except with the consent of the Governor-General previously obtained on any particular occasion and communicated to the Assembly by message from the Administrator, the Assembly shall not until the expiration of a period of at least three years from the date of the first sitting of the first session of the Assembly, be competent to make Ordinances in relation to any of the following subject matters
- (a) the establishment or control of any police force in the territory,
 - (b) civil aviation,
 - (c) primary or secondary education in schools supported or aided from the revenues of the territory,
 - (d) the establishment, management, or control of any land or agricultural bank in the territory,
 - (e) the allotment, sale, lease, or disposal of Government lands in the territory
- (2) At any time after the expiry of the said period of three years, if power has not been so conferred by the Governor-General upon the Assembly to make Ordinances in relation to any particular subject matter specified in sub section (1), then the Governor-General may, on a recommendation made by the Assembly and embodied in a resolution for which it is certified by the Chairman thereof that not less than two thirds of the members thereof voted, declare by proclamation in the *Gazette* and in the *Official Gazette* of the territory, the full competency of the Assembly to make Ordinances in respect of that subject-matter
- (3) Save as is specially provided in this section, the provisions thereof shall remain in operation after the said period of three years
- 28 It shall not be lawful for the Assembly—
- (a) to originate or pass any Ordinance, Vote, or Resolution which has the effect of appropriating any part of the Territory Revenue Fund formed as hereinafter provided, or
 - (b) to originate or pass any Vote, Ordinance, or Resolution imposing any tax, duty, due, or charge or burden on the people, unless such Ordinance, Vote, or Resolution has first been recommended to the Assembly by a written message of the Administrator during the session in which it is proposed

Every ordinance passed by the assembly must be presented to the administrator for his assent. The administrator may then (a) refer the ordinance back to the assembly, with such amendments as he may suggest for its consideration, (b) assent to

the ordinance, or (c) reserve the ordinance for the signification of the governor-general's pleasure. In the last mentioned event the administrator must transmit the ordinance, together with such explanatory observations as may be necessary, to the governor-general, who may declare within six months after the receipt thereof by him, that he allows or disallows the ordinance or reserves it for further consideration. An ordinance so reserved has no force or effect unless and until the governor-general, within a further period of six months from the date of his reservation declares that he does not exercise his power of disallowance. Copies of all ordinances which have been reserved for further consideration by the governor-general or disallowed and the reasons for reservation or disallowance must be laid upon the tables of both houses of parliament. Unless a particular date is fixed, every ordinance comes into operation as from the date of its first publication in the *Gazette*.

Although not competent to make ordinances on the matters reserved by sections 26 and 27 of the act, the assembly may by resolution recommend to the governor-general or to the administrator the issue of a proclamation enacting a law or amending or repealing any law relating to such matters.

As regards finance, the act provides for the formation of a fund known as the Territory Revenue Fund, which may be drawn upon only under the authority of an appropriation ordinance passed by the assembly and in pursuance of a warrant under the hand of the administrator directed to an officer serving under the administration of the territory, provided that until such appropriation has been made and for a period not exceeding two months after the end of a financial year, the administrator may withdraw from the fund moneys to meet expenditure on services, in respect of which there has been an appropriation up to the end of that financial year. The administrator may, by special warrant under his hand, authorize the issue of moneys from the Territory Revenue Fund (a) to defray unforeseen expenditure of a special character, which is not provided for in any Appropriation Ordinance or in an Appropriation Proclamation issued under section thirty-eight of the act, as amended by Act No. 38 of 1931, and which cannot without serious injury to the public interest be postponed until adequate provision can be made therefor by the Assembly, or (b) to meet

an excess on any head of expenditure in an Appropriation Ordinance or Appropriation Proclamation. The total sum which the administrator may authorize must not at any time exceed £25,000, and the relative expenditure must be submitted to the assembly for appropriation not later than its next ensuing session.

The annual estimates of expenditure for the territory are prepared by the administrator in consultation with the advisory council, and thereafter submitted to the assembly. The act provides that

38 If the Assembly rejects or fails to pass—

- (a) an Ordinance appropriating in any financial year money from the Territory Revenue Fund sufficient, in the opinion of the Administrator, to pay during that year the salaries and allowances of the Administrator, of the Judge of the High Court, and of officers serving under the Administration, and to carry on the public Administration of the Territory, and any other services which the Administrator certifies to be necessary in the interests of the Territory or to meet any liabilities which have been incurred in or in respect of the Territory or of any railway or harbour works therein, or
- (b) an Ordinance imposing any tax to raise in any year revenue which the Administrator certifies to be, with other revenues, necessary for the purposes described in paragraph (a),

or, though passing the Ordinance, passes it with amendments to which the Administrator personally is unable to agree, regard being had by him to the purposes aforesaid, the Administrator may transmit a full report in relation to the whole matter to the Governor-General, and the Governor-General may, after consideration of that report and of any further report or recommendation on the matter, passed and transmitted by the Assembly by message, make a law by proclamation under the powers reserved to the Governor-General under this Act, providing for such appropriation or such tax (as the case may be) as may, in the opinion of the Governor-General, be sufficient for the purposes mentioned in paragraph (a) or paragraph (b) of this section (as the case may be).

Section 44 of the act contains the following important reservation

- 44 (1) Nothing in this Act contained shall be construed as in any manner abolishing, diminishing, or derogating from those full powers of administration and legislation over the Territory as an integral portion of the Union which are conferred by the mandate hereinbefore recited and have been confirmed by the

Treaty of Peace and South-West Africa Mandate Act, 1919 (Act No 49 of 1919), or as modifying any provision of that Act. Those full powers of administration and legislation are hereby expressly reserved to the Governor-General and may be exercised or delegated by him in accordance with that Act to the intent that by proclamations new laws may be made for the Territory, existing proclamations may be repealed, amended, or modified, or any Ordinance made by the Assembly and in force under this Act may be repealed, amended, or modified. Every such proclamation of the Governor-General or of the Administrator shall, before it has the force of law in the Territory, be published in the *Official Gazette* thereof.

(2) A Proclamation of the Administrator or an Ordinance made by the Assembly shall, though promulgated, have effect in and for the Territory so long and as far only as it is not repugnant to or inconsistent with a Proclamation of the Governor-General, or an Act of the Union Parliament, applicable to the Territory.

Section 45 of the act provides as follows

- 45 After the expiration of a period of three years from the date of the first sitting of the first session of the Assembly, the Governor-General may, on a recommendation made by the Assembly and embodied in a resolution for which it is certified by the Chairman thereof that not less than two thirds of the members thereof voted, repeal, or alter any provision of this Act, except sections *twenty six* and *forty four* and this section, provided that the Governor-General shall not act upon such a recommendation, unless the proposals contained therein have lain upon the Tables of both Houses of Parliament for a period of one month and during that period neither House has expressed its disapproval of the proposals.

(6) *Franchise.* Every European male person who (a) has been resident in the territory for twelve months prior to the date fixed for the commencement of any provisional list of voters, and (b) is twenty-one years of age or upwards at that date, and (c) is a British subject, as well as every male person who under section 2 of Act No 30 of 1924, became a British subject naturalized under Act No 4 of 1910, shall be entitled to be registered as a voter, unless in either case he is disentitled for any reason mentioned in paragraph 2 of the schedule to the act. But no person shall be entitled to be registered on more than one list or, if registered on more than one list, to vote in more than one electoral division. No person shall be entitled to be registered if he has been (a) convicted at any time of murder unless he has obtained a free pardon therefore, (b) convicted at

any time of any offence and sentenced to imprisonment without the option of a fine, which imprisonment has not expired at least three years before the date of the commencement of registration, unless he has obtained a free pardon for that offence

(7) *District Administration* The territory, exclusive of Ovamboland, is divided into seventeen magisterial districts, wherein the various magistrates exercise certain administrative as well as judicial functions. They are charged with the functions of receivers of revenue, and excepting in the districts of Windhoek and Luderitz, with the control of district native affairs

(8) *Local Government* Town and district councils were established in 1910 by a decree of the German imperial chancellor. The district councils lapsed on the occupation of the country by the Union forces, but the town councils were allowed to continue in office until the end of 1918, when their powers were taken away and exercised by the magistrates. In July 1920 a proclamation re-establishing municipal councils was issued. Under this proclamation councillors were nominated by the administrator for one year and certain powers of intervention were reserved. In every case, half the number of councillors appointed were Germans. In other respects the proclamation follows Union lines, and a rating system is established in lieu of the municipal income tax, which formed the chief feature of municipal finance under the German régime. A municipal amendment proclamation was promulgated in 1922, providing for the election of half of the members of municipal councils. In January 1925, a proclamation (No. 2 of 1925) was issued, under which it is competent for the administrator to establish a village management board in any village not being a municipality, and in any other area of residence of any community. Such board, of which the magistrate of the district is *ex-officio* chairman and treasurer, consists of not fewer than two and not more than four members appointed by the administrator from amongst the residents in the area for which it is constituted, and possesses certain powers of local government defined by the proclamation.

(9) *Financial Organization* The territory under the German government had not reached the independent stage of British self-governing colonies. The landesrath was merely an advisory body, and all fiscal edicts were issued by the governor. The estimates of revenue and expenditure prepared in the territory

required the sanction of the imperial reichstag. The supervision of the imperial government was held to be justified on the grounds that imperial grants were made annually to the protectorate although these grants merely approximated to the cost of the military establishment. The imperial government guaranteed the loans issued for the purpose of building railways. The control of all revenue and expenditure, including that of the railways, but excluding post and telegraph revenue, was exercised by the 'finanz referent' under the governor. The post and telegraph department was a branch of the imperial department and quite distinct from the protectorate administration. Certain revenues were assigned by the governor to municipal and district councils. These included dog tax, liquor, bar, hotel and trade licences. The local authorities were also empowered to raise funds for local purposes by means of an income tax.

After the occupation by the Union forces changes were made to bring the administration into line with that of the Union, but no fundamental changes were made in taxation laws. The administration was financed by grants from the Union war loan vote to March 1920. Since that date it has been financed from revenue raised in the territory. The railways were taken over, and financed by the railways and harbours department of the Union, but the German tariff of charges was retained. Union Act No. 20 of 1922 enacts that the government railways and harbours in the territory as they existed on January 11, 1920, should become from that date vested in the railway administration of the Union as part of the Union system. The loss arising from the working of the railways from August 1, 1915, to March 31, 1922, was made chargeable to the Union railways and harbours capital account, while future receipts and expenditure were to be charged to the Union railways and harbours fund. The territory was thus relieved of the burden of financing the railways and maintaining the high rates levied under the German régime. Considerable reductions have been made in the through passenger fares to the Union and in goods traffic rates. The municipal councils continued to exist, and the German practice of assigned revenues was followed by the Union administration. The district councils were abolished.

Generally the revenues payable under the German system have been collected and utilized in part payment of the cost of

administration The customs revenues have been collected and retained in the Union, but from April 1, 1919, these were credited to the territory, and the Union treasury was authorized to exercise financial control over the territory

The provisions of the Union Exchequer and Audit Act, 1911, were applied to South-West Africa from April 1, 1921 The financial regulations framed under the act were also applied as far as they could be made applicable, and financial regulations to meet local requirements were also issued An ordinance to regulate the receipt, custody and issue of public moneys and to provide for the audit of accounts thereof was passed by the legislative assembly for the territory at its first session and brought into operation in September 1926

(10) *Naturalization* The South-West Africa Naturalization of Aliens Act, No 30 of 1924, passed by the Union parliament, made the Naturalization of Aliens Act, No 4 of 1910, effective in the territory, which for the purposes of the act was considered to form part of the Union Act No 30 of 1924 provided that every adult European who being a subject of any of the late enemy powers, was on January 1 1924, or at any time thereafter or at the commencement of the act domiciled in the territory should at the expiration of six months after the latter date, be deemed to become a naturalized British subject unless within that period he signed a declaration that he was not desirous of being naturalized The Naturalization of Aliens Act, No 4 of 1910, was repealed by the British Nationality in the Union and Naturalization and Status of Aliens Act, No 18 of 1926 The latter act is in force also in South-West Africa, the expression *'the Union'* being defined by the act to include South-West Africa In the same way the Union Nationality and Flags Act, No 40 of 1927, is in force in South-West Africa ¹

3. The Administration of Justice

(1) *Legal System* Article 2 of the mandate, under which the territory is administered by the government of the Union of South Africa, authorized the mandatory to apply the laws of the Union to the territory, subject to such local modifications as circumstances might require By the Administration of Justice Proclamation, 1919, the Roman-Dutch Law as existing and

¹ This act also includes South West Africa as part of the Union

applied in the province of the Cape of Good Hope on January 1, 1920, was introduced as the common law of the territory, and all existing laws in conflict therewith were to the extent of such conflict repealed, except that proclamations issued during the military occupation and still in force continued to remain in force. Rights already accrued and liabilities already incurred were preserved. The effect of this proclamation was that Roman-Dutch law has been introduced into South-West Africa together with all the modifications which it had undergone in the Cape Province by desuetude, custom, judicial decision, and statute, whether abrogating or enacting. The statutory law of the Cape Province relating to the execution of wills is therefore the law of the territory, and the Cape law of prescription as contained in Act No. 6 of 1861 is also part of the law of the territory. Much of the statute law of the Union has been specifically extended to the territory by Union Act, proclamation, or ordinance, subject to amendments required by local circumstances. Amongst such statutes may be mentioned those relating to the interpretation of laws, solemnization of marriages, insolvency, administration of estates, deeds registration, companies, bills of exchange, stamp duties, profiteering, prisons, public health, rents, pounds, liquor licensing, inquests, concealment of birth, protection of girls and mentally defective women, prevention of cruelty to animals, stock theft, diseases of stock, vagrancy, masters and servants, police offences, preservation of game, railways and harbours, and usury. Certain portions of the German law (for example, that portion relating to mining) have been kept alive by express provisions in proclamations issued by the administrator. A few acts of parliament of the Union apply directly to the territory.¹

The law in force in South-West Africa includes, therefore, (i) the Roman-Dutch Law, with the modifications which it has undergone in the Cape province as explained above, (ii) certain Union acts of parliament which apply directly to the territory, (iii) proclamations issued by the governor-general or the administrator, some of which specially introduce Union statutes, (iv) ordinances by the legislative assembly, (v) those portions of the German law which have been expressly preserved, and (vi)

¹ e.g. Acts Nos. 24 and 29 of 1922, No. 27 of 1923, No. 30 of 1924, No. 42 of 1925, Nos. 13, 18, and 22 of 1926, Nos. 22 and 40 of 1927, No. 27 of 1928.

those fragments of the German law which have survived by reason of the fact that they do not conflict with any of the laws already mentioned

(2) *Superior Courts.* On January 1, 1920, military courts were abolished and civil courts established. A superior court entitled the High Court of South-West Africa was created, consisting of a single judge. It has its seat at Windhoek, but may be held at other places appointed by the judge. In civil cases the judge sits alone, but in criminal cases the court is composed of the judge, who is president, and two other members, who must be either advocates or magistrates. There is no jury. Questions of law are decided by the judge, except questions of law governing punishment, which are decided by a majority of the members of the court. Questions of fact are determined by a majority of members which also fixes the sentence to be passed. An officer styled the Attorney-General has been appointed, who, in regard to the prosecution of crimes and offences, possesses the powers of an attorney-general in a province of the Union under section 129 of the South Africa Act. There are also a registrar and master of the high court, a registrar of deeds, and a sheriff.

By Proclamation No. 38 of 1920, circuit courts were established with a constitution similar to that of the high court. The territory is divided from time to time into two or more circuit districts in each of which a circuit court is held at least twice a year.

An appeal from the high court or from a circuit court, whether in exercise of civil or criminal jurisdiction, lies to the appellate division of the supreme court of South Africa under the same circumstances and subject to the same conditions as an appeal lies from a provincial division of the supreme court of South Africa.¹ In cases of an appeal from orders or judgments of the high court or a circuit court upon application by way of motion or petition, or on summons for provisional sentence, or judgments as to costs only, or on civil or criminal appeals from a magistrate's court, special leave to appeal must first be obtained from the appellate division.

The law of procedure and evidence in the high court and in circuit courts in civil cases is that of the Cape provincial division.

¹ Section 3 of Act No. 12 of 1920.

of the supreme court of South Africa, and in criminal cases that prescribed by the Union Criminal Procedure and Evidence Act, 1917, which has been extended and applied to the territory with certain amendments. Rules for the conduct of proceedings in the high court and circuit courts are framed by the judge of the high court subject to the approval of the administrator.

(3) *Inferior Courts.* Magistrates' courts were also established on January 1, 1920, and have the same jurisdiction and observe the same procedure as the magistrates' courts in the Union. An appeal lies to the high court of South-West Africa from a judgment of a magistrate's court in the same circumstances and on like terms and conditions as an appeal may be had to a provincial division of the supreme court of South Africa from a magistrate's court in the Union. All sentences imposed by a magistrate's court of whipping or of fines exceeding £5 or of imprisonment exceeding one month are reviewed by the high court. The country is divided into eighteen magisterial districts each of which is the area of jurisdiction of a magistrate's court. Periodical courts are also held by magistrates at other places at regular intervals. Any magistrate's court may be held at any place or places within the local limits within which it has jurisdiction, appointed by the magistrate. There is no Rules Board as in the Union, but by Proclamation No 1 of 1920 the judge of the high court has been empowered to frame new rules and to repeal and amend existing rules of magistrates' courts subject to the approval of the administrator.

Special justices of the peace have been appointed under Proclamation No 25 of 1921. They have jurisdiction in criminal cases to impose a sentence of a fine not exceeding £10 and imprisonment not exceeding one month. Except in the case of juvenile offenders, special justices of the peace may not impose a sentence of whipping. All sentences imposed by special justices of the peace are reviewed by the magistrates of the respective districts. Special justices of the peace have no jurisdiction in civil cases.

The power to remit sentences is vested in the administrator, except as regards death sentences, in which case the prerogative of mercy may be exercised by the governor-general-in-council of the Union. The languages which may be used in the courts

are English and Dutch including Afrikaans, but German may be used in addressing the high court. In criminal cases interpreters are provided in all languages free of charge, and in the high court interpreters in English, Dutch, and German are provided free in civil cases also.

By Act No. 24 of 1922 of the Union parliament provision was made for the reciprocal service and enforcement in the Union and the territory of civil and criminal summonses, orders, warrants, and other processes of magistrates' courts and superior courts. Provision was also made for the removal of proceedings, whether criminal or civil, from a superior court in the Union to the high court of South West-Africa, and vice versa. The same act provided that for all judicial purposes the port and settlement of Walvis Bay should be regarded as a part of the territory of South-West Africa. That port and settlement has been included in the magisterial district of Swakopmund.

By Act No. 13 of 1926 of the Union parliament, provision was made for the arrest and surrender of fugitive offenders from British colonies and protectorates in Africa south of the Equator, in which the governor-general by proclamation declares that there exists a law providing reciprocally for the arrest and surrender of fugitive offenders from South-West Africa. The same Act provided for the application to South-West Africa of the Imperial Extradition Acts, 1870 to 1906, as regards the extradition of fugitive criminals between South-West Africa and any foreign State between the government of which and His Majesty an extradition treaty has been entered into, if the treaty provides for its extension to South-West Africa. By Proclamation No. 26 of 1920, provision was made to enforce the attendance before the courts of inhabitants of certain adjoining territories resident or being within South-West Africa and required as witnesses in civil or criminal proceedings.

(4) *Admission of Legal Practitioners.* Provision has been made for the admission of advocates, attorneys, notaries public, and conveyancers. The high court may admit to practise as an advocate or as an attorney any person entitled to practise or to be admitted to practise as an advocate or as an attorney, as the case may be, in any division of the supreme court of South Africa. No person may be admitted to practise both as an advocate and as an attorney. Certain practitioners of the former

German courts of South-West Africa may also be admitted to practise as advocates or as attorneys. The high court may also admit as an attorney any person who, after having passed the matriculation examination of any university in the Union of South Africa or an equivalent examination, has served under articles for three years, and has passed the examination in law and jurisprudence of the university of the Cape of Good Hope or an equivalent examination of another South African university, and who has also passed an examination in practice by three examiners appointed by the court, a person so admitted may also appear in any proceedings before a magistrate's court. The high court exercises jurisdiction in respect of advocates, attorneys, notaries public, and conveyancers, similar to that exercised by the Cape provincial division of the supreme court in respect of practitioners in the Cape province. By Proclamation No. 32 of 1921, the Law Society of South-West Africa was established.

(5) *The Government of the Natives.* The main provisions of the native law, apart from those dealing with masters and servants, which is practically the law as it exists in the Cape Province, in areas which have been opened up for settlement for Europeans, are embodied in the following enactments:

(a) *The Native Administration Proclamation, 1922*, which supercedes many of the old German laws, and constitutes the principal pass law, regulating as it does the movements of natives within the territory and of those desirous of leaving or of entering it. This proclamation also provides for the exemption of natives under certain conditions from the carrying of passes, and contains provisions for the establishment of reserves and the control of natives therein and on farms. The pass laws are not applicable in purely native areas, such as Ovamboland and Rehoboth.

(b) *The Vagrancy Proclamation*, which provides for the suppression of idleness and trespass. Natives are allowed to select their own masters, and strict instructions have been issued against forcing natives to take service with particular masters against their will. When a native is dilatory in finding employment an employer can be indicated, and if he refuses to engage himself, he can be prosecuted under the vagrancy laws. Before sentencing natives under the vagrancy laws, magistrates are required to give the offender an opportunity of taking employ-

ment in preference to undergoing imprisonment. Certificates of exemption from labour may be granted to natives having visible means of support, such as possession of stock. Persons unfitted for labour for reasons of old age or infirmity are *ipso facto* exempted persons.

(c) *The Municipal Proclamation*, which empowers municipalities to make regulations, subject to government sanction, for the control and management of native locations within their respective areas.

(d) *The Natives' Stock Brands Proclamation*, which provides for the branding and registration of their large stock, frees natives from the liability of having to purchase branding irons. Under this proclamation these irons are provided by the administration and are in the custody of prescribed officials under whose supervision the stock is branded.

(e) *The Native Reserve Trust Fund Proclamation*, which provides for revenue collected in reserves being spent entirely in the interests of the natives resident in the reserves concerned.

(f) *The Urban Areas Proclamation*, which adopts all the main provisions of the Union Natives (Urban Areas) Act of 1923, and omits only those which are not applicable to the conditions obtaining in the territory.

(g) *The Native Administration Proclamation*, 1928, which provides for the appointment of a chief native commissioner, native commissioners, and assistant native commissioners, establishes courts for the hearing of native cases, and deals with tribal organization and the control of natives generally.

The natives are in a very backward state of development. Reserves have been established in various areas, and these are controlled by chiefs or headmen who are responsible to the magistrate of the district for the preservation of law and order. In some instances European superintendents have been appointed.

XXX

THE SOUTH AFRICAN HIGH COMMISSION AND THE SOUTH AFRICAN CROWN TERRITORIES¹

1. The South African High Commission

THE office of high commissioner in and for South Africa was created by letters patent in 1878. Under the commission of 1889, the high commissioner now represents the crown in all matters occurring in South Africa beyond the limits of the Union and of Southern and Northern Rhodesia.

Prior to October 1, 1923, Southern Rhodesia was administered by the British South Africa Company, and the high commissioner exercised certain powers of control under the Southern Rhodesia Order-in-Council, 1898. On September 12, 1923, the territory was annexed to His Majesty's dominions as the colony of Southern Rhodesia. On October 1, 1923, responsible government was established in the colony, and on that date the first governor of Southern Rhodesia assumed office. Upon the establishment of responsible government, the Order-in-Council of 1898 lapsed, but under the constitution letters patent, the high commissioner was vested with certain powers and functions in regard to native administration, and the Southern Rhodesia order-in-council, 1920, whereby the native reserves were vested in the high commissioner, was continued in full force and effect.

Communications from the Union government relating to the high commission territories go through the department of external affairs of the Union to the high commissioner for South Africa at Pretoria.

2. Basutoland

Basutoland was annexed to the Cape Colony in 1871, and in 1884 was disannexed and brought under the direct control of the British Government. The territory is now governed by a resident commissioner under the direction of the high commissioner for South Africa, the latter possessing the legislative authority, which is exercised by proclamation. The chiefs

¹ This chapter is based on the memoranda supplied by the office of the High Commissioner for South Africa at Pretoria.

adjudicate on cases between the natives, with a right of appeal to the magistrates' courts, where all cases between the natives and Europeans are brought. There is a Basutoland council consisting of a hundred members, all natives, ninety-five being nominated by the chiefs and five by the Government. The council is consultative and advisory, and deals chiefly with the domestic affairs of the people. It has no executive powers.

Administration of Justice. The Basutoland courts of law consist of

(a) *The court of the resident commissioner*, which constitutes the supreme court of Basutoland, and from which an appeal lies to the judicial committee of the Privy Council. Under Proclamation No. 10 of 1928, the constitution of the resident commissioner's court has been amended and provision has been made for the appointment of a judicial commissioner, who may sit with the resident commissioner or alone, and there may be associated with the court not more than two officers of the administration, appointed by the resident commissioner for the purpose by notice in the *Gazette*. The resident commissioner, when present, and in his absence the judicial commissioner, shall be president of the court, and the judgment of the court is the judgment pronounced and approved by the president.

The power conferred upon the resident commissioner to review and correct the proceedings of courts or officers may be exercised also by the judicial commissioner, and any decision recorded or action taken by the judicial commissioner in the course of such review or correction shall be of the same force and effect as if it had been recorded or taken by the resident commissioner.

(b) *Courts of assistant commissioners*, which are empowered to impose sentences not exceeding two years' imprisonment with hard labour, or fines not exceeding £50, with jurisdiction in civil cases up to £500.

These courts, however, have no jurisdiction to try summarily any person charged with treason, murder, attempt to murder, culpable homicide, rape, attempt to commit rape, or sedition, and in these cases and other serious crimes preparatory examinations are taken.

(c) *Two courts of officers-in-charge in sub-districts*, which have minor jurisdiction in criminal cases to impose a penalty not

exceeding six months' imprisonment or a fine of £10. All the proceedings of these courts are sent to the assistant commissioners' courts of their districts for confirmation.

(d) *Native courts* Under Proclamation No 2 b of 1884, the paramount chief and other native chiefs of Basutoland were authorized to continue to exercise jurisdiction according to native law and custom in civil and criminal cases, within such limits as may be defined by any rules established by the authority of the resident commissioner, subject to a proviso that no suit, action, or proceeding whatsoever, to which any European shall be a party, either as plaintiff or complainant or as defendant, shall be adjudicated upon by any such chief, save by the consent of all parties concerned. An appeal lies from the decision of any chief to the court of the assistant commissioner of the district within which such chief holds his court, provided that in no case in which any European shall have agreed to submit himself to the jurisdiction of any such native chief as aforesaid shall he have the right of appeal from the judgment or decision of any such chief.

The laws in force are the same as were in force in the Cape of Good Hope up to March 18, 1884, except where repealed or altered by proclamation of the high commissioner, who is also empowered to make by proclamation such laws as may be necessary for the peace, order, and good government of the territory.

3. Bechuanaland Protectorate

During the year 1885 Sir Charles Warren, who was in command of an expedition dispatched from the United Kingdom to pacify Southern Bechuanaland, and the Boers from the South African Republic, visited the principal chiefs in the territory now known as the Bechuanaland Protectorate, and as a result a British protectorate was proclaimed over their territories. No further steps were taken until the year 1891, when, by an order-in-council, dated May 9, the limits of the Bechuanaland Protectorate were more clearly defined, and the high commissioner for South Africa was authorized to appoint such officers as might appear to him to be necessary to provide for the administration of justice, the raising of revenue, and generally for the peace, order, and good government of all persons within the limits of

the territory. A resident commissioner was appointed and two assistant commissioners and the laws in force in the colony of the Cape of Good Hope on June 10, 1891, were declared in force in the territory *mutatis mutandis*, and so far as not inapplicable. Subsequent legislation has been effected by proclamation of the high commissioner.

The form of government is very similar to that which obtains in Basutoland. The territory is administered by a resident commissioner under the direction of the high commissioner for South Africa, the latter possessing the legislative authority, which is exercised by proclamation. There is also an assistant resident commissioner.

Administration of Justice. The resident commissioner exercises all the powers possessed by the supreme court of the Cape Colony in 1891, but no original civil action, suit, or proceeding can be instituted in his court, and, except in cases of murder, it is not competent to institute or bring any criminal proceedings before his court in the first instance, otherwise than by way of appeal from the decision of a court of assistant commissioner, resident magistrate, assistant resident magistrate, or special justice of the peace.

Until 1912 assistant commissioners and resident magistrates had jurisdiction in all civil and criminal cases except murder, subject to the right of appeal to the resident commissioner and to the Crown-in-Council, but their jurisdiction did not, and does not, except in native divorce cases where the parties have been legally married in accordance with European law, extend to any matter in which natives of the same tribe are concerned, unless in the opinion of such court the exercise of such jurisdiction is necessary in the interest of peace or for the prevention of punishment of acts of violence to persons or property. Until 1912, also, the trial of every person charged with murder had, under section 4 of the Bechuanaland Protectorate Proclamation, No. 2 of 1896, to be held before a court consisting of the resident commissioner, as president, and any two assistant commissioners or resident magistrates of the territory. But since 1912 a special court, called the special court of the Bechuanaland Protectorate, has been established for the trial of such cases (civil and criminal) as are hereinafter mentioned and (save as hereinafter otherwise stated) to exclude such cases from the jurisdiction of the courts

of resident commissioner, assistant commissioner, and resident magistrate. The special court is held at such time and at such place or places as are publicly notified by the resident commissioner, and consists of a judge or advocate of the supreme court of South Africa, appointed by the high commissioner to be president of the court, and any two assistant commissioners nominated by the resident commissioner.

Such court has jurisdiction in respect of

(a) Civil actions in which either party is a European, and in which the claim or value of any property in dispute exceeds £1,000, or in which the action is for the divorce of persons joined in matrimony or for a declaration of nullity of marriage.

(b) Criminal cases in which the accused is a European and is charged on indictment with any of the following offences, or with an attempt to commit any such offence: Murder, culpable homicide, rape, perjury, arson, offences relating to the coinage or currency, and other offence with which such accused may be charged before a court of a resident magistrate and which that court may consider to be, from its nature or magnitude, subject to the jurisdiction of, or more proper for, the cognizance of the special court.

(c) Any case at any time pending in the court of the resident commissioner on appeal or in the court established under section 4 of Proclamation No. 2 of 1896 as amended by Proclamation No. 48 of 1920, which such courts may on their own motion remove to a special court.

(d) Such civil actions pending in any court of assistant commissioner or resident magistrate in which either party is a European as such court may, either on application to it by either party to the action or on its own motion, remove to the said special court.

(e) Any civil action in which natives only are concerned which may any time be pending in any court of resident magistrate under the provisions of section 8 of the Proclamation of June 10, 1891, and which the court may, of its own motion, remove to the said special court by reason either of the magnitude of the issues involved or of considerations affecting the peace and good order of the Protectorate, and neither the court of the resident commissioner nor a court of assistant commissioner or resident magistrate now has jurisdiction in

any cases mentioned in (a) or (b) above, otherwise than for conducting a preliminary examination, unless both of the parties or the accused, as the case may be, apply to have the case tried before such court and such court grants such application where the case is within its jurisdiction. A right of appeal to the privy council lies against any final judgment, decree, sentence, or order of the said special court.

When the special court is not sitting, any court of assistant commissioner or resident magistrate may hear and determine (a) all motions and applications (including applications for arrests and interdicts of persons and things) in respect of any claim, debt, or matter in dispute which is within the jurisdiction of the said special court, whether an action in respect thereof is pending in the said special court or not, (b) all actions for provisional sentence which are within the jurisdiction of the said special court, (c) all trial cases commenced in the said special court in which either the plaintiff or the defendant is in default or in which consent to judgment is filed by the defendant, where such court would but for the provisions above cited have had jurisdiction to hear and determine such case, and in all such cases an appeal lies from the decision of a court of assistant commissioner or resident magistrate to the said special court. The rules of the special court of the Bechuanaland Protectorate are contained in High Commissioner's Notice No 127 of 1929.

The rules, orders, and regulations respecting the manner and form of proceeding in civil and criminal cases before the court of the resident commissioner are, *mutatis mutandis*, and as far as the circumstances of the territory admit, the same as those of the supreme court of the colony of the Cape of Good Hope, and the procedure in the courts of assistant commissioners and resident magistrates is, subject to a similar proviso, the same as that which was in force in the said colony on June 10, 1891. Under High Commissioner's Notice No 151 of 1925 (published in the official *Gazette* of October 9, 1925) a rule of the court of the resident commissioner provided scales of fees and charges to be taken and made by attorneys of the courts of Bechuanaland Protectorate in civil cases, where the cause of action exceeds £50, and in applications for compulsory sequestration and voluntary surrender of estates as insolvent.

Courts of the assistant resident magistrates, first established in 1898, have such jurisdiction in all matters and cases, civil and criminal, as was conferred prior to June 10, 1891, on the courts of resident magistrates of the colony of the Cape of Good Hope, but their jurisdiction does not extend to cases in which natives belonging to one and the same tribe are concerned, except where it is necessary in the interests of peace or for the prevention or punishment of acts of violence to person or property.

The native chiefs adjudicate in cases arising among natives of their respective tribes, and legislation had recently been introduced, which provides for appeals against judgments of native chiefs in the Bechuanaland Protectorate. Such appeals like in the first instance to a court composed of the assistant commissioner or magistrate of the district and of the chief whose judgment is appealed from. If the assistant commissioner or magistrate and the chief agree, but the complainant is dissatisfied with their decision, a further appeal lies to the resident commissioner. In the event of the assistant commissioner or magistrate and the chief disagreeing, then the resident commissioner decides the matter in dispute.

The jurisdiction of special justices of the peace in the Bechuanaland Protectorate is similar to that which was conferred on special justices of the peace of the Cape Colony prior to June 10, 1891, the punishment which may be inflicted by them on offenders is a fine of £2 or imprisonment with or without hard labour for one month, and all cases tried by them must be sent for review.

Apart from the resident commissioner's court and the special court of the Bechuanaland Protectorate, there are in the territory eleven courts of resident magistrate. There are also a number of justices of the peace throughout the territory.

4. Swaziland

In 1890 a provisional government was established over the territory of Swaziland (which lies to the south-east of the Transvaal), representative of the Swazis, the British, and South African Republican governments. In 1894, under a convention between the two latter Governments, the South African Republic was given powers of protection and administration,

without incorporation, and Swaziland continued to be governed under this form of control until the outbreak of the Boer war in 1899

In 1902, after the conclusion of the hostilities in the Transvaal, a special commissioner took charge, and under an order-in-council in 1903, the governor of the Transvaal administered the territory through the special commissioner until 1907, when, under an order-in-council of 1906, the high commissioner assumed control and established the present form of administration. Following the order-in-council of 1906, which placed Swaziland directly under the control of the high commissioner for South Africa, a proclamation was issued in March, 1907, providing for the appointment of a resident commissioner, a government secretary, assistant commissioners, and the establishment of a police force. In 1921 the establishment was approved of an advisory council to advise the administration in purely European matters. A council of nine members was elected, five for the southern portion of Swaziland, and four for the northern portion. A second council was re-elected in 1923, a third in 1926, a fourth in 1928, and a fifth in 1932.

Administration of Justice. By the Swaziland Administration Proclamation, 1907, a court of resident commissioner, with all the powers of a supreme court, was established. The laws of the Transvaal then in force in Swaziland were re-enacted *mutatis mutandis*, and the Roman-Dutch common law was declared to be in force. In 1912 this proclamation was amended, and a special court was substituted for the resident commissioner's court, with an advocate of the provincial division of the Transvaal as president. The other members of this court consist of the resident commissioner, the deputy resident commissioner, and the assistant commissioners of the various districts. The court holds sessions at least twice a year. All cases which come before it are dealt with by three members sitting without a jury. This court has jurisdiction in all civil and criminal cases arising in Swaziland, including the right of reviewing the proceedings of, and hearing appeals from, any inferior court of justice in Swaziland.

When the court is not in session—

(a) The president of the special court has power to review the criminal proceedings of the courts of assistant commissioner

when the sentence exceeds three months' imprisonment, or a fine of £25, or any sentence of whipping, and to hear appeals in all civil and criminal cases against any judgment, sentence, or final order of the courts of assistant commissioners

(b) The resident commissioner, or the deputy resident commissioner as a member of the special court, is competent to exercise the civil jurisdiction of the special court in all motions and applications for provisional sentence, and in all cases in which the parties apply to have the case tried before the resident commissioner. In any case other than a review of criminal proceedings, there is a right of appeal to the full court

Death sentences can only be carried out upon the special warrant of the high commissioner. There is a right of appeal to the Privy Council against any final judgment of the special court where the matter in dispute is of the value of £500 or upwards

Under the 1907 Proclamation, the high commissioner appointed courts of assistant commissioner with jurisdiction in all civil proceedings in which neither party is a white person, and in criminal proceedings in which the accused is not a white person. These courts have no jurisdiction to try summarily any persons charged with treason, murder, attempt to murder culpable homicide, rape, attempt to commit rape, or sedition, and in these cases and in other serious cases, preparatory examinations are taken under the Criminal Procedure Code 1903, of the Transvaal, which is in force in Swaziland. The jurisdiction of courts of assistant commissioner as regards white persons, in both civil and criminal matters, is the same as was conferred on magistrates' courts in the Transvaal at that time.

Under the above-mentioned proclamation, the paramount chief and other native chiefs of Swaziland are authorized to continue to exercise jurisdiction according to native law and custom in all civil disputes in which natives only are concerned. An appeal lies from the decision of any such chief to the resident commissioner, whose decision is final.

APPENDIXES

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APPENDIX I

TRADE UNIONS, INDUSTRIAL DISPUTES, AND WAGE REGULATION

PROBLEMS of labour in the Union must always be considered from the point of view of the complications brought into the subject by the existence of the large native and coloured population. This large section of unskilled workers limits to a considerable degree the employment of Europeans to the more skilled occupations or to the work of supervising and controlling the mass of unskilled labour. Nevertheless there is a growing class of unskilled European labourers, who, in competition with the poorly paid non-European labourer, find themselves in a serious position. The standard of living between the European and the non-European is so different that it is almost impossible to find a balance between the two sections. This has introduced social and economic difficulties not found in any other country. The solution of the problem of preventing the European from drifting into the 'poor white' class, a class tending to approximate to the non-European standard of living, with grave results to the health, morality, and civilization of the Union, has become a major task of successive governments.

In order to prevent an increase in the already considerable number of 'poor whites', and possibly to bring about a decrease, a policy known as the 'civilized labour policy' has been adopted by successive governments. As far as the departments of state are concerned, the 'civilized labour policy' adopted by them, is to be found outlined in the Prime Minister's Circular, of the October 31, 1924, which reads as follows:

- (1) The Prime Minister desires it to be understood by all Departments of State that it has been decided as a matter of definite policy that, wherever practicable, civilized labour shall be substituted in all employment by the Government for that which may be classified as uncivilized. Civilized labour is to be considered as the labour rendered by persons, whose standard of living conforms to the standard generally recognized as tolerable from the usual European standpoint. Uncivilized labour is to be regarded as the labour rendered by persons whose aim is restricted to the bare requirements of the necessities of life as understood among barbarous and undeveloped peoples.
- (2) The system of utilizing the cheapest labour available has no doubt been found to possess certain present advantages, but it is considered that with the exercise of efficient organization and control

the employment of the higher grade capabilities in all classes of work will result in greater and more permanent economic and social advantage

- (iii) Every Department will, therefore, investigate with the closest attention the avenues in which it is at all practicable to give effect to the principle indicated. A representative of the Department of Labour will be associated with responsible officers in each Department to ensure co-ordination of method, to allow of the wider application of successful experience and to keep the system under helpful observation
- (iv) Juvenile white labour should be employed wherever possible, and the Department of Labour will welcome any suggestion as to the development of a reasonably permanent career to this class of employee, and the avoidance of ultimate and unmerited stagnation
- (v) It is desired that, in connexion with any changes consequent upon the introduction of the policy under reference, the Labour Exchanges attached to the Department of Labour should be exclusively utilized, and in the case of any difficulty the Secretary for Labour, Pretoria, should be approached
- (vi) At the close of the financial year the Prime Minister will desire from each Department a statement showing precisely the action which has been taken in response to this circular, the number and classes of persons replaced, the classes of work upon which they were engaged, the cost of the service under the previous system and the number of persons employed under the new system and the cost, with a statement showing the degree of economic success which has been secured as the result of the change

Since the issue of the circular, the different government departments have systematically endeavoured to give effect to the policy outlined therein, and in the Railways and Harbours Service the civilized labour policy has had far-reaching effects, a wide field of employment having been opened to European unskilled and semi-skilled labour. In order to assist in relieving unemployment amongst Europeans the provincial administrations and local bodies have also adopted the civilized labour policy to the greatest extent, the difference in the wage-bill cost as between the economic wage and the civilized wage agreed upon being borne in agreed proportions by the central government and the employing body.

The trade union movement in South Africa has been faced with this problem of unskilled native labour. Skilled labour has been dealt with along the lines of minimum rates of pay. Trade unions, in pressing for high minimum rates, have done so with an eye upon native competition. The result has been that it is nearly always more economic (and more patriotic) to employ a European rather than a

native, the minimum rate of pay for each being the same. The practical result of the legislative protection of wages in the skilled trades has been to weaken the trade unions, because wages being protected by law, there has appeared to be no reason for the existence of trade unions.

There have always been two schools of thought amongst European trade unionists. The one has pressed for the organization of natives and European workers into the same trade unions. This, it was argued, would preserve a high level of wages for all workers and there would be no undercutting. The other school of thought, opposed as it is to the granting of any privileges to natives, has rigorously fought the admission of natives to trade unions, and this school of thought has won. Whether it will win in the field of labour competition without legislative assistance is doubtful. Employers, however much the trade unions may harass them, will naturally buy labour in the cheapest market and especially in such the case as far as unskilled labour is concerned. European labour costing twice as much as non-European labour stands no chance whatsoever. There are a number of non-European trade unions, but up to the present organization difficulties have prevented them from becoming a force.

The Industrial Conciliation Act, 1924, which provides, *inter alia*, for wage agreements between organizations of employers and employees has done something to revive trade unionism amongst skilled workers. The Wage Act, 1925, endeavours to protect the wages of unorganized labour. We propose to examine these two measures.

The primary purpose of the Industrial Conciliation Act, No. 11 of 1924 (as amended by Act No. 24 of 1930), is 'to make provision for the prevention and settlement of disputes between employers and employees by conciliation and for the registration and regulation of trade unions, employers' organizations, and private registry offices.'

The act applies to every industrial and public utility undertaking, to every industry, trade, and occupation, and to every employer and employee engaged in any such undertaking, industry, trade, or occupation, but it does not extend to agricultural or farming employment or, with certain exceptions, to government employment.

The establishment of industrial councils by employers or registered employers' organizations on the one hand and registered trade unions or groups of registered trade unions on the other hand, for the regulation of matters between them and the prevention and settlement of disputes is provided for. Such councils must consist of an equal number of representatives of employers and employees. Where there

are no industrial councils, conciliation boards may be formed in certain circumstances. Where both parties to any dispute under consideration by any industrial council or conciliation board apply to the minister for the appointment of a mediator, or where the minister thinks that settlement of the dispute would be settled thereby, the minister may appoint a mediator. A majority of representatives of employers and employees respectively on an industrial council or a conciliation board may decide upon the appointment of one or more arbitrators, and where more than one arbitrator is appointed, the appointment of an umpire, who is required to give a decision in the event of the arbitrators failing to agree. Awards made by umpires or arbitrators are binding. It is unlawful to strike or lock-out when an agreement has been arrived at as a result of the appointment of an umpire or arbitrator, or during the period of operation of any award made as the outcome of such appointment. The minister may declare on the application of an industrial council or conciliation board, that any agreement arrived at shall be binding upon the parties thereto, and upon the employers or employees represented on the council or board, or he may, if he is satisfied that in any area the parties to any agreement are sufficiently representative of the undertaking, industry, trade, or occupation concerned, declare that the agreement shall be binding upon all employers and employees in that undertaking, industry, trade, or occupation in that area.

The minister may, upon the recommendation of an industrial council or conciliation board, fix the minimum rate of wages and the maximum number of hours in any week to be worked by persons excluded from the definition of employee in the act. He may also exclude any scheduled native area from the operation of an agreement. One calendar month's notice of any alteration or demand for alteration in the terms of employment must be given by an employer or an employee, unless shorter notice is mutually agreed to. If the matter at issue is submitted for consideration by an industrial council or conciliation board within fourteen days, it must await the determination of the body concerned. Special provision is made for the conduct of any dispute between a local authority and its employees engaged upon work connected with the supply of light, power, water, sanitary, transportation, or fire extinguishing services, which has remained unsettled notwithstanding efforts of any industrial council or conciliation board. It is unlawful for any employer, employer's organization, trade union, or other person, to declare any strike or lock-out, until the matter at issue has been investigated by an industrial council, or where there is no such council, by a conciliation

board, and until any further period stipulated in any agreement between the parties as a period, within which a strike or lock-out shall not be declared, shall have lapsed. The minister may in certain eventualities step in and carry on any municipal service at the expense of the municipality. The act provides penalties for infringements of its provisions and empowers the making of regulations for the effective carrying out of its objects and purposes.

The act also provides for the appointment of a registrar of trade unions and employers' organizations, and for the registration of trade unions and employers' organizations, including unions of government servants. If the registrar is satisfied that in the area in respect of which it is proposed that the union or organization should be operative, no union or organization sufficiently representative of the interests concerned is already registered under the act, he is required to register such union or organization. Every registered trade union and employers' organization is a body corporate, capable in law of suing and being sued. The laws governing companies, insurance companies, and friendly or provident societies do not apply to trade unions or employers' organizations in respect of the exercise by such unions or organizations of any function, or the performance of any act under the act or rules authorized thereunder.

The Industrial Conciliation Act has been extensively and beneficially used by industry, and the record of strikes and lock-outs since this act came into operation has been greatly reduced.

In order to enable industry to avail itself of the provisions of this act, more organization on the part of both the employers and employees is necessary.

The Wage Act, No. 27 of 1925 (as amended by Act No. 23 of 1930), provides for the constitution of a permanent Wage Board for the Union, to consist of three members, with power given to the government to add two members for any particular inquiry—one to represent the employers and one to represent the employees.

The Wage Board begins to function upon a reference by the minister, or on the application of a registered trade union or association of employers, or, where no such registered union or association exists, on the application of employers or employees who satisfy the board as to their representative character. The proviso is made, however, that where there exist registered organizations of both employers and employees sufficiently representative, the board shall not proceed with any investigation in respect of such trade, unless directed to do so by the minister. The object of this proviso is to allow the Industrial Conciliation Act to take its course where possible. The Wage Act defines the matters which have to be taken into

consideration by the board in investigating wage and labour conditions, and the subjects upon which the board may make a recommendation. The act further provides for duties of inspection, for the maintenance of certain records, and for a complete system of co-operation between the industrial inspectors of the Department of Labour and the investigations of the board, with further co-operation with the Board of Trade and Industries.

The Industrial Conciliation Act has been used by organized masters and workmen, the Wage Act has been created to protect unorganized labour.

APPENDIX II

THE RULE OF LAW AS ILLUSTRATED BY THE CASE OF

In re Willem Kok and Nathamel Bahe

(1879) Buchanan, 45

In 1878 Willem Kok and others were arrested in Griqualand East, conveyed to Natal, and thence by steamer to Capetown, and there kept in custody from June 1878 to February 1879, when they made application to the Supreme Court for their release. In their petition they stated that they had not 'since their arrival at Capetown been brought before any magistrate, a judicial tribunal, to be charged with the commission of any crime or offence, nor are they detained in custody under the authority of any lawful warrant or authority

'Whereupon your petitioners humbly pray that your Lordships will be pleased to inquire by what authority they and their fellow prisoners are detained in custody, and in default of lawful authority that your Lordships will order their immediate liberation and discharge.'

When this application was brought before court, the court, being of opinion that a *prima facie* case had been made out to justify an inquiry into the cause of detention of these natives, made an order upon their custodian to produce them in court and at the same time to furnish a statement of the cause of their detention. This order is analogous to the writ *de homine libero exhibendo* of the Roman-Dutch law or the writ of *habeas corpus* of the English law. The justification put forward for the detention of the prisoners was that they were prisoners of war. It appeared that there had been a rebellion over the appointment of a chief and the prisoners, after the rebellion had been quelled, fled, and were captured.

DE VILLIERS C.J. in his judgment releasing the prisoners stated 'It is unnecessary to consider the rights which under the Roman-Dutch law free persons had to a release or to the writ *de homine libero exhibendo*, for, in my opinion, the rights of the personal liberty, which persons within this colony enjoy, are substantially the same, since the abolition of slavery, as those which are possessed in Great Britain. Where those rights are violated this Court would at least have the same power of restraining such violation as the Supreme Court of Holland had to interdict the infringement without sufficient cause of the rights to personal liberty as understood by the Roman-Dutch law. But in addition to the powers vested in this Court under the Roman-Dutch law, there are certain statutory provisions which not only add to the powers of the Court, but make it the bounden duty of the Court to protect personal liberty whenever it is illegally infringed

upon The Charter of Justice, after reciting in its preamble that it is expedient to make provision for the better and more effectual administration of justice in the Cape of Good Hope and in several territories and settlements dependent thereupon, and for that purpose to constitute within the said colony and its dependencies a Supreme Court of Justice, enacts in the 30th section that the said Supreme Court shall have cognizance of all pleas and jurisdiction in all causes, whether civil, criminal or mixed, arising within the said colony, with jurisdiction over Her Majesty's subjects and all other persons whomsoever residing and being within the said colony in as full and ample a manner as the then existing Supreme Court of Justice had or could lawfully exercise the same. The Charter of Justice came into operation in February, 1834, but the powers of the Supreme Court in criminal matters had been clearly defined by Ordinance No. 40 of 1828, and these powers were confirmed by the Charter. The first section of the Ordinance enacts that "All crimes and all offences against the law (for the commission of which any penalty or punishment is by law provided) committed by any person in this colony, or its dependencies, are subject to the jurisdiction of the Supreme Court." In the case of any Judge of an inferior court or a Magistrate illegally committing a person to prison, it is competent for such prisoner under the 54th Section of the Ordinance, "to apply to the Supreme Court or to the Circuit Court of the district within which he is imprisoned, or in case neither of those Courts shall be then sitting, to the Chief Justice or any of the judges of the Supreme Court, who shall make such order thereon as to them in the circumstances of the case shall seem just", and by the 65th section of the same Ordinance the Supreme Court and Circuit Courts are required at the close of each of their sessions to discharge all such persons as by law shall then be entitled to liberation. Supposing that the applicants had been detained in one of the ordinary gaols of the colony, and it had been brought to the notice of the Court that they were so kept without a lawful warrant, it surely would have been competent for the Court to call upon the gaoler to produce the prisoners and justify the detention. Can it then make any difference that they are detained in a military fortress instead of an ordinary gaol? I think not. In either case the person in whose custody they are is bound to produce his warrant or other authority for detaining them, and in case the return to the order of Court be found to be clearly bad it would be the duty of this Court, under ordinary circumstances to order their discharge. But then it is said that the Country is in such an unsettled state, that the applicants are reputed to be of such a dangerous character, that the Court ought not to exercise a power which under ordinary circumstances

might be usefully and properly exercised. The disturbed state of the country ought not in my opinion to influence the Court, for its first and most sacred duty is to administer justice to those who seek it, and not to preserve the peace of the country. If a different argument were to prevail, it might so happen that injustice towards individual natives has disturbed and unsettled a whole tribe, and the Court would be prevented from removing the very cause which produced the disturbance. Far be it from me to say that such is the case in the present instance — on the contrary, it is clear that the government acted with the best motives, and that the disturbance in Griqualand East was not in any way caused by the arrest of the applicant, but I am merely pointing out the natural consequences of an argument which has been urged upon the Court. Undoubtedly occasions have arisen, and may again arise, when civil jurisdiction is suspended and the ordinary forms of trial are held in abeyance, and in consequence Martial Law is proclaimed, but such a proclamation can only be justified, if at all, as an absolute necessity, and by way of self-defence, and cannot continue in force after the occasion which gave rise to it has ceased to exist. It is a power which may be exercised by the military authorities but they do so at their own peril, and cannot expect the assistance of any Civil Court in carrying it out. The Civil Courts have but one duty to perform, and that is to administer the laws of the Country without fear, favour, or prejudice, independently of the consequences which ensue. In the case of Nehemia Moshesh, who was tried before me at King William's Town for sedition at the instance of the late Government, I told the jury that their sole duty was to decide upon the evidence whether or not his guilt had been established, and that they ought not to inquire what effect his liberation might have had on the minds of the natives generally. The jury acquitted the prisoner, but I am not aware that this simple act of justice produced such disastrous consequences as were anticipated by some at the time. Thus far I have assumed that the applicants are aliens, but some of the arguments which were adduced before the Court went upon the assumption that they are British Subjects.

The matter, therefore, now stands thus, either East Griqualand is British territory and the Griquas are British subjects or not. If the country is not British territory, and its inhabitants are not British subjects, Captain Blyth was an intruder, without any right or power whatever to exercise civil and criminal jurisdiction over the Griquas, and the Griquas had a perfect right to resist him in his attempt to arrest some of them for offences committed in Griqualand East, or otherwise to exercise jurisdiction over them. Suppose, for example, that an official of the Government were to attempt to exercise

civil and criminal jurisdiction in the Orange Free State, and arrested subjects of that State, who by force of arms resisted his authority, it could not for a moment be maintained that the persons thus arrested if brought into this colony are prisoners of war whom the Government may detain for an indefinite time. If Griqualand East is not British territory, there can be no difference between the two cases except perhaps this that in the former case an immediate demand would be made by the Free State Government on the Government of this Colony for the surrender of the prisoners, whereas in the case of the Griquas the *de facto*, if not *de jure* Government of East Griqualand, being dependent on the Cape Government, such a demand would be impossible—a difference which, if it has any weight at all, ought to weigh in favour of the applicants. An attempt was indeed made at the first hearing to show that although East Griqualand remained Griqua territory, Captain Blyth was entitled to exercise jurisdiction over the inhabitants as a British resident appointed by the Crown, but no evidence was adduced in support of this view. On the contrary, as I have more than once remarked, the sole jurisdiction brought forward by Captain Blyth for his conduct is the alleged fact that the country is British territory, and its inhabitants are British subjects. But if this view be correct, it is perfectly clear that the return, stating that the applicants are prisoners of war, cannot be sustained.

As British subjects they would be entitled to be brought to trial within a reasonable time after their arrest, and to resist the claim of the Crown to keep them in confinement for an indefinite period as prisoners of war. After they had been detained for nearly twelve months an opportunity to bring them to trial was offered to the Crown, but Mr Cole, in the exercise of his discretion as Counsel of the Crown, refused to avail himself of the opportunity. The only course therefore, which is now open to the Court is to order the immediate discharge of the applicants.

See also *Sigcau v The Queen*, 12 S C 256, *In re Marechane*, 1 S A R 27.

APPENDIX III

STATUTE OF WESTMINSTER, 1931

(22 Geo V, c 4)

An Act to give effect to certain resolutions passed A D 1931
by Imperial Conferences held in the years 1926
and 1930 [11th December 1931]

WHEREAS the delegates of His Majesty's Governments in the United Kingdom, the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, the Irish Free State and Newfoundland, at Imperial Conferences holden at Westminster in the years of our Lord nineteen hundred and twenty-six and nineteen hundred and thirty did concur in making the declarations and resolutions set forth in the Reports of the said Conferences

And whereas it is meet and proper to set out by way of preamble to this Act that, inasmuch as the Crown is the symbol of the free association of the members of the British Commonwealth of Nations, and as they are united by a common allegiance to the Crown, it would be in accord with the established constitutional position of all the members of the Commonwealth in relation to one another that any alteration in the law touching the Succession to the Throne or the Royal Style and Titles shall hereafter require the assent as well of the Parliaments of all the Dominions as of the Parliament of the United Kingdom

And whereas it is in accord with the established constitutional position that no law hereafter made by the Parliament of the United Kingdom shall extend to any of the said Dominions as part of the law of that Dominion otherwise than at the request and with the consent of that Dominion

And whereas it is necessary for the ratifying, confirming and establishing of certain of the said declarations and resolutions of the said Conferences that a law be made and enacted in due form by authority of the Parliament of the United Kingdom

A.D. 1931

And whereas the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, the Irish Free State and Newfoundland have severally requested and consented to the submission of a measure to the Parliament of the United Kingdom for making such provision with regard to the matters aforesaid as is hereafter in this Act contained

Now, therefore, be it enacted by the King's most Excellent Majesty by and with the advice and consent of the Lords Spiritual and Temporal, and Commons in this present Parliament assembled, and by the authority of the same, as follows —

Meaning of
'Dominion' in
this Act

1.¹ In this Act the expression 'Dominion' means any of the following Dominions, that is to say, the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, the Irish Free State and Newfoundland

Validity of
laws made
by Parliament
of a Dominion
28 & 29 Vict.
c. 63

2.¹—(1) The Colonial Laws Validity Act, 1865, shall not apply to any law made after the commencement of this Act by the Parliament of a Dominion

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

Power of
Parliament of
Dominion to
legislate extra-
territorially

Parliament of
United King-
dom not to
legislate for
Dominion
except by
consent

3.¹ It is hereby declared and enacted that the Parliament of a Dominion has full power to make laws having extra-territorial operation

4.¹ No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof

5.¹ Without prejudice to the generality of the fore-

¹ Re-enacted in the Schedule to the Statute of the Union Act, 1934 See Appendix VII

going provisions of this Act, sections seven hundred and thirty-five and seven hundred and thirty-six of the Merchant Shipping Act, 1894, shall be construed as though reference therein to the Legislature of a British possession did not include reference to the Parliament of a Dominion

A D 1931
Powers of
Dominion
Parliaments
in relation
to merchant
shipping
57 & 58 Vict
c 60

6¹ Without prejudice to the generality of the foregoing provisions of this Act, section four of the Colonial Courts of Admiralty Act, 1890 (which requires certain laws to be reserved for the signification of His Majesty's pleasure or to contain a suspending clause), and so much of section seven of that Act as requires the approval of His Majesty in Council to any rules of Court for regulating the practice and procedure of a Colonial Court of Admiralty, shall cease to have effect in any Dominion as from the commencement of this Act

Powers of
Dominion
Parliaments
in relation
to Courts of
Admiralty
53 & 54 Vict.
c 27

7 —(1) Nothing in this Act shall be deemed to apply to the repeal, amendment or alteration of the British North America Acts, 1867 to 1910, or any order, rule or regulation made thereunder

Saving for
British
North
America
Acts and
application
of the Act
to Canada

(2) The provisions of section two of this Act shall extend to laws made by any of the Provinces of Canada and to the powers of the legislatures of such Provinces

(3) The powers conferred by this Act upon the Parliament of Canada or upon the legislatures of the Provinces shall be restricted to the enactment of laws in relation to matters within the competence of the Parliament of Canada or of any of the legislatures of the Provinces respectively

8 Nothing in this Act shall be deemed to confer any power to repeal or alter the Constitution Act of the Commonwealth of Australia or the Constitution Act of the Dominion of New Zealand otherwise than in accordance with the law existing before the commencement of this Act

Saving for
Constitution
Acts of
Australia
and New
Zealand

9 —(1) Nothing in this Act shall be deemed to authorise the Parliament of the Commonwealth of Australia to make laws on any matter within the authority of the States of Australia, not being a matter *within the authority of the Parliament or Government* of the Commonwealth of Australia

Saving
with respect
to States of
Australia.

¹ Re-enacted in the Schedule of the Statute of the Union Act, 1934. See Appendix VII

A.D. 1931

(2) Nothing in this Act shall be deemed to require the concurrence of the Parliament or Government of the Commonwealth of Australia in any law made by the Parliament of the United Kingdom with respect to any matter within the authority of the States of Australia, not being a matter within the authority of the Parliament or Government of the Commonwealth of Australia, in any case where it would have been in accordance with the constitutional practice existing before the commencement of this Act that the Parliament of the United Kingdom should make that law without such concurrence

(3) In the application of this Act to the Commonwealth of Australia the request and consent referred to in section four shall mean the request and consent of the Parliament and Government of the Commonwealth

Certain
sections of
Act not to
apply to
Australia,
New Zealand
or Newfound-
land unless
adopted

10 —(1) None of the following sections of this Act, that is to say, sections two, three, four, five and six, shall extend to a Dominion to which this section applies as part of the law of that Dominion unless that section is adopted by the Parliament of the Dominion, and any Act of that Parliament adopting any section of this Act may provide that the adoption shall have effect either from the commencement of this Act or from such later date as is specified in the adopting Act

(2) The Parliament of any such Dominion as aforesaid may at any time revoke the adoption of any section referred to in subsection (1) of this section

(3) The Dominions to which this section applies are the Commonwealth of Australia, the Dominion of New Zealand, and Newfoundland

Meaning of
'Colony' in
future Acts
52 & 53 Vict
c 68

11 ¹ Notwithstanding anything in the Interpretation Act, 1889, the expression 'Colony' shall not, in any Act of the Parliament of the United Kingdom passed after the commencement of this Act, include a Dominion or any Province or State forming part of a Dominion

Short title

12 ¹ This Act may be cited as the Statute of Westminster, 1931

¹ Re enacted in the Schedule of the Status of the Union Act, 1934 See Appendix VII

APPENDIX IV¹
SOUTH AFRICA ACT, 1909 AS AMENDED UP TO
DECEMBER 31, 1933

SOUTH AFRICA ACT, 1909

OF EDWARD VII

CHAPTER 9

An Act to constitute the Union of South Africa

[20th September, 1909]

WHEREAS it is desirable for the welfare and future progress of South Africa that the several British Colonies therein should be united under one Government in a legislative union under the Crown of Great Britain and Ireland

And whereas it is expedient to make provision for the union of the Colonies of the Cape of Good Hope, Natal, the Transvaal, and the Orange River Colony on terms and conditions to which they have agreed by resolution of their respective Parliaments, and to define the executive, legislative, and judicial powers to be exercised in the government of the Union

And whereas it is expedient to make provision for the establishment of provinces with powers of legislation and administration in local matters and in such other matters as may be specially reserved for provincial legislation and administration

And whereas it is expedient to provide for the eventual admission into the Union or transfer to the Union of such parts of South Africa as are not originally included therein

Be it therefore enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons in this present Parliament assembled, and by the authority of the same as follows —

75, 84.

PART I

PRELIMINARY

Sovereignty and Guidance of Almighty God acknowledged.

1 ² *The people of the Union acknowledge the sovereignty and guidance of Almighty God* **75, 109, 110.**

¹ *Note* A figure at the end of a section indicates the page of the book at which the section is dealt with. The marginal headings are printed in bold type.

² As substituted by section 1 of Act No. 9 of 1925

Definitions.

2.¹ In this Act, unless it is otherwise expressed or implied, the words 'the Union' shall be taken to mean the Union of South Africa as constituted under the Act, and the words 'Houses of Parliament', 'House of Parliament', or 'Parliament', shall be taken to mean the Parliament of the Union

75

Application of Act to King's Successors.

3 The provisions of this Act referring to the King shall extend to His Majesty's heirs and successors in the sovereignty of the United Kingdom of Great Britain and Ireland

75

PART II

THE UNION

Proclamation of Union

4 It shall be lawful for the King, with the advice of the Privy Council, to declare by proclamation that, on and after a date therein appointed, not being later than one year after the passing of this Act, the Colonies of the Cape of Good Hope, Natal, the Transvaal, and the Orange River Colony, hereinafter called the Colonies, shall be united in a legislative union under one Government under the name of the Union of South Africa. On and after the day appointed by such proclamation the Government and Parliament of the Union shall have full power and authority within the limits of the Colonies, but the King may at any time after the proclamation appoint a Governor-General for the Union.

75.

Commencement of Act

5. The provisions of this Act shall, unless it is otherwise expressed or implied, take effect on and after the day so appointed

Incorporation of Colonies into the Union.

6 The Colonies mentioned in section *four* shall become original provinces of the Union under the names of Cape of Good Hope, Natal, Transvaal, and Orange Free State, as the case may be. The original provinces shall have the same limits as the respective Colonies at the establishment of the Union

76

Application of 58 and 59 Vict. c. 34, &c.

7 Upon any Colony entering the Union, the Colonial Boundaries Act, 1895, and every other Act applying to any of the Colonies as

¹ See the reference to the parliament of the Union in section 2 of the Status of the Union Act, 1934, and the meaning of 'heirs and successors' under section 5 of that Act (Appendix VII)

being self-governing Colonies or Colonies with responsible government, shall cease to apply to that Colony, but as from the date when this Act takes effect every such Act of Parliament shall apply to the Union

PART III

EXECUTIVE GOVERNMENT

Executive Power

8¹ The Executive Government of the Union is vested in the King, and shall be administered by His Majesty in person or by a Governor-General as his representative 76, 116.

Governor-General

9. The Governor-General shall be appointed by the King, and shall have and may exercise in the Union during the King's pleasure, but subject to this Act, such powers and functions of the King as His Majesty may be pleased to assign to him 76, 117, 124.

Salary of Governor-General

10. There shall be payable to the King out of the Consolidated Revenue Fund of the Union for the salary of the Governor-General an annual sum of ten thousand pounds. The salary of the Governor-General shall not be altered during his continuance in office 134.

Application of Act to Governor-General

11 The provisions of this Act relating to the Governor-General extend and apply to the Governor-General for the time being or such person as the King may appoint to administer the government of the Union. The King may authorize the Governor-General to appoint any person to be his deputy within the Union during his temporary absence, and in that capacity to exercise for and on behalf of the Governor-General during such absence all such powers and authorities vested in the Governor-General as the Governor-General may assign to him, subject to any limitations expressed or directions given by the King but the appointment of such deputy shall not affect the exercise by the Governor-General himself of any power or function 121

Executive Council.

12 There shall be an Executive Council to advise the Governor-General in the government of the Union, and the members of the council shall be chosen and summoned by the Governor-General

¹ See sections 4 and 11 (1) of the Status of the Union Act, 1934 (Appendix VII)

and sworn as executive councillors, and shall hold office during his pleasure 139, 140

Meaning of Governor-General-in-Council

13. The provisions of this Act referring to the Governor-General-in-Council shall be considered as referring to the Governor-General acting with the advice of the Executive Council 140

Appointment of Ministers.

14.¹ (1) The Governor-General may appoint officers not exceeding eleven in number to administer such departments of State of the Union as the Governor-General-in-Council may establish, such officers shall hold office during the pleasure of the Governor-General. They shall be members of the Executive Council and shall be the King's Ministers of State for the Union. After the first general election of members of the House of Assembly, as hereinafter provided, no minister shall hold office for a longer period than three months unless he is or becomes a member of either House of Parliament

²(2) *Whenever any Minister of State is from any cause whatever unable to perform any of the functions of his office, the Governor-General-in-Council may appoint any member of the Executive Council (whether he has or has not been appointed as a Minister of State, under sub-section (1) to act in the said Minister's stead, either generally or in the performance of any particular function* 26, 141

Appointment and Removal of Officers.

15.³ The appointment and removal of all officers of the public service of the Union shall be vested in the Governor-General-in-Council, unless the appointment is delegated by the Governor-General-in-Council or by this Act or by a law of Parliament to some other authority 76, 377.

Transfer of Executive Powers to Governor-General-in-Council

16. All powers, authorities, and functions which at the establishment of the Union are in any of the Colonies vested in the Governor or in the Governor-in-Council, or in any authority of the Colony, shall, as far as the same continue in existence and are capable of being exercised after the establishment of the Union, be vested in the Governor-General or in the Governor-General-in-Council, or in the authority exercising similar powers under the Union, as the case

¹ As amended by section 1 of Act No. 34 of 1925

² Added by section 1 of Act No. 17 of 1933

³ See section 19 of Act No. 27 of 1923

may be, except such powers and functions as are by this Act or may by a law of Parliament be vested in some other authority 76

Command of Naval and Military Forces

17 The command-in-chief of the naval and military forces within the Union is vested in the King or in the Governor-General as his representative

Seat of Government

18. Save as in section *twenty-three* excepted, Pretoria shall be the seat of Government of the Union 60, 65, 76, 211.

PART IV

PARLIAMENT

Legislative Power

19 The legislative power of the Union shall be vested in the Parliament of the Union, herein called Parliament, which shall consist of the King, a Senate, and a House of Assembly 76, 183.

Sessions of Parliament

20 ¹ The Governor-General may appoint such times for holding the sessions of Parliament as he thinks fit, and may also from time to time, by proclamation or otherwise, prorogue Parliament, and may in like manner dissolve the Senate and the House of Assembly simultaneously, or the House of Assembly alone provided that the Senate shall not be dissolved within a period of ten years after the establishment of the Union, and provided further that the dissolution of the Senate shall not affect any senators nominated by the Governor-General-in-Council 205, 210, 211, 245-248

Summoning of First Parliament

21 Parliament shall be summoned to meet not later than six months after the establishment of the Union 210

Annual Session of Parliament

22. There shall be a session of Parliament once at least in every year, so that a period of twelve months shall not intervene between the last sitting of Parliament in one session and its first sitting in the next session 210.

Seat of Legislature

23 Capetown shall be the seat of the Legislature of the Union 60, 65, 76, 211

¹ See section 1 of Act No. 54 of 1926 regarding dissolution of the senate, see also section 1 of Act No. 9 of 1920

SENATE

Original Constitution of Senate

24.¹ For ten years after the establishment of the Union the constitution of the Senate shall, in respect of the original provinces, be as follows —

- (i) Eight senators shall be nominated by the Governor-General-in-Council, and for each original province eight senators shall be elected in the manner hereinafter provided
- (ii) The senators to be nominated by the Governor-General-in-Council shall hold their seats for ten years. One-half of their number shall be selected on the ground mainly of their thorough acquaintance, by reason of their official experience, or otherwise, with the reasonable wants and wishes of the coloured races in South Africa. If the seat of a senator so nominated shall become vacant, the Governor-General-in-Council shall nominate another person to be a senator, who shall hold his seat for ten years
- (iii) After the passing of this Act, and before the day appointed for the establishment of the Union, the Governor of each of the Colonies shall summon a special sitting of both Houses of the Legislature, and the two Houses sitting together as one body and presided over by the Speaker of the Legislative Assembly shall elect eight persons to be senators for the province. Such senators shall hold their seats for ten years. If the seat of a senator so elected shall become vacant, the provincial council of the province for which such senator has been elected shall choose a person to hold the seat until the completion of the period for which the person in whose stead he is elected would have held his seat

71, 76, 188, 246, 448, 518

Subsequent Constitution of Senate

25.² Parliament may provide for the manner in which the Senate shall be constituted after the expiration of ten years, and unless and until such provision shall have been made—

- (i) the provisions of the last preceding section with regard to nominated senators shall continue to have effect,
- (ii) eight senators for each province shall be elected by the members of the provincial council of such province together with the members of the House of Assembly elected for such province. Such senators shall hold their seats for ten years unless

¹ See footnote, p. 563

² See section 1 of Act No. 54 of 1926 regarding dissolution of the senate

the Senate be sooner dissolved. If the seat of an elected senator shall become vacant, the members of the provincial council of the province, together with the members of the House of Assembly elected for such province, shall choose a person to hold the seat until the completion of the period for which the person in whose stead he is elected would have held his seat. The Governor-General-in-Council shall make regulations for the joint election of senators prescribed in this section 76, 246

Qualifications of Senators.

26.¹ The qualifications of a senator shall be as follows —
He must—

- (a) be not less than thirty years of age,
- (b) be qualified to be registered as a voter for the election of members of the House of Assembly in one of the provinces,
- (c) have resided for five years within the limits of the Union as existing at the time when he is elected or nominated, as the case may be,
- (d) be a British subject of European descent,
- (e) in the case of an elected senator, be the registered owner of immovable property within the Union of the value of not less than five hundred pounds over and above any special mortgages thereon

For the purposes of this section, residence in, and property situated within, a Colony before its incorporation in the Union shall be treated as residence in and property situated within the Union

13, 26, 188, 190, 212

Appointment and Tenure of Office of President

27 The Senate shall, before proceeding to the dispatch of any other business, choose a senator to be the President of the Senate, and as often as the office of President becomes vacant the Senate shall again choose a senator to be the President. The President shall cease to hold office if he ceases to be a senator. He may be removed from office by a vote of the Senate, or he may resign his office by writing under his hand addressed to the Governor-General 214

Deputy-President

28 Prior to or during any absence of the President the Senate may choose a senator to perform his duties in his absence 217.

Resignation of Senators.

29 A senator may, by writing under his hand addressed to the Governor-General, resign his seat, which thereupon shall become

¹ See section 6 of the Status of the Union Act, 1934 (Appendix VII) in regard to sub-clause (d). See also section 4 (2) of Act No. 18 of 1930

vacant The Governor-General shall as soon as practicable cause steps to be taken to have the vacancy filled 188

Quorum

30 The presence of at least twelve senators shall be necessary to constitute a meeting of the Senate for the exercise of its powers

Voting in the Senate

31 All questions in the Senate shall be determined by a majority of votes of senators present other than the President or the presiding senator, who shall, however, have and exercise a casting vote in the case of an equality of votes

HOUSE OF ASSEMBLY

Constitution of House of Assembly.

32. The House of Assembly shall be composed of members directly chosen by the voters of the Union in electoral divisions delimited as hereinafter provided 76, 191, 195

Original Number of Members

33. The number of members to be elected in the original provinces at the first election and until the number is altered in accordance with the provisions of this Act shall be as follows —

Cape of Good Hope	Fifty-one
Natal	Seventeen
Transvaal	Thirty-six
Orange Free State	Seventeen

These numbers may be increased as provided in the next succeeding section, but shall not, in the case of any original province, be diminished until the total number of members of the House of Assembly in respect of the provinces herein provided for reaches one hundred and fifty, or until a period of ten years has elapsed after the establishment of the Union, whichever is the longer period 71, 99, 192

Increase of Number of Members

34 ¹ The number of members to be elected in each province as provided in section *thirty-three*, shall be increased from time to time as may be necessary in accordance with the following provisions —

- (1) The quota of the Union shall be obtained by dividing the total number of European male adults in the Union, as ascertained at the census of nineteen hundred and four, by the total number of members of the House of Assembly as constituted at the establishment of the Union

¹ See Act No 2 of 1910, section 1 of Act No 31 of 1918, and also Act No 15 of 1918

- (ii) In nineteen hundred and eleven, and every five years thereafter, a census of the European population of the Union shall be taken for the purposes of this Act
- (iii) After any such census the number of European male adults in each province shall be compared with the number of European male adults as ascertained at the census of nineteen hundred and four, and, in the case of any province where an increase is shown, as compared with the census of nineteen hundred and four, equal to the quota of the Union, or any multiple thereof, the number of members allotted to such province in the last preceding section shall be increased by an additional member or an additional number of members equal to such multiple, as the case may be
- (iv) Notwithstanding anything herein contained, no additional member shall be allotted to any province until the total number of European male adults in such province exceeds the quota of the Union multiplied by the number of members allotted to such province for the time being, and thereupon additional members shall be allotted to such province in respect only of such excess
- (v) As soon as the number of members of the House of Assembly to be elected in the original provinces in accordance with the preceding sub-sections reaches the total of one hundred and fifty, such total shall not be further increased unless and until Parliament otherwise provides, and subject to the provisions of the last preceding section the distribution of members among the provinces shall be such that the proportion between the number of members to be elected at any time in each province and the number of European male adults in such province as ascertained at the last preceding census, shall as far as possible be identical throughout the Union
- (vi) 'Male adults' in this Act shall be taken to mean males of twenty-one years of age or upwards not being members of His Majesty's regular forces on full pay
- (vii) For the purposes of this Act the number of European male adults, as ascertained at the census of nineteen hundred and four, shall be taken to be—

For the Cape of Good Hope	167,546
For Natal	34,784
For the Transvaal	106,493
For the Orange Free State	41,014
	99, 108, 192, 196.

Qualifications of Voters

35¹ (1) Parliament may by law prescribe the qualifications which shall be necessary to entitle persons to vote at the election of members of the House of Assembly, but no such law shall disqualify any person in the province of the Cape of Good Hope who, under the laws existing in the Colony of the Cape of Good Hope at the establishment of the Union, is or may become capable of being registered as a voter from being so registered in the province of the Cape of Good Hope by reason of his race or colour only, unless the Bill be passed by both Houses of Parliament sitting together, and at the third reading be agreed to by not less than two-thirds of the total number of members of both Houses. A Bill so passed at such joint sitting shall be taken to have been duly passed by both Houses of Parliament.

(2) No person who at the passing of any such law is registered as a voter in any province shall be removed from the register by reason only of any disqualification based on race or colour. 76, 197, 239.

Application of Existing Qualifications.

36² Subject to the provisions of the last preceding section, the qualifications of parliamentary voters, as existing in the several Colonies at the establishment of the Union, shall be the qualifications necessary to entitle persons in the corresponding provinces to vote for the election of members of the House of Assembly. Provided that no member of His Majesty's regular forces on full pay shall be entitled to be registered as a voter. 13, 76, 197.

Elections.

37³ (1) Subject to the provisions of this Act, the laws in force in the Colonies at the establishment of the Union relating to elections for the more numerous Houses of Parliament in such Colonies respectively, the registration of voters, the oaths or declarations to be taken by voters, returning officers, the powers and duties of such officers, the proceedings in connexion with elections, election expenses, corrupt and illegal practices, the hearing of election petitions and the proceedings incident thereto, the vacating of seats of members, and the proceedings necessary for filling such vacancies, shall, *mutatis mutandis*, apply to the elections in the respective provinces of members of the House of Assembly.

(2) Notwithstanding anything to the contrary in any of the said

¹ Cf. paragraph 11 of the Royal Instructions (Appendix VI).

² See section 144 of Act No. 12 of 1918, Act No. 18 of 1930, Act No. 41 of 1931.

³ See section 36 (2) of Act No. 12 of 1918, Acts Nos. 11 of 1926, 23 of 1926, 24 of 1928, 35 of 1931.

laws contained, at any general election of members of the House of Assembly, all polls shall be taken on one and the same day in all the electoral divisions throughout the Union, such day to be appointed by the Governor-General-in-Council 13, 76, 197, 204, 208

Commission for Delimitation of Electoral Divisions

38 Between the date of the passing of this Act and the date fixed for the establishment of the Union, the Governor-in-Council of each of the Colonies shall nominate a judge of any of the Supreme or High Courts of the Colonies, and the judges so nominated shall, upon acceptance by them respectively of such nomination, form a joint commission, without any further appointment, for the purpose of the first division of the provinces into electoral divisions. The High Commissioner for South Africa shall forthwith convene a meeting of such commission at such time and place in one of the Colonies as he shall fix and determine. At such meeting the Commissioners shall elect one of their number as chairman of such commission. They shall thereupon proceed with the discharge of their duties under this Act, and may appoint persons in any province to assist them or to act as assessors to the commission or with individual members thereof for the purpose of inquiring into matters connected with the duties of the commission. The commission may regulate their own procedure and may act by a majority of their number. All moneys required for the payment of the expenses of such commission before the establishment of the Union in any of the Colonies shall be provided by the Governor-in-Council of such Colony. In case of the death, resignation, or other disability of any of the Commissioners before the establishment of the Union, the Governor-in-Council of the Colony in respect of which he was nominated shall forthwith nominate another judge to fill the vacancy. After the establishment of the Union the expenses of the commission shall be defrayed by the Governor-General-in-Council, and any vacancies shall be filled by him 195.

Electoral Divisions

39 The commission shall divide each province into electoral divisions, each returning one member 195.

Method of Dividing Provinces into Electoral Divisions.

40 (1) For the purpose of such division as is in the last preceding section mentioned, the quota of each province shall be obtained by dividing the total number of voters in the province, as ascertained at the last registration of voters, by the number of members of the House of Assembly to be elected thereon

(2) Each province shall be divided into electoral divisions in such a manner that each such division shall, subject to the provisions of sub-section (3) of this section, contain a number of voters, as nearly as may be, equal to the quota of the province

(3) The Commissioners shall give due consideration to—

- (a) community or diversity of interests,
- (b) means of communication,
- (c) physical features,
- (d) existing electoral boundaries,
- (e) sparsity or density of population,

in such manner that, while taking the quota of voters as the basis of division, the Commissioners may, whenever they deem it necessary, depart therefrom, but in no case to any greater extent than fifteen per centum more or fifteen per centum less than the quota 195

Alteration of Electoral Divisions.

41¹ As soon as may be after every quinquennial census, the Governor-General-in-Council shall appoint a commission consisting of three judges of the Supreme Court of South Africa to carry out any re-division which may have become necessary as between the different electoral divisions in each province, and to provide for the allocation of the number of members to which such province may have become entitled under the provisions of this Act. In carrying out such re-division and allocation the commission shall have the same powers and proceed upon the same principles as are by this Act provided in regard to the original division 195

Powers and Duties of Commission for Delimiting Electoral Divisions

42.¹ (1) The joint commission constituted under section *thirty-eight*, and any subsequent commission appointed under the provisions of the last preceding section, shall submit to the Governor-General-in-Council—

- (a) a list of electoral divisions, with the names given to them by the commission and a description of the boundaries of every such division
- (b) a map or maps showing the electoral divisions into which the provinces have been divided
- (c) such further particulars as they consider necessary

(2) The Governor-General-in-Council may refer to the commission for its consideration any matter relating to such list or arising out of the powers or duties of the commission

¹ See section 3 of Act No. 18 of 1930

(3) The Governor-General-in-Council shall proclaim the names and boundaries of the electoral divisions as finally settled and certified by the commission, or a majority thereof, and thereafter, until there shall be a re-division, the electoral divisions as named and defined shall be the electoral divisions of the Union in the provinces

(4) If any discrepancy shall arise between the description of the divisions and the aforesaid map or maps, the description shall prevail 195

Date from which Alteration of Electoral Divisions to take effect

43 Any alteration in the number of members of the House of Assembly to be elected in the several provinces, and any re-division of the provinces into electoral divisions, shall, in respect of the election of members of the House of Assembly, come into operation at the next general election held after the completion of the re-division or of any allocation consequent upon such alteration, and not earlier 195.

Qualifications of Members of House of Assembly

44 ¹ The qualifications of a member of the House of Assembly shall be as follows —

He must—

- (a) be qualified to be registered as a voter for the election of members of the House of Assembly in one of the provinces,
- (b) have resided for five years within the limits of the Union as existing at the time when he is elected,
- (c) be a British subject of European descent

For the purposes of this section, residence in a Colony before its incorporation in the Union shall be treated as residence in the Union

191

Duration

45 Every House of Assembly shall continue for five years from the first meeting thereof, and no longer, but may be sooner dissolved by the Governor-General

Appointment and Tenure of Office of Speaker

46 The House of Assembly shall, before proceeding to the dispatch of any other business, choose a member to be the Speaker of the House, and, as often as the office of Speaker becomes vacant, the House shall again choose a member to be the Speaker. The Speaker shall cease to hold his office if he ceases to be a member. He may be removed from office by a vote of the House, or he may resign his

¹ See section 37 of Act No. 12 of 1918 as amended by section 27 of Act No. 11 of 1926. See footnotes to sections 36 and 37 *supra*, see section 6 of the Status of the Union Act, 1934 (Appendix VII)

office or his seat by writing under his hand addressed to the Governor-General 215

Deputy-Speaker.

47 Prior to or during the absence of the Speaker, the House of Assembly may choose a member to perform his duties in his absence 217

Resignation

48 ¹ A member may, by writing under his hand addressed to the Speaker, or if the Speaker is absent from the Union, to the Governor General, resign his seat, which shall thereupon become vacant

Quorum

49. The presence of at least thirty members of the House of Assembly shall be necessary to constitute a meeting of the House for the exercise of its powers

Voting in House of Assembly.

50. All questions in the House of Assembly shall be determined by a majority of votes of members present other than the Speaker or the presiding member, who shall, however, have and exercise a casting vote in the case of an equality of votes

BOTH HOUSES OF PARLIAMENT

Oath or Affirmation of Allegiance.

51 ² Every senator and every member of the House of Assembly shall, before taking his seat, make and subscribe before the Governor-General, or some person authorized by him, an oath or affirmation of allegiance in the following form —

Oath

I, A B, do swear that I will be faithful and bear true allegiance to His Majesty [*here insert the name of the King or Queen of the United Kingdom of Great Britain and Ireland for the time being*] His [*or Her*] heirs and successors according to law So help me (God)

Affirmation

I, A B, do solemnly and sincerely affirm and declare that I will be faithful and bear true allegiance to His Majesty [*here insert the name of the King or Queen of the United Kingdom of Great Britain and Ireland for the time being*] His [*or Her*] heirs and successors according to law 184, 213-215

¹ Repealed by section forty-nine (1), Act No 11 of 1926 See Sub-section (2) thereof, which is to the same effect

² See section 7 of the Status of the Union Act, 1934 (Appendix VII), where the new form of oath is printed

Members of either House disqualified for being Member of the other House.

52 A member of either House of Parliament shall be incapable of being chosen or of sitting as a member of the other House. Provided that every Minister of State who is a member of either House of Parliament shall have the right to sit and speak in the Senate and the House of Assembly, but shall vote only in the House of which he is a member.

18, 191

Disqualifications for being a Member of either House.

53 ¹ No person shall be capable of being chosen or of sitting as a senator or as a member of the House of Assembly who—

- (a) has been at any time convicted of any crime or offence for which he shall have been sentenced to imprisonment without the option of a fine for a term of not less than twelve months, unless he shall have received a grant of amnesty or a free pardon, or unless such imprisonment shall have expired at least five years before the date of his election, or
- (b) is an unrehabilitated insolvent, or
- (c) is of unsound mind, and has been so declared by a competent court, or
- (d) holds any office of profit under the Crown within the Union. Provided that the following persons shall not be deemed to hold an office of profit under the Crown for the purposes of this sub-section
 - (1) a Minister of State for the Union,
 - (2) a person in receipt of a pension from the Crown,
 - (3) an officer or member of His Majesty's naval or military forces on retired or half-pay, or an officer or member of the naval or military forces of the Union whose services are not wholly employed by the Union

191, 192

Vacation of Seats

54 ² If a senator or member of the House of Assembly—

- (a) becomes subject to any of the disabilities mentioned in the last preceding section, or
- (b) ceases to be qualified as required by law, or
- (c) fails for a whole ordinary session to attend without the special leave of the Senate or the House of Assembly, as the case may be,

his seat shall thereupon become vacant

192

¹ See section 1 of Act No. 10 of 1913, section 1 of Act No. 23 of 1920, section 27 of Act No. 11 of 1926. See section 2 of Act No. 17 of 1933 for new subsection (4) regarding justices of the peace. ² See section 51 of Act No. 11 of 1926.

Penalty for Sitting or Voting when Disqualified.

55. If any person who is by law incapable of sitting as a senator or member of the House of Assembly shall, while so disqualified and knowing or having reasonable grounds for knowing that he is so disqualified, sit or vote as a member of the Senate or the House of Assembly, he shall be liable to a penalty of one hundred pounds for each day on which he shall so sit or vote, to be recovered on behalf of the Treasury of the Union by action in any Superior Court of the Union

192

Allowances of Members

56.¹ (1) *Subject to the provisions of this section, every member of the Senate and the House of Assembly (excluding Ministers receiving a salary under the Crown, the President of the Senate and the Speaker of the House of Assembly) shall receive an allowance of seven hundred pounds per annum*

(2) *For every day during which any such member fails to attend a meeting of the House of which he is a member there shall be deducted the sum of two pounds. Provided that such member shall be exempted from deductions on account of such failure—*

- (a) *for any day on which he attends a meeting of any Committee of the House for which he is a member, and*
- (b) *when his absence is due to his illness or to the summons or subpoena of a competent Court (except a summons to answer a criminal charge upon which he is convicted), and*
- (c) *when his absence is due to the death or serious illness of his wife and such absence is condoned by the Sessional Committee on Standing Orders of the Senate or the Committee on Standing Rules and Orders of the House of Assembly (as the case may be), and*
- (d) *in respect of any further period of absence not exceeding fifteen days on which he so fails to attend during a session at which the estimates of expenditure for the ordinary administrative services of a financial year are considered*

(3) *Subject to the deductions incurred, if any, the Clerk of the House concerned shall pay to every such member of the House of which he is Clerk the allowance aforesaid in monthly instalments, the first month to be reckoned from the date notified in the Gazette as the date on which the member concerned was nominated or elected (as the case may be)*

(4) *The amount of the allowances paid under this section shall be charged annually to the Consolidated Revenue Fund and the provision*

¹ As substituted by section 1 of Act No. 51 of 1926, see sections 4 and 11 of Act No. 21 of 1932

of this sub-section shall be deemed to be an appropriation of every such amount

183

Privileges of Houses of Parliament

57 ¹ The powers, privileges, and immunities of the Senate and of the House of Assembly and of the members and committees of each House shall, subject to the provisions of this Act, be such as are declared by Parliament, and until declared shall be those of the House of Assembly of the Cape of Good Hope and of its members and committees at the establishment of the Union

72, 108, 251

Rules of Procedure

58 Each House of Parliament may make rules and orders with respect to the order and conduct of its business and proceedings. Until such rules and orders shall have been made the rules and orders of the Legislative Council and House of Assembly of the Cape of Good Hope at the establishment of the Union shall *mutatis mutandis* apply to the Senate and House of Assembly respectively. If a joint sitting of both Houses of Parliament is required under the provisions of this Act, it shall be convened by the Governor-General by message to both Houses. At any such joint sitting the Speaker of the House of Assembly shall preside and the rules of the House of Assembly shall, as far as practicable, apply

72, 219, 230, 239

POWERS OF PARLIAMENT

Powers of Parliament.

59 ² Parliament shall have full power to make laws for the peace, order, and good government of the Union

76, 93, 97.

Money Bills

60 (1) Bills appropriating revenue or moneys or imposing taxation shall originate only in the House of Assembly. But a Bill shall not be taken to appropriate revenue or moneys or to impose taxation by reason only of its containing provisions for the imposition or appropriation of fines or other pecuniary penalties.

(2) The Senate may not amend any Bills so far as they impose taxation or appropriate revenue or moneys for the services of the Government.

(3) The Senate may not amend any Bills so as to increase any proposed charges or burden on the people

15, 223, 224

¹ But see now Powers and Privileges of Parliament Act (Act No. 19 of 1911)

² See section 3 of the Statute of Westminster, 1931 (Appendix III), and section 2 of the Status of the Union Act, 1934 (Appendix VII)

Appropriation Bills

61 Any Bill which appropriates revenue or moneys for the ordinary annual services of the Government shall deal only with such appropriation 224

Recommendation of Money Votes.

62 The House of Assembly shall not originate or pass any vote, resolution, address, or Bill for the appropriation of any part of the public revenue or of any tax or impost to any purpose unless such appropriation has been recommended by message from the Governor-General during the session in which such vote, resolution, address, or Bill is proposed 222, 224

Disagreements between the Two Houses.

63 If the House of Assembly passes any Bill and the Senate rejects or fails to pass it or passes it with amendments to which the House of Assembly will not agree, and if the House of Assembly in the next session again passes the Bill with or without any amendments which have been made or agreed to by the Senate and the Senate rejects or fails to pass it or passes it with amendments to which the House of Assembly will not agree, the Governor-General may during that session convene a joint sitting of the members of the Senate and House of Assembly. The members present at any such joint sitting may deliberate and shall vote together upon the Bill as last proposed by the House of Assembly and upon amendments, if any, which have been made therein by one House of Parliament and not agreed to by the other, and any such amendments which are affirmed by a majority of the total number of members of the Senate and House of Assembly present at such sitting shall be taken to have been carried, and if the Bill with the amendments, if any, is affirmed by a majority of the members of the Senate and House of Assembly present at such sitting, it shall be taken to have been duly passed by both Houses of Parliament. Provided that, if the Senate shall reject or fail to pass any Bill dealing with the appropriation of revenue or moneys for the public service, such joint sitting may be convened during the same session in which the Senate so rejects or fails to pass such Bill

77, 183, 230, 232, 233, 237

Royal Assent to Bills.

64 ¹ When a Bill is presented to the Governor-General for the King's Assent, he shall declare according to his discretion, but subject to the provisions of this Act, and to such instructions as may from

¹ See section 8 of the Status of the Union Act, 1934 (Appendix VII), which abolishes the right of reserving bills for the King's pleasure

time to time be given in that behalf by the King, that he assents in the King's name, or that he withholds assent, or that he reserves the Bill for the signification of the King's pleasure. All Bills repealing or amending this section or any of the provisions of Chapter IV under the heading 'House of Assembly', and all Bills abolishing provincial councils or abridging the powers conferred on provincial councils under section *eighty-five*, otherwise than in accordance with the provisions of that section, shall be so reserved. The Governor-General may return to the House in which it originated any Bill so presented to him, and may transmit therewith any amendments which he may recommend, and the House may deal with the recommendation

77, 96, 134, 226, 243.

Disallowance of Bills

65.¹ The King may disallow any law within one year after it has been assented to by the Governor-General, and such disallowance, on being made known by the Governor-General by speech or message to each of the Houses of Parliament or by proclamation, shall annul the law from the day when the disallowance is made known. 77, 96, 135, 243

Reservation of Bills

66.² A Bill reserved for the King's pleasure shall not have any force unless and until, within one year from the day on which it was presented to the Governor-General for the King's Assent, the Governor-General makes known by speech or message to each of the Houses of Parliament or by proclamation that it has received the King's Assent. 77, 96, 135, 243

Signature and Enrolment of Acts

67.³ As soon as may be after any law shall have been assented to in the King's name by the Governor-General, or having been reserved for the King's pleasure shall have received his assent, the Clerk of the House of Assembly shall cause two fair copies of such law, one being in the English and the other in the Dutch language (one of which copies shall be signed by the Governor-General), to be enrolled of record in the office of the Registrar of the Appellate Division of the Supreme Court of South Africa, and such copies shall be conclusive evidence as to the provisions of every such law, and in case of conflict between the two copies thus deposited that signed by the Governor-General shall prevail. 244

¹ See section 11 (2) of the Status of the Union Act, 1934 (Appendix VII)

² This section is repealed by section 11 (1) of the Status of the Union Act, 1934 (Appendix VII)

³ Amended by section 9 of the Status of the Union Act, 1934 (Appendix VII)
Act No. 8 of 1925 includes Afrikaans in the Dutch language

PART V
THE PROVINCES
Administrators

Appointment and Tenure of Office of Provincial Administrators

68 (1) In each province there shall be a chief executive officer appointed by the Governor-General-in-Council, who shall be styled the administrator of the province, and in whose name all executive acts relating to provincial affairs therein shall be done

(2) In the appointment of the administrator of any province, the Governor-General-in-Council shall, as far as practicable, give preference to persons resident in such province

(3) Such administrator shall hold office for a term of five years and shall not be removed before the expiration thereof except by the Governor-General-in-Council for cause assigned, which shall be communicated by message to both Houses of Parliament within one week after the removal, if Parliament be then sitting, or if Parliament be not sitting, then within one week after the commencement of the next ensuing session

(4) The Governor-General-in-Council may from time to time appoint a deputy-administrator to execute the office and functions of the administrator during his absence illness or other inability

77, 177, 315, 318, 346

Salaries of Administrators

69 The salaries of the administrators shall be fixed and provided by Parliament, and shall not be reduced during their respective terms of office

315, 316

Provincial Councils

Constitution of Provincial Councils

70 (1) There shall be a provincial council in each province consisting of the same number of members as are elected in the province for the House of Assembly. Provided that, in any province whose representatives in the House of Assembly shall be less than twenty-five in number, the provincial council shall consist of twenty-five members.

(2) Any person qualified to vote for the election of members of the provincial council shall be qualified to be a member of such council

77, 322

Qualification of Provincial Councillors.

71 ¹ (1) The members of the provincial council shall be elected by the persons qualified to vote for the election of members of the House

¹ See section 3 of Act No. 18 of 1930.

of Assembly in the province voting in the same electoral divisions as are delimited for the election of members of the House of Assembly. Provided that, in any province in which less than twenty-five members are elected to the House of Assembly, the delimitation of the electoral divisions and any necessary re-allocation of members or adjustment of electoral divisions, shall be effected by the same commission and on the same principles as are prescribed in regard to the electoral divisions for the House of Assembly.

(2) Any alteration in the number of members of the provincial council, and any re-division of the province into electoral divisions, shall come into operation at the next general election for such council held after the completion of such re-division or of any allocation consequent upon such alteration, and not earlier.

(3) The election shall take place at such times as the administrator shall by proclamation direct, and the provisions of section *thirty-seven* applicable to the election of members of the House of Assembly shall *mutatis mutandis* apply to such elections. 316, 322.

Application of Sections fifty-three to fifty-five to Provincial Councillors

72¹ The provisions of sections *fifty-three*, *fifty-four*, and *fifty-five*, relative to members of the House of Assembly shall *mutatis mutandis* apply to members of the provincial councils. Provided that any member of a provincial council who shall become a member of either House of Parliament shall thereupon cease to be a member of such provincial council. 77, 334.

Tenure of Office by Provincial Councillors.

73 Each provincial council shall continue for three years from the date of its first meeting and shall not be subject to dissolution save by effluxion of time.

Sessions of Provincial Councils

74 The administrator of each province shall by proclamation fix such times for holding the sessions of the provincial council as he may think fit, and may from time to time prorogue such council. Provided that there shall be a session of every provincial council once at least in every year, so that a period of twelve months shall not intervene between the last sitting of the council in one session and its first sitting in the next session. 316, 324.

Chairman of Provincial Councils

75 The provincial council shall elect from among its members a chairman, and may make rules for the conduct of its proceedings.

¹ See section 37 of Act No. 12 of 1918, sections 27 and 51 of Act No. 11 of 1928.

Such rules shall be transmitted by the administrator to the Governor-General, and shall have full force and effect unless and until the Governor-General-in-Council shall express his disapproval thereof in writing addressed to the administrator 325

Allowances of Provincial Councillors

76 The members of the provincial council shall receive such allowances as shall be determined by the Governor-General-in-Council 324

Freedom of Speech in Provincial Councils

77 There shall be freedom of speech in the provincial council, and no member shall be liable to any action or proceeding in any court by reason of his speech or vote in such council 325

Executive Committees

Provincial Executive Committees

78. (1) Each provincial council shall at its first meeting after any general election elect from among its members, or otherwise, four persons to form with the administrator, who shall be chairman an executive committee for the province. The members of the executive committee other than the administrator shall hold office until the election of their successors in the same manner

(2) Such members shall receive such remuneration as the provincial council, with the approval of the Governor-General-in-Council, shall determine

(3) A member of the provincial council shall not be disqualified from sitting as a member by reason of his having been elected as a member of the executive committee

(4) Any casual vacancy arising in the executive committee shall be filled by election by the provincial council if then in session, or if the council is not in session, by a person appointed by the executive committee to hold office temporarily pending an election by the council 77, 319, 346

Right of Administrator, &c, to Take Part in Proceedings of Provincial Council

79 The administrator and any other member of the executive committee of a province, not being a member of the provincial council, shall have the right to take part in the proceedings of the council, but shall not have the right to vote 77, 316, 320

Powers of Provincial Executive Committees

80 The executive committee shall on behalf of the provincial council carry on the administration of provincial affairs. Until the first election of members to serve on the executive committee, such

administration shall be carried on by the administrator Whenever there are not sufficient members of the executive committee to form a quorum according to the rules of the committee, the administrator shall, as soon as practicable, convene a meeting of the provincial council for the purpose of electing members to fill the vacancies, and until such election the administrator shall carry on the administration of provincial affairs 77, 320, 346

Transfer of Powers to Provincial Executive Committees.

81 ¹ Subject to the provisions of this Act, all powers, authorities, and functions which at the establishment of the Union are in any of the Colonies vested in or exercised by the Governor or the Governor-in-Council, or any Minister of the Colony, shall after such establishment be vested in the executive committee of the province so far as such powers, authorities, and functions relate to matters in respect of which the provincial council is competent to make ordinances 77, 274, 320

Voting in Executive Committees.

82 Questions arising in the executive committee shall be determined by a majority of votes of the members present, and, in case of an equality of votes, the administrator shall have also a casting vote Subject to the approval of the Governor-General-in-Council, the executive committee may make rules for the conduct of its proceedings 77, 316, 320

Tenure of Office of Members of Executive Committees

83 ² Subject to the provisions of any law passed by Parliament regulating the conditions of appointment, tenure of office, retirement, and superannuation of public officers, the executive committee shall have power to appoint such officers as may be necessary, in addition to officers assigned to the province by the Governor-General-in-Council under the provisions of this Act, to carry out the services entrusted to them and to make and enforce regulations for the organization and discipline of such officers 321.

Power of Administrator to Act on behalf of Governor-General-in-Council

84 In regard to all matters in respect of which no powers are reserved or delegated to the provincial council, the administrator shall act on behalf of the Governor-General-in-Council when required to do so, and in such matters the administrator may act without reference to the other members of the executive committee 77, 317.

¹ See section 11 of Act No 10 of 1913, section 9 of Act No 46 of 1925, section 1 of Act No 39 of 1927, section 3 of Act No 21 of 1928

² See Act No, 27 of 1923, section 1 of Act No 29 of 1912

*Powers of Provincial Councils***Powers of Provincial Councils**

85.¹ Subject to the provisions of this Act and the assent of the Governor-General-in-Council as hereinafter provided, the provincial council may make ordinances in relation to matters coming within the following classes of subjects (that is to say) —

77, 86, 96, 97, 260, 261, 262, 264, 268, 272, 274, 346

- (i)² Direct taxation within the province in order to raise a revenue for provincial purposes 273-281
- (ii) The borrowing of money on the sole credit of the province with the consent of the Governor-General-in-Council and in accordance with regulations to be framed by Parliament 281
- (iii)³ Education, other than higher education, for a period of five years and thereafter until Parliament otherwise provides 277, 287
- (iv) Agriculture to the extent and subject to the conditions to be defined by Parliament 290
- (v) The establishment, maintenance, and management of hospitals and charitable institutions 290
- (vi)⁴ Municipal institutions, divisional councils, and other local institutions *having authority and functions in any area in respect of the local government of, or the preservation of public health in, that area, including any such body as is referred to in section seven of the Public Health Act, 1919 (Act No 36 of 1919)* 265, 291
- (vii) Local works and undertakings within the province, other than railways and harbours, and other than such works as extend beyond the borders of the province, and subject to the power of Parliament to declare any work a national work and to provide for its construction by arrangement with the provincial council or otherwise 301

¹ See section 9 of Act No 46 of 1925, section 11 of Act No 10 of 1913, section 3 of Act No 39 of 1927, section 3 of Act No 21 of 1928. See also Acts Nos 9 of 1917, 6 of 1920, 4 of 1920 (section 2), 5 of 1922, and 31 of 1926.

² Amended by section 3 of Act No 5 of 1921, section 9 of Act No 5 of 1922, see section 11 of Act No 10 of 1913, section 9 of Act No 46 of 1925, Act No 30 of 1927, section 3 of Act No 21 of 1928.

³ 'Higher education' is defined in section 11 of Act No 5 of 1922, see section 14 of Act No 46 of 1925, Act No 20 of 1928.

⁴ As amended by section 1 (1) of Act No 1 of 1926, in operation since January 1, 1920, but not with reference to the Natal Ordinances referred to in section 2 of that act.

- (viii) Roads, outspans, ponts, and bridges, other than bridges connecting two provinces 302
- (ix) Markets and pounds 303
- (x) Fish and game preservation ¹ 304
- (xi) The imposition of punishment by fine, penalty, or imprisonment for enforcing any law or any ordinance of the province made in relation to any matter coming within any of the classes of subjects enumerated in this section 305
- (xii) Generally all matters which, in the opinion of the Governor-General-in-Council, are of a merely local or private nature in the province 65, 306
- (xiii)² All other subjects in respect of which Parliament shall by any law delegate the power of making ordinances to the provincial council 307, 309

Effect of Provincial Ordinances

86 Any ordinance made by a provincial council shall have effect in and for the province as long and as far only as it is not repugnant to any Act of Parliament 78, 97, 263, 264, 268, 270

Recommendations to Parliament

87 A provincial council may recommend to Parliament the passing of any law relating to any matter in respect of which such council is not competent to make ordinances 346

Power to Deal with Matters Proper to be Dealt with by Private Bill Legislation

88 ³ In regard to any matter which requires to be dealt with by means of a private Act of Parliament, the provincial council of the province to which the matter relates may, subject to such procedure as shall be laid down by Parliament, take evidence by means of a Select Committee or otherwise for and against the passing of such law, and, upon receipt of a report from such council, together with the evidence upon which it is founded, Parliament may pass such Act without further evidence being taken in support thereof 228, 327

Constitution of Provincial Revenue Fund.

89.⁴ A provincial revenue fund shall be formed in every province, into which shall be paid all revenues raised by or accruing to the provincial council and all moneys paid over by the Governor-General-in-Council to the provincial council. Such fund shall be

¹ As to National Parks see section 3 of Act No. 56 of 1936

² See Act No. 10 of 1913 and its amendments

³ See section 5 of Act No. 20 of 1912

⁴ See section 17 of Act No. 10 of 1913 for administrator's powers in regard to unforeseen expenditure

appropriated by the provincial council by ordinance for the purposes of the provincial administration generally, or, in the case of moneys paid over by the Governor-General-in-Council for particular purposes, then for such purposes, but no such ordinance shall be passed by the provincial council unless the administrator shall have first recommended to the council to make provision for the specific service for which the appropriation is to be made. No money shall be issued from the provincial revenue fund except in accordance with such appropriation and under warrant signed by the administrator. Provided that, until the expiration of one month after the first meeting of the provincial council, the administrator may expend such moneys as may be necessary for the services of the province. 282, 316

Assent to Provincial Ordinances.

90 When a proposed ordinance has been passed by a provincial council it shall be presented by the administrator to the Governor-General-in-Council for his assent. The Governor-General-in-Council shall declare within one month from the presentation to him of the proposed ordinance that he assents thereto, or that he withholds assent, or that he reserves the proposed ordinance for further consideration. A proposed ordinance so reserved shall not have any force unless and until, within one year from the day on which it was presented to the Governor-General-in-Council, he makes known by proclamation that it has received his assent. 78, 269, 319

Effect and Enrolment of Ordinances

91 An ordinance assented to by the Governor-General-in-Council and promulgated by the administrator shall, subject to the provisions of this Act, have the force of law within the province. The administrator shall cause two fair copies of every such ordinance, one being in the English and the other in the Dutch language (one of which copies shall be signed by the Governor-General), to be enrolled of record in the office of the Registrar of the Appellate Division of the Supreme Court of South Africa, and such copies shall be conclusive evidence as to the provisions of such ordinance, and, in case of conflict between the two copies thus deposited, that signed by the Governor-General shall prevail. 78, 97, 269, 316

Miscellaneous

Audit of Provincial Accounts.

92 (1) In each province there shall be an auditor of accounts to be appointed by the Governor-General-in-Council.

(2) No such auditor shall be removed from office except by the Governor-General-in-Council for cause assigned, which shall be communicated by message to both Houses of Parliament within one

week after the removal if Parliament be then sitting, and, if Parliament be not sitting, then within one week after the commencement of the next ensuing session

(3) Each such auditor shall receive out of the Consolidated Revenue Fund such salary as the Governor-General-in-Council, with the approval of Parliament, shall determine

(4) Each such auditor shall examine and audit the accounts of the province to which he is assigned subject to such regulations and orders as may be framed by the Governor-General-in-Council and approved by Parliament, and no warrant signed by the administrator authorizing the issuing of money shall have effect unless countersigned by such auditor

283, 321

Continuation of Powers of Divisional and Municipal Councils

93 Notwithstanding anything in this Act contained, all powers, authorities, and functions lawfully exercised at the establishment of the Union by divisional or municipal councils, or any other duly constituted local authority, shall be and remain in force until varied or withdrawn by Parliament or by a provincial council having power in that behalf

42

Seats of Provincial Government

94. The seats of provincial government shall be—

For the Cape of Good Hope	Capetown.
For Natal	Pietermaritzburg
For the Transvaal	Pretoria
For the Orange Free State	Bloemfontein

324

PART VI¹

THE SUPREME COURT OF SOUTH AFRICA

Constitution of Supreme Court

95.² There shall be a Supreme Court of South Africa consisting of a Chief Justice of South Africa, the judges of appeal, and the other judges of the several divisions of the Supreme Court of South Africa in the provinces

108, 357

Appellate Division of Supreme Court.

96.³ *There shall be an appellate division of the Supreme Court of South Africa consisting of the chief justice of South Africa and four judges of appeal*

78, 357.

¹ See section 2 of Act No. 11 of 1927

² As amended by section 3 (1) (a) of Act No. 12 of 1920

³ As substituted by section 1 of Act No. 12 of 1920

Filling of Temporary Vacancies in Appellate Division.

97¹ The Governor-General-in-Council may, during the absence, illness, or other incapacity of the Chief Justice of South Africa, or of any judge of appeal, appoint any other judge of the Supreme Court of South Africa to act temporarily as such chief justice, or judge of appeal, as the case may be

109

Constitution of Provincial and Local Divisions of Supreme Court.

98 (1) The several supreme courts of the Cape of Good Hope, Natal, and the Transvaal, and the High Court of the Orange River Colony shall, on the establishment of the Union, become provincial divisions of the Supreme Court of South Africa within their respective provinces, and shall each be presided over by a judge-president

(2) The court of the eastern districts of the Cape of Good Hope the High Court of Griqualand, the High Court of Witwatersrand and the several circuit courts, shall become local divisions of the Supreme Court of South Africa within the respective areas of their jurisdiction as existing at the establishment of the Union

(3) The said provincial and local divisions, referred to in this Act as superior courts, shall, in addition to any original jurisdiction exercised by the corresponding courts of the Colonies at the establishment of the Union, have jurisdiction in all matters—

(a) in which the Government of the Union or a person suing or being sued on behalf of such Government is a party

(b) in which the validity of any provincial ordinance shall come into question

(4)² Unless and until Parliament shall otherwise provide, the said superior courts shall *mutatis mutandis* have the same jurisdiction in matters affecting the validity of elections of members of the House of Assembly and provincial councils as the corresponding courts of the Colonies have at the establishment of the Union in regard to *parliamentary elections in such Colonies respectively* 42, 78, 357

Continuation in Office of Existing Judges

99 All judges of the superior courts of the Colonies, including the High Court of the Orange River Colony, holding office at the establishment of the Union shall on such establishment become judges of the Supreme Court of South Africa, assigned to the divisions of the Supreme Court in the respective provinces, and shall retain all such rights in regard to salaries and pensions as they may possess at the establishment of the Union. The Chief Justices of the Colonies holding office at the establishment of the Union shall on such establishment

¹ As amended by section 2 (1) (b) of Act No 12 of 1920

² See sections 106-33 of Act No 12 of 1918

become the Judges-President of the divisions of the Supreme Court in the respective provinces but shall so long as they hold that office retain the title of Chief Justice of their respective provinces 42, 78, 377

Appointment and Remuneration of Judges

100¹ The Chief Justice of South Africa, the judges of appeal, and all other judges of the Supreme Court of South Africa to be appointed after the establishment of the Union, shall be appointed by the Governor-General-in-Council, and shall receive such remuneration as Parliament shall prescribe and their remuneration shall not be diminished during their continuance in office 76, 78, 377.

Tenure of Office by Judges

101 The Chief Justice of South Africa and other judges of the Supreme Court of South Africa shall not be removed from office except by the Governor-General-in-Council on an address from both Houses of Parliament in the same session praying for such removal on the ground of misbehaviour or incapacity 78, 377.

Reduction in Number of Judges

102 Upon any vacancy occurring in any division of the Supreme Court of South Africa, other than the Appellate Division, the Governor-General-in-Council may, in case he shall consider that the number of judges of such court may with advantage to the public interests be reduced postpone filling the vacancy until Parliament shall have determined whether such reduction shall take place 377

Appeals to Appellate Division.

103² In every civil case in which, according to the law in force at the establishment of the Union, an appeal might have been made to the Supreme Court of any of the Colonies from a superior court in any of the Colonies, *or from the High Court of Southern Rhodesia*, the appeal shall be made only to the Appellate Division, except in cases of orders or judgments given by a single judge, upon applications by way of motion or petition or on summons for provisional sentence or judgments as to costs only, which by law are left to the discretion of the court. The appeal from any such orders or judgments as well as any appeal in criminal cases from any such superior court, or the special reference by any such court of any point of law in a criminal case, shall be made to the provincial division

¹ As amended by section 2 (1) (c) of Act No. 12 of 1920

² See Appellate Division Further Jurisdiction Act, 1911 (Act No. 1 of 1911). See section 3 of Act No. 12 of 1920 regarding appeals from S.W.A., and Act No. 18 of 1931 regarding appeals from Southern Rhodesia. See Act No. 31 of 1917, sections 368-72. Act No. 11 of 1927. The words in italics were deleted by section 7 (2) of Act No. 18 of 1931.

corresponding to the court which before the establishment of the Union would have had jurisdiction in the matter. There shall be no further appeal against any judgment given on appeal by such provincial division except to the Appellate Division, and then only if the Appellate Division shall have given special leave to appeal. 78, 108

Existing Appeals.

104 In every case, civil or criminal, in which at the establishment of the Union an appeal might have been made from the Supreme Court of any of the Colonies or from the High Court of the Orange River Colony to the King-in-Council, the appeal shall be made only to the Appellate Division. Provided that the right of appeal in any civil suit shall not be limited by reason only of the value of the matter in dispute or the amount claimed or awarded in such suit.

Appeals from Inferior Courts to Provincial Divisions

105 In every case, civil or criminal, in which at the establishment of the Union an appeal might have been made from a court of resident magistrate or other inferior court to a superior court in any of the Colonies, the appeal shall be made to the corresponding division of the Supreme Court of South Africa, but there shall be no further appeal against any judgment given on appeal by such division except to the Appellate Division, and then only if the Appellate Division shall have given special leave to appeal. 360, 363

Provisions as to Appeals to the King-in-Council

106. There shall be no appeal from the Supreme Court of South Africa or from any division thereof to the King-in-Council, but nothing herein contained shall be construed to impair any right which the King-in-Council may be pleased to exercise to grant special leave to appeal from the Appellate Division to the King-in-Council. Parliament may make laws limiting the matters in respect of which such special leave may be asked, but Bills containing any such limitation shall be reserved by the Governor-General for the signification of His Majesty's pleasure.¹ Provided that nothing in this section shall affect any right of appeal to His Majesty-in-Council from any judgment given by the Appellate Division of the Supreme Court under or in virtue of the Colonial Courts of Admiralty Act, 1890

78, 134, 136, 244, 375, 376

Rules of Procedure in Appellate Division

107² The Chief Justice of South Africa and the judges of appeal may, subject to the approval of the Governor-General-in-Council,

¹ Cf. paragraph vii of the Royal Instructions (Appendix VI). See section 9 of the Royal Executive Functions and Seals Act, 1934 (Appendix VIII)

² As amended by section 2 (1) (d) of Act No. 12 of 1920

make rules for the conduct of the proceedings of the Appellate Division and prescribing the time and manner of making appeals thereto. Until such rules shall have been promulgated, the rules in force in the Supreme Court of the Cape of Good Hope at the establishment of the Union shall *mutatis mutandis* apply.

Rules of Procedure in Provincial and Local Divisions

108 The Chief Justice and other judges of the Supreme Court of South Africa may, subject to the approval of the Governor-General-in-Council, frame rules for the conduct of the proceedings of the several provincial and local divisions. Until such rules shall have been promulgated, the rules in force at the establishment of the Union in the respective courts which become divisions of the Supreme Court of South Africa shall continue to apply therein.

Place of Sittings of Appellate Division

109¹ The Appellate Division shall sit in Bloemfontein, but may from time to time for the convenience of suitors hold its sittings at other places within the Union. 78, 108, 361

Quorum for Hearing Appeals

110.² (1) *On the hearing of an appeal from a court consisting of a single judge, three judges of the Appellate Division shall form a quorum and on the hearing of an appeal from a court consisting of two or more judges, four judges of the Appellate Division shall form a quorum.*

Provided that if four judges of the Appellate Division sit to hear an appeal and are equally divided as to any judgment or order, or part thereof, to be given on appeal, any part of the judgment or order of the court from which the appeal is made, in respect whereof such judges are so divided, shall stand and shall be deemed to be the judgment or order of the Appellate Division.

Provided, further, that the costs arising out of any matter in respect whereof such judges are so divided shall be awarded to the party in whose favour such matter was decided by the court from which the appeal is made, subject to the power of such judges, or three of them, to make any other order as to the costs which they may deem equitable.

(2) *If after argument on an appeal has been heard a judge who sat at the hearing dies or retires, or becomes otherwise incapable of acting before judgment has been given on the appeal, then—*

(a) *if the argument was heard before three judges, the judgments of the two remaining judges if in agreement, or*

¹ See section 16 of Act No. 27 of 1912 for interpretation hereof.

² As substituted by section 1 of Act No. 11 of 1927.

(b) *if the argument was heard before four judges, the judgments of the three remaining judges if in agreement, or*

(c) *if the argument was heard before five judges, the judgments of the four remaining judges if in agreement, or of any three of them which are in agreement,*

shall be the judgment of the Court

(3) *No judge shall sit in the hearing of an appeal against a judgment or order given in a case which was heard before him* 360

Jurisdiction of Appellate Division

111. The process of the Appellate Division shall run throughout the Union, and all its judgments or orders shall have full force and effect in every province and shall be executed in like manner as if they were original judgments or orders of the provincial division of the Supreme Court of South Africa in such province 362

Execution of Processes of Provincial Divisions

112.¹ The registrar of every provincial division of the Supreme Court of South Africa, if thereto requested by any party in whose favour any judgment or order has been given or made by any other division, shall, upon the deposit with him of an authenticated copy of such judgment or order and on proof that the same remains unsatisfied, issue a writ or other process for the execution of such judgment or order, and thereupon such writ or other process shall be executed in like manner as if it had been originally issued from the division of which he is registrar 369

Transfer of Suits from one Provincial or Local Division to Another.

113.² Any provincial or local division of the Supreme Court of South Africa to which it may be made to appear that any civil suit pending therein may be more conveniently or fitly heard or determined in another division, may order the same to be removed to such other division, and thereupon such last-mentioned division may proceed with such suit in like manner as if it had been originally commenced therein 369

Registrar and Officers of Appellate Division.

114. The Governor-General-in-Council may appoint a registrar of the Appellate Division and such other officers thereof as shall be required for the proper dispatch of the business thereof

¹ See section 5 (1) of Act No. 24 of 1922 for application of this section to mandated territory of S.W.A.

² See section 14 of Act No. 27 of 1912 in civil, and section 141 of Act No. 31 of 1917 in criminal matters. As to S.W.A. see Act No. 24 of 1922

Advocates and Attorneys

115 (1) The laws regulating the admission of advocates and attorneys to practise before any superior court of any of the Colonies shall *mutatis mutandis* apply to the admission of advocates and attorneys to practise in the corresponding division of the Supreme Court of South Africa

(2) All advocates and attorneys entitled at the establishment of the Union to practise in any superior court of any of the Colonies shall be entitled to practise as such in the corresponding division of the Supreme Court of South Africa

(3) All advocates and attorneys entitled to practise before any provincial division of the Supreme Court of South Africa shall be entitled to practise before the Appellate Division 354, 382

Pending Suits

116 All suits, civil or criminal pending in any superior court of any of the Colonies at the establishment of the Union shall stand removed to the corresponding division of the Supreme Court of South Africa, which shall have jurisdiction to hear and determine the same, and all judgments and orders of any superior court of any of the Colonies given or made before the establishment of the Union shall have the same force and effect as if they had been given or made by the corresponding division of the Supreme Court of South Africa. All appeals to the King-in-Council which shall be pending at the establishment of the Union shall be proceeded with as if this Act had not been passed

PART VII**FINANCE AND RAILWAYS****Constitution of Consolidated Revenue Fund and Railway and Harbour Fund**

117.¹ All revenues, from whatever source arising, over which the several Colonies have at the establishment of the Union power of appropriation, shall vest in the Governor-General-in-Council. There shall be formed a Railway and Harbour Fund, into which shall be paid all revenues raised or received by the Governor-General-in-Council from the administration of the railways, ports, and harbours, and such fund shall be appropriated by Parliament to the purposes of the railways, ports, and harbours in the manner prescribed by this Act. There shall also be formed a Consolidated Revenue Fund,

¹ See section 4 (3) of Act No. 33 of 1922 about defence endowment account. See Act No. 20 of 1922, as to S. W. A. See Act No. 5 of 1926, as to provision of a General Sinking Fund.

into which shall be paid all other revenues raised or received by the Governor-General-in-Council, and such fund shall be appropriated by Parliament for the purposes of the Union in the manner proscribed by this Act, and subject to the charges imposed thereby 78, 158

Commission of Inquiry into Financial Relations between Union and Provinces.

118¹ The Governor-General-in-Council shall, as soon as may be after the establishment of the Union, appoint a commission, consisting of one representative from each province, and presided over by an officer from the Imperial Service, to institute an inquiry into the financial relations which should exist between the Union and the provinces. Pending the completion of that inquiry and until Parliament otherwise provides, there shall be paid annually out of the Consolidated Revenue Fund to the administrator of each province—

- (a) an amount equal to the sum provided in the estimates for education, other than higher education, in respect of the financial year, 1908-9, as voted by the Legislature of the corresponding colony during the year nineteen hundred and eight,
- (b) such further sums as the Governor-General-in-Council may consider necessary for the due performance of the services and duties assigned to the provinces respectively

Until such inquiry shall be completed and Parliament shall have made other provisions, the executive committees in the several provinces shall annually submit estimates of their expenditure for the approval of the Governor-General-in-Council, and no expenditure shall be incurred by any executive committee which is not provided for in such approved estimates

72, 274, 283

Security for Existing Public Debts.

119 The annual interest of the public debts of the Colonies and any sinking funds constituted by law at the establishment of the Union shall form a first charge on the Consolidated Revenue Fund

42, 157

Requirements for Withdrawal of Money from Funds

120 No money shall be withdrawn from the Consolidated Revenue Fund or the Railway and Harbour Fund except under appropriation made by law. But, until the expiration of two months after the first meeting of Parliament the Governor-General-in-Council may draw therefrom and expend such moneys as may be necessary for the public service, and for railway and harbour administration respectively

78, 158, 223.

¹ See Act No 10 of 1913

Transfer of Colonial Property to the Union.

121 All stocks, cash, bankers' balances, and securities for money belonging to each of the Colonies at the establishment of the Union shall be the property of the Union. Provided that the balances of any funds raised at the establishment of the Union by law for any special purposes in any of the Colonies shall be deemed to have been appropriated by Parliament for the special purposes for which they have been provided 42, 78

Crown Lands, &c

122 Crown lands, public works, and all property throughout the Union, movable or immovable, and all rights of whatever description belonging to the several Colonies at the establishment of the Union, shall vest in the Governor-General-in-Council subject to any debt or liability specifically charged thereon 42

Mines and Minerals

123 ¹ All rights in and to mines and minerals, and all rights in connection with the searching for, working for, or disposing of, minerals (or precious stones), which at the establishment of the Union are vested in the Government of any of the Colonies, shall on such establishment vest in the Governor-General-in-Council 42

Assumption by Union of Colonial Debts

124 The Union shall assume all debts and liabilities of the Colonies existing at its establishment, subject, notwithstanding any other provision contained in this Act, to the conditions imposed by any law under which such debts or liabilities were raised or incurred, and without prejudice to any rights of security or priority in respect of the payment of principal, interest, sinking fund, and other charges conferred on the creditors of any of the Colonies, and may, subject to such conditions and rights, convert, renew, or consolidate such debts 42, 78.

Ports, Harbours, and Railways

125 All ports, harbours, and railways belonging to the several Colonies at the establishment of the Union shall from the date thereof vest in the Governor-General-in-Council. No railway for the conveyance of public traffic, and no port, harbour, or similar work, shall be constructed without the sanction of Parliament 42, 153

Constitution of Harbour and Railway Board

126.² Subject to the authority of the Governor-General-in-Council, the control and management of the railways, ports, and harbours of

¹ See section 1 of Act No. 44 of 1927 regarding precious stones

² See Act No. 13 of 1915, and Act No. 17 of 1916

the Union shall be exercised through a board consisting of not more than three commissioners who shall be appointed by the Governor-General-in-Council and a minister of State who shall be chairman. Each commissioner shall hold office for a period of five years but may be re-appointed. He shall not be removed before the expiration of his period of appointment except by the Governor-General-in-Council for cause assigned which shall be communicated by message to both Houses of Parliament within one week after the removal, if Parliament be then sitting, or if Parliament be not sitting then within one week after the commencement of the next ensuing session. The salaries of the commissioners shall be fixed by Parliament and shall not be reduced during their respective terms of office.

78, 153

Administration of Railways, Ports, and Harbours

127.¹ The railways, ports and harbours of the Union shall be administered on business principles due regard being had to agricultural and industrial development within the Union and promotion by means of cheap transport of the settlement of an agricultural and industrial population in the inland portions of all provinces of the Union. So far as may be the total earnings shall be not more than are sufficient to meet the necessary outlays for working maintenance betterment depreciation and the payment of interest due on capital not being capital contributed out of railway or harbour revenue and not including any sums payable out of the Consolidated Revenue Fund in accordance with the provisions of sections *one hundred and thirty and one hundred and thirty-one*. The amount of interest due on such capital invested shall be paid over from the Railway and Harbour Fund into the Consolidated Revenue Fund. The Governor-General-in-Council shall give effect to the provisions of this section as soon as and at such time as the necessary administrative and financial arrangements can be made but in any case shall give full effect to them before the expiration of four years from the establishment of the Union. During such period if the revenues accruing to the Consolidated Revenue Fund are insufficient to provide for the general service of the Union and if the earnings accruing to the Railway and Harbour Fund are in excess of the outlays specified herein Parliament may by law appropriate such excess or any part thereof towards the general expenditure of the Union, and all sums so appropriated shall be paid over to the Consolidated Revenue Fund.

78, 153, 154

¹ Administration now governed by Act No. 22 of 1916, as amended

Establishment of Fund for Maintaining Uniformity of Railway Rates

128.¹ Notwithstanding anything to the contrary in the last preceding section the Board may establish a fund out of railway and harbour revenue to be used for maintaining as far as may be uniformity of rates notwithstanding fluctuations in traffic 153

Management of Railway and Harbour Balances

129. All balances standing to the credit of any fund established in any of the Colonies for railway or harbour purposes at the establishment of the Union shall be under the sole control and management of the Board and shall be deemed to have been appropriated by Parliament for the respective purposes for which they have been provided 153

Construction of Harbour and Railway Works.

130. Every proposal for the construction of any port or harbour works or of any line of railway before being submitted to Parliament, shall be considered by the Board which shall report thereon and shall advise whether the proposed works or line of railway should or should not be constructed. If any such works or line shall be constructed contrary to the advice of the Board and if the Board is of opinion that the revenue derived from the operation of such works or line will be insufficient to meet the costs of working and maintenance and of interest on the capital invested therein it shall frame an estimate of the annual loss which in its opinion will result from such operation. Such estimate shall be examined by the Controller and Auditor-General and when approved by him the amount thereof shall be paid over annually from the Consolidated Revenue Fund to the Railway and Harbour Fund. Provided that if in any year the actual loss incurred as calculated by the Board and certified by the Controller and Auditor-General is less than the estimate framed by the Board the amount paid over in respect of that year shall be reduced accordingly so as not to exceed the actual loss incurred. In calculating the loss arising from the operation of any such work or line the Board shall have regard to the value of any contributions of traffic to other parts of the system which may be due to the operation of such work or line.

Making Good of Deficiencies in Railway Fund in Certain Cases

131.¹ If the Board shall be required by the Governor-General in

¹ See section 3 of Act No. 17 of 1916 for requirements of report.

² See also section 56 of Act No. 21 of 1911, section 37 of Act No. 31 of 1916, section 3 (2) of Act No. 17 of 1916 and for application to South-West Africa, section 7 of Act No. 20 of 1922.

³ See section 56 of Act No. 21 of 1911, section 17 of Act No. 31 of 1916.

Council or under any Act of Parliament or resolution of both Houses of Parliament to provide any services or facilities either gratuitously or at a rate of charge which is insufficient to meet the costs involved in the provision of such services or facilities, the Board shall at the end of each financial year present to Parliament an account approved by the Controller and Auditor-General, showing, as nearly as can be ascertained, the amount of the loss incurred by reason of the provision of such services and facilities, and such amount shall be paid out of the Consolidated Revenue Fund to the Railway and Harbour Fund 157.

Controller and Auditor-General

132 The Governor-General in Council shall appoint a Controller and Auditor-General who shall hold office during good behaviour provided that he shall be removed by the Governor-General in Council on an address praying for such removal presented to the Governor-General by both Houses of Parliament provided further that when Parliament is not in session the Governor-General in Council may suspend such officer on the ground of incompetence or misbehaviour, and, when and so often as such suspension shall take place, a full statement of the circumstances shall be laid before both Houses of Parliament within fourteen days after the commencement of its next session and, if an address shall at any time during the session of Parliament be presented to the Governor-General by both Houses praying for the restoration to office of such officer, he shall be restored accordingly and if no such address be presented the Governor-General shall confirm such suspension and shall declare the office of Controller and Auditor-General to be, and it shall thereupon become, vacant Until Parliament shall otherwise provide, the Controller and Auditor-General shall exercise such powers and functions and undertake such duties as may be assigned to him by the Governor-General in Council by regulations framed in that behalf (*Repealed by section one, Act No 21 of 1911*) 108, 157

Compensation of Colonial Capitals for Diminution of Prosperity

133 In order to compensate Pietermaritzburg and Bloemfontein for any loss sustained by them in the form of diminution of prosperity or decreased rateable value by reason of their ceasing to be seats of government of their respective Colonies, there shall be paid from the Consolidated Revenue Fund for a period not exceeding twenty-five years to the municipal councils of such towns a grant of two per centum per annum on their municipal debts, as existing on the thirty-first day of January nineteen hundred and nine, and as ascertained by the Controller and Auditor-General The Commission appointed under *section one hundred and eighteen* shall, after due inquiry, report

to the Governor-General-in-Council what compensation should be paid to the municipal councils of Capetown and Pretoria for the losses, if any, similarly sustained by them. Such compensation shall be paid out of the Consolidated Revenue Fund for a period not exceeding twenty-five years, and shall not exceed one per centum per annum on the respective municipal debts of such towns existing on the thirty-first January nineteen hundred and nine, and as ascertained by the Controller and Auditor-General. For the purposes of this section Capetown shall be deemed to include the municipalities of Capetown, Grcen Point and Sea Point, Woodstock, Mowbray and Rondebosch, Claremont, and Wynberg and any grant made to Capetown shall be payable to the councils of such municipalities in proportion to their respective debts. One half of any such grants shall be applied to the redemption of the municipal debts of such towns respectively. At any time after the tenth annual grant has been paid to any of such towns the Governor-General-in-Council, with the approval of Parliament, may after due inquiry withdraw or reduce the grant to such town.

PART VIII

GENERAL

Method of Voting for Senators, &c

134. The election of senators and of members of the executive committees of the provincial councils as provided in this Act shall, whenever such election is contested, be according to the principle of proportional representation, each voter having one transferable vote. The Governor-General-in-Council, or, in the case of the first election of the Senate, the Governor-in-Council of each of the Colonies, shall frame regulations prescribing the method of voting and of transferring and counting votes and the duties of returning officers in connection therewith, and such regulations or any amendments thereof after being duly promulgated shall have full force and effect unless and until Parliament shall otherwise provide.

189, 319

Continuation of Existing Colonial Laws

135. Subject to the provisions of this Act, all laws in force in the several Colonies at the establishment of the Union shall continue in force in the respective provinces until repealed or amended by Parliament, or by the provincial councils in matters in respect of which the power to make ordinances is reserved or delegated to them. All legal commissions in the several Colonies at the establishment of the Union shall continue as if the Union had not been established.

Free Trade throughout the Union.

136 There shall be free trade throughout the Union, but until Parliament otherwise provides the duties of custom and of excise leviable under the laws existing in any of the Colonies at the establishment of the Union shall remain in force 79

Equality of English and Dutch Languages.

137 ¹ Both the English and Dutch languages shall be official languages of the Union, and shall be treated on a footing of equality, and possess and enjoy equal freedom, rights, and privileges, all records, journals, and proceedings of Parliament shall be kept in both languages, and all Bills, Acts, and notices of general public importance or interest issued by the Government of the Union shall be in both languages 100, 111

Naturalization

138. All persons who have been naturalized in any of the Colonies shall be deemed to be naturalized throughout the Union 42

Administration of Justice

139 ² The administration of justice throughout the Union shall be under the control of the Minister of State, in whom shall be vested all powers, authorities, and functions which shall at the establishment of the Union be vested in the Attorneys-General of the Colonies 108, 379

Existing Officers

140 ³ Subject to the provisions of the next succeeding section, all officers of the public service of the Colonies shall at the establishment of the Union become officers of the Union 78

Reorganization of Public Departments

141 (1) As soon as possible after the establishment of the Union, the Governor-General-in-Council shall appoint a public service commission to make recommendations for such reorganization and readjustment of the departments of the public service as may be necessary. The commission shall also make recommendations in regard to the assignment of officers to the several provinces.

(2) The Governor-General-in-Council may after such commission has reported assign from time to time to each province such officers as may be necessary for the proper discharge of the services reserved or delegated to it, and such officers on being so assigned shall become officers of the province. Pending the assignment of such officers,

¹ See section 1 of Act No. 8 of 1925, regarding Afrikaans

² As amended by section 1 (1) of Act No. 39 of 1926

³ See section 59 of Act No. 29 of 1912, sections 6, 9, 10 of Act No. 39 of 1914

the Governor-General-in-Council may place at the disposal of the provinces the services of such officers of the Union as may be necessary

(3) The provisions of this section shall not apply to any service or department under the control of the Railway and Harbour Board, or to any person holding office under the Board

Public Service Commission

142 ¹ After the establishment of the Union the Governor-General-in-Council shall appoint a permanent public service commission with such powers and duties relating to the appointment, discipline, retirement, and superannuation of public officers as Parliament shall determine

108, 149

Pensions of Existing Officers

143 Any officer of the public service of any of the Colonies at the establishment of the Union who is not retained in the service of the Union or assigned to that of a province shall be entitled to receive such pension, gratuity, or other compensation as he would have received in like circumstances if the Union had not been established

78, 152

Tenure of Office of Existing Officers

144 Any officer of the public service of any of the Colonies at the establishment of the Union who is retained in the service of the Union or assigned to that of a province shall retain all his existing and accruing rights, and shall be entitled to retire from the service at the time at which he would have been entitled by law to retire, and on the pension or retiring allowance to which he would have been entitled by law in like circumstances if the Union had not been established

148.

Existing Officers not to be Dismissed for Ignorance of English or Dutch

145 The services of officers in the public service of any of the Colonies at the establishment of the Union shall not be dispensed with by reason of their want of knowledge of either the English or Dutch language

148

Compensation to Existing Officers Who are Not Retained

146 Any permanent officer of the Legislature of any of the Colonies who is not retained in the service of the Union, or assigned to that of any province, and for whom no provision shall have been made by such Legislature, shall be entitled to such pension, gratuity, or compensation as Parliament may determine

148

¹ See Act No 27 of 1923, Act No 29 of 1912 as amended by Act No 39 of 1914

Administration of Native Affairs, &c

147¹ The control and administration of native affairs and of matters specially or differentially affecting Asiatics throughout the Union shall vest in the Governor-General-in-Council, who shall exercise all special powers in regard to native administration hitherto vested in the Governors of the Colonies or exercised by them as supreme chiefs, and any lands vested in the Governor or Governor and Executive Council of any Colony for the purpose of reserves for native locations shall vest in the Governor-General-in-Council, who shall exercise all special powers in relation to such reserves as may hitherto have been exercisable by any such Governor or Governor and Executive Council, and no lands set aside for the occupation of natives which cannot at the establishment of the Union be alienated except by an Act of the Colonial Legislature shall be alienated or in any way diverted from the purposes for which they are set apart except under the authority of an Act of Parliament 22, 24, 446, 460

Devolution on Union of Rights and Obligations under Conventions

148 (1) All rights and obligations under any conventions or agreements which are binding on any of the Colonies shall devolve upon the Union at its establishment

(2) The provisions of the railway agreement between the Governments of the Transvaal, the Cape of Good Hope, and Natal, dated the second of February, nineteen hundred and nine, shall, as far as practicable, be given effect to by the Government of the Union

42, 65, 78.

PART IX**NEW PROVINCES AND TERRITORIES****Alteration of Boundaries of Provinces.**

149.² Parliament may alter the boundaries of any province, divide a province into two or more provinces, or form a new province out of provinces within the Union, on the petition of the provincial council of every province whose boundaries are affected thereby

75, 79

Power to Admit into Union Territories Administered by British South Africa Company.

150³ The King, with the advice of the Privy Council, may on addresses from the Houses of Parliament of the Union admit into

¹ See Act No 38 of 1927

² See South Africa Act Amendment Act, 1934, (Appendix IX)

³ See section 10 of the Status of the Union Act, 1934 (Appendix VII)

the Union the territories administered by the British South Africa Company on such terms and conditions as to representation and otherwise in each case as are expressed in the addresses and approved by the King, and the provisions of any Order-in-Council in that behalf shall have effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland **244**

Power to Transfer to Union Government of Native Territories

151 ¹ The King, with the advice of the Privy Council, may, on addresses from the Houses of Parliament of the Union, transfer to the Union the government of any territories, other than the territories administered by the British South Africa Company, belonging to or under the protection of His Majesty, and inhabited wholly or in part by natives, and upon such transfer the Governor-General-in-Council may undertake the government of such territory upon the terms and conditions embodied in the Schedule to this Act **244**

PART X

AMENDMENT OF ACT

Amendment of Act

152. Parliament may by law repeal or alter any of the provisions of this Act. Provided that no provision thereof, for the operation of which a definite period of time is prescribed, shall during such period be repealed or altered. And provided further that no repeal or alteration of the provisions contained in this section, or in sections *thirty-three* and *thirty-four* (until the number of members of the House of Assembly has reached the limit therein prescribed, or until a period of ten years has elapsed after the establishment of the Union, whichever is the longer period), or in sections *thirty-five* and *one hundred and thirty-seven*, shall be valid unless the Bill embodying such repeal or alteration shall be passed by both Houses of Parliament sitting together, and at the third reading be agreed to by not less than two-thirds of the total number of members of both Houses. A Bill so passed at such joint sitting shall be taken to have been duly passed by both Houses of Parliament
13, 74, 84, 99, 100, 102, 103, 109, 110, 153, 183, 232, 233, 238-42

PART XI²

SUPPLEMENTARY

Short Title.

153 *This Act may be cited as the South Africa Act, 1909*

¹ See footnote ², p 600 ² Added by section 2 of Act No 9 of 1925, See p 111 *supra*

SCHEDULE

1 After the transfer of the government of any territory belonging to or under the protection of His Majesty, the Governor-General-in-Council shall be the legislative authority, and may by proclamation make laws for the peace, order, and good government of such territory. Provided that all such laws shall be laid before both Houses of Parliament within seven days after the issue of the proclamation or, if Parliament be not then sitting, within seven days after the beginning of the next session, and shall be effectual unless and until both Houses of Parliament shall by resolutions passed in the same session request the Governor-General-in-Council to repeal the same, in which case they shall be repealed by proclamation.

2 The Prime Minister shall be charged with the administration of any territory thus transferred and he shall be advised in the general conduct of such administration by a commission consisting of not fewer than three members with a secretary, to be appointed by the Governor-General-in-Council, who shall take the instructions of the Prime Minister in conducting all correspondence relating to the territories, and shall also under the like control have custody of all official papers relating to the territories.

3 The members of the commission shall be appointed by the Governor-General-in-Council, and shall be entitled to hold office for a period of ten years, but such period may be extended to successive further terms of five years. They shall each be entitled to a fixed annual salary, which shall not be reduced during the continuance of their term of office, and they shall not be removed from office except upon addresses from both Houses of Parliament passed in the same session praying for such removal. They shall not be qualified to become, or to be, members of either House of Parliament. One of the members of the commission shall be appointed by the Governor-General-in-Council as vice-chairman thereof. In case of the absence, illness, or other incapacity of any member of the commission, the Governor-General-in-Council may appoint some other fit and proper person to act during such absence, illness, or other incapacity.

4 It shall be the duty of the members of the commission to advise the Prime Minister upon all matters relating to the general conduct of the administration of, or the legislation for, the said territories. The Prime Minister, or other Minister of State nominated by the Prime Minister to be his deputy for a fixed period, or, failing such nomination, the vice-chairman shall preside at all meetings of the commission, and in case of an equality of votes shall have a casting vote. Two members of the commission shall form a quorum. In case

the commission shall consist of four or more members, three of them shall form a quorum

5 Any member of the commission who dissents from the decision of a majority shall be entitled to have the reasons for his dissent recorded in the minutes of the commission

6 The members of the commission shall have access to all official papers concerning the territories, and they may deliberate on any matter relating thereto and tender their advice thereon to the Prime Minister

7 Before coming to a decision on any matter relating either to the administration, other than routine, of the territories or to legislation therefor, the Prime Minister shall cause the papers relating to such matter to be deposited with the secretary to the commission, and shall convene a meeting of the commission for the purpose of obtaining its opinion on such matter

8 Where it appears to the Prime Minister that the dispatch of any communication or the making of any order is urgently required, the communication may be sent or order made although it has not been submitted to a meeting of the commission or deposited for the perusal of the members thereof. In any such case the Prime Minister shall record the reasons for sending the communication or making the order and give notice thereof to every member

9 If the Prime Minister does not accept a recommendation of the commission or proposes to take some action contrary to their advice, he shall state his views to the commission, who shall be at liberty to place on record the reasons in support of their recommendation or advice. This record shall be laid by the Prime Minister before the Governor-General-in-Council, whose decision in the matter shall be final

10 When the recommendations of the commission have not been accepted by the Governor-General-in-Council or action not in accordance with their advice has been taken by the Governor-General-in-Council, the Prime Minister, if thereto requested by the commission, shall lay the record of their dissent from the decision or action taken, and of the reasons therefor before both Houses of Parliament, unless in any case the Governor-General-in-Council shall transmit to the commission a minute recording his opinion that the publication of such record and reasons would be gravely detrimental to the public interest

11 The Governor-General-in-Council shall appoint a resident commissioner for each territory, who shall, in addition to such other duties as shall be imposed on him, prepare the annual estimates of revenue and expenditure for such territory, and forward the same to

the secretary to the commission for the consideration of the commission and of the Prime Minister. A proclamation shall be issued by the Governor-General-in-Council giving to the provisions for revenue and expenditure made in the estimate as finally approved by the Governor-General-in-Council the force of law.

12. There shall be paid into the Treasury of the Union all duties of customs levied on dutiable articles imported into and consumed in the territories, and there shall be paid out of the Treasury annually towards the cost of administration of each territory a sum in respect of such duties which shall bear to the total customs revenue of the Union in respect of each financial year the same proportion as the average amount of the customs revenue of such territory for the three completed financial years last preceding the taking effect of this Act bore to the average amount of the whole customs revenue for all the Colonies and territories included in the Union received during the same period.

13. If the revenue of any territory for any financial year shall be insufficient to meet the expenditure thereof, any amount required to make good the deficiency may, with the approval of the Governor-General-in-Council, and on such terms and conditions and in such manner as with the like approval may be directed or prescribed, be advanced from the funds of any other territory. In default of any such arrangement, the amount required to make good any such deficiency shall be advanced by the Government of the Union. In case there shall be a surplus for any territory such surplus shall in the first instance be devoted to the repayment of any sums previously advanced by any other territory or by the Union Government to make good any deficiency in the revenue of such territory.

14. It shall not be lawful to alienate any land in Basutoland or any land forming part of the native reserves in the Bechuanaland Protectorate and Swaziland from the native tribes inhabiting those territories.

15. The sale of intoxicating liquor to natives shall be prohibited in the territories, and no provision giving facilities for introducing, obtaining, or possessing such liquor in any part of the territories less stringent than those existing at the time of transfer shall be allowed.

16. The custom, where it exists, of holding pitso or other recognized forms of native assembly shall be maintained in the territories.

17. No differential duties or imposts on the produce of the territories shall be levied. The laws of the Union relating to customs and excise shall be made to apply to the territories.

18. There shall be free intercourse for the inhabitants of the

territories with the rest of South Africa subject to the laws, including the laws of the Union

19 Subject to the provisions of this Schedule, all revenues derived from any territory shall be expended for and on behalf of such territory. Provided that the Governor-General-in-Council may make special provision for the appropriation of a portion of such revenue as a contribution towards the cost of defence and other services performed by the Union for the benefit of the whole of South Africa, so, however, that that contribution shall not bear a higher proportion to the total cost of such services than that which the amount payable under paragraph 12 of this Schedule from the Treasury of the Union towards the cost of administration of the territory bears to the total customs revenue of the Union on the average of the three years immediately preceding the year for which the contribution is made

20 The King may disallow any law made by the Governor-General-in-Council by proclamation for any territory within one year from the date of the proclamation and such disallowance on being made known by the Governor-General by proclamation shall annul the law from the day when the disallowance is so made known

21 The members of the commission shall be entitled to such pensions or superannuation allowances as the Governor-General-in-Council shall by proclamation provide and the salaries and pensions of such members and all other expenses of the commission shall be borne by the territories in the proportion of their respective revenues

22 The rights as existing at the date of transfer of officers of the public service employed in any territory shall remain in force

23 Where any appeal may by law be made to the King-in-Council from any court of the territories, such appeal shall, subject to the provisions of this Act, be made to the Appellate Division of the Supreme Court of South Africa

24 The Commission shall prepare an annual report on the territories which shall when approved by the Governor-General-in-Council be laid before both Houses of Parliament.

25 All Bills to amend or alter the provisions of this Schedule shall be reserved for the signification of His Majesty's pleasure

APPENDIX V
LETTERS PATENT CREATING THE OFFICE OF
GOVERNOR-GENERAL
UNION OF SOUTH AFRICA

LETTERS PATENT¹

PASSED UNDER THE GREAT SEAL OF THE UNITED KINGDOM, CON-
STITUTING THE OFFICE OF GOVERNOR-GENERAL AND COMMAN-
DER-IN-CHIEF OF THE UNION OF SOUTH AFRICA

*Edward the Seventh, by the Grace of God of the United Kingdom of Great
Britain and Ireland and of the British Dominions beyond the Seas
King, Defender of the Faith, Emperor of India*

To all to whom these presents shall come

GREETING

WHEREAS by an Act of Parliament passed on the Twentieth day of September, 1909, in the ninth year of Our reign, entitled 'An Act to constitute the Union of South Africa', it was enacted that it should be lawful for Us, with the advice of Our Privy Council, to declare by proclamation that, on and after a day therein appointed, not later than one year after the passing of that Act, Our Colonies of the Cape of Good Hope, Natal, the Transvaal, and the Orange River Colony (hereinafter called the Colonies), should be united in a legislative union under one Government under the name of the Union of South Africa, and that on and after the day appointed by such proclamation the Government and Parliament of the Union should have full power and authority within the limits of the Colonies, but that We might at any time after the proclamation appoint a Governor-General for the Union

And whereas We did on the Second day of December, 1909, by and with the advice of Our Privy Council, declare by Proclamation that on and after the Thirty-first day of May, 1910, the Colonies should be united into a legislative union under one Government under the name of the Union of South Africa

And whereas by the said recited Act it was further enacted that the Governor-General shall be appointed by Us, and shall have and may exercise in the Union during Our pleasure, but subject to that Act, such of Our powers and functions as We may be pleased to assign to him, and that the provisions of that Act relating to the Governor-

¹ For commission appointing the governor general, see *supra*, Chapter IV (1)

General shall extend and apply to the Governor-General for the time being, or such person as We may appoint to administer the Government of the Union

And whereas We are desirous of making effectual and permanent provision for the office of Governor-General and Commander-in-Chief in and over the Union

Now know ye that We do by these presents declare Our Will and pleasure as follows

I There shall be a Governor-General and Commander-in-Chief in and over Our Union of South Africa (herein after called the Union), and appointments to the said office shall be made by Commission under Our Sign Manual and Signet

And We do hereby authorize and command Our said Governor-General and Commander-in-Chief (herein after called the Governor-General) to do and execute, in due manner, all things that shall belong to his said office, and to the trust We have reposed in him, according to the several powers and authorities granted or appointed him by virtue of the South Africa Act, 1909, and of these present Letters Patent and of such Commission as may be issued to him under Our Sign Manual and Signet, and according to such Instructions as may from time to time be given to him, under Our Sign Manual and Signet, or by Our Order in Our Privy Council or by Us through one of Our Principal Secretaries of State and to such laws as are or shall hereafter be in force in the Union

II¹ There shall be a Great Seal of and for the Union, which the Governor-General shall keep and use for sealing all things whatsoever that shall pass the said Great Seal Provided that until a Great Seal shall be provided, the private seal of the Governor-General may be used as the Great Seal of the Union

III The Governor-General may on Our behalf exercise all powers under the South Africa Act, 1909, or otherwise in respect of the summoning, proroguing, or dissolving the Parliament of the Union

IV And We do hereby declare Our pleasure to be that, in the event of the death, incapacity removal, or absence from the Union of the Governor-General, all and every the powers and authorities herein granted to him shall, until Our further pleasure is signified therein, be vested in such person as may be appointed by Us under Our Sign Manual and Signet to be Our Lieutenant-Governor of the Union, or if there shall be no such Lieutenant-Governor in the Union, then in such person or persons as may be appointed by Us under Our

¹ For warrant authorizing the use of a great seal for the Union, see government notice No 422 of 1911 See Royal Executive Functions and Seals Act, 1934 (Appendix VIII)

Sign Manual and Signet to administer the Government of the same, and in case there shall be no person or persons within the Union so appointed by Us, then in the Chief Justice of South Africa for the time being, or in case of the death, incapacity, removal, or absence from the Union of the said Chief Justice for the time being, then in the Senior Judge for the time being of the Supreme Court of South Africa then residing in the Union, and not being under incapacity. Provided always that the said Senior Judge shall act in the administration of the Government only if and when the said Chief Justice shall not be present within the Union and capable of administering the Government.

Provided further that no such powers or authorities shall vest in such Lieutenant-Governor, or such other person or persons, until he or they shall have taken the Oaths appointed to be taken by the Governor-General of the Union, and in the manner provided by the Instructions accompanying these Our Letters Patent.

V Whenever and so often as the Governor-General shall be temporarily absent from the Union in pursuance of any instructions from Us through one of Our Principal Secretaries of State, or in the execution of any Letters Patent or any Commission under Our Sign Manual and Signet appointing him to be Our High Commissioner or Special Commissioner for any territories in South Africa with which We may have relations, or appointing him to be Governor or to administer the Government of any Colony, province, or territory adjacent or near to the Union, or shall be absent from the Union for the purpose of visiting some neighbouring Colony, territory, or State, for a period not exceeding one month, then and in every such case the Governor-General may continue to exercise all and every the powers vested in him as fully as if he were residing within the Union.

VI In the event of the Governor-General having occasion to be temporarily absent for a short period from the seat of Government or from the Union, he may, in every such case, by an instrument under the Public Seal of the Union, constitute and appoint any persons to be his Deputy within the Union during such temporary absence, and in that capacity to exercise, perform, and execute for and on behalf of the Governor-General during such absence, but no longer, all such powers and authorities vested in the Governor-General, as shall in and by such instrument be specified and limited, but no others. Every such Deputy shall conform to and observe all such instructions as the Governor-General shall from time to time address to him for his guidance. Provided, nevertheless, that by the appointment of a Deputy, as aforesaid, the power and authority of the Governor-General shall not be abridged, altered, or in any way

affected otherwise than We may at any time hereafter think proper to direct

Provided further that, if any such Deputy shall have been duly appointed, it shall not be necessary during the continuance in office of such Deputy for any person to assume the Government of the Union as Administrator thereof

VII And We do hereby require and command all Our Officers and Ministers, Civil and Military, and all other the inhabitants of the Union, to be obedient aiding, and assisting unto the Governor-General, or, in the event of his death, incapacity, or absence, to such person or persons as may from time to time, under the provisions of these Our Letters Patent, administer the Government of the Union

VIII And We do hereby reserve to Ourselves, Our heirs, and successors, full power and authority from time to time to revoke, alter, or amend these Our Letters Patent as to Us or them shall seem meet

IX These Our Letters Patent shall be proclaimed at such place or places within the Union as the Governor-General shall think fit, and shall commence and come into operation on the day fixed by Our Proclamation for the establishment of the Union

In witness whereof We have caused these Our Letters to be made Patent Witness Ourself at Westminster this Twenty-ninth day of December, in the Ninth Year of Our Reign

By Warrant under the King's Sign Manual

MURR MACKENZIE

APPENDIX VI
ROYAL INSTRUCTIONS TO THE GOVERNOR-GENERAL
UNION OF SOUTH AFRICA
INSTRUCTIONS

PASSED UNDER THE ROYAL SIGN MANUAL AND SIGNET TO THE
GOVERNOR-GENERAL AND COMMANDER-IN-CHIEF OF THE UNION OF
SOUTH AFRICA

EDWARD R. & I

Instructions to Our Governor-General and Commander-in-Chief in and over Our Union of South Africa, or in his absence, to Our Lieutenant-Governor or the Officer for the time being administering the government of the Union

WHEREAS by certain Letters Patent bearing even date herewith, We have constituted, ordered, and declared that there shall be a Governor-General and Commander-in-Chief (therein and hereinafter called the Governor-General) in and over Our Union of South Africa (therein and hereinafter called the Union)

And whereas We have thereby authorized and commanded the Governor-General to do and execute in due manner all things that shall belong to his said office, and to the trust We have reposed in him, according to the several powers and authorities granted or appointed him by virtue of the said Letters Patent and of such Commission as may be issued to him under Our Sign Manual and Signet and according to such Instructions as may from time to time be given to him, under Our Sign Manual and Signet, or by Our Order in Our Privy Council, or by Us through one of Our Principal Secretaries of State, and to such laws as shall hereafter be in force in the Union,

Now, therefore, We do, by these Our Instructions under Our Sign Manual and Signet, declare Our pleasure to be as follows:—

I Our first appointed Governor-General shall, with all due solemnity, cause Our Commission under Our Sign Manual and Signet appointing him to be read and published in the presence of the Senior Military Officer for the time being in command of Our Regular Forces in South Africa, and of such persons as are able to attend

II The said first appointed Governor-General shall take the Oath of Allegiance and the Oath of Office in the forms provided by an Act

passed in the Session holden in the thirty-first and thirty-second years of the Reign of Her late Majesty Queen Victoria, intituled 'An Act to amend the Law relating to Promissory Oaths' which Oaths the senior Chief Justice or Judge of the Supreme Courts of the Cape of Good Hope, Natal, and the Transvaal, and the High Court of the Orange River Colony then present is hereby required to tender and administer unto him

III Every Governor-General of the Union after the said first appointed Governor-General shall, with all due solemnity, cause Our Commission, under Our Sign Manual and Signet, appointing him to be Governor-General to be read and published in the presence of the Chief Justice of South Africa, or some other Judge of the Supreme Court of South Africa

IV Every Governor-General, and every other officer appointed to administer the government of the Union after the first appointed Governor-General, shall take the Oath of Allegiance and the Oath of Office in the forms provided by an Act passed in the Session holden in the thirty-first and thirty-second years of the Reign of Her late Majesty Queen Victoria, intituled 'An Act to amend the Law relating to Promissory Oaths' which Oaths the Chief Justice of South Africa, or some other Judge of the Supreme Court of South Africa, shall and he is hereby required to tender and administer unto him or them

V And We do authorize and require the Governor-General from time to time, by himself or by any other person to be authorized by him in that behalf, to administer to all and to every person or persons, as he shall think fit, who shall hold any office or place of trust or profit in the Union, the said Oath of Allegiance, together with such other oath or oaths as may from time to time be prescribed by any laws or statutes in that behalf made and provided

VI And We do require the Governor-General to communicate forthwith to the Members of the Executive Council for the Union these Our Instructions, and likewise all such others, from time to time, as he shall find convenient for Our service to be imparted to them

VII The Governor-General shall not assent in Our name to any bill which We have specially instructed him through one of Our Principal Secretaries of State to reserve, and he shall take special care that he does not assent to any bill which he may be required under the South Africa Act, 1909, to reserve,¹ and in particular he shall reserve any bill which disqualifies any person in the Province of the Cape of Good Hope, who, under the laws existing in the Colony

¹ Cf sections 66 and 106 of the South Africa Act, 1909, and the Status of the Union Act, 1934 (Appendix VII)

of the Cape of Good Hope at the establishment of the Union, is, or may become, capable of being registered as a voter, from being so registered in the Province of the Cape of Good Hope by reason of his race or colour only ¹

VIII The Governor-General is to take care that all laws assented to by him in Our name, or reserved for the signification of Our pleasure thereon, shall, when transmitted by him, be fairly abstracted in the margins, and be accompanied, in such cases as may seem to him necessary, with such explanatory observations as may be required to exhibit the reasons and occasions for proposing such laws and he shall also transmit fair copies of the Journals and Minutes of the proceedings of the Parliament of the Union, which he is to require from the clerks or other proper officers in that behalf, of the said Parliament

IX And We do further authorize and empower the Governor-General, as he shall see occasion, in Our name and on Our behalf, when any crime or offence against the laws of the Union has been committed for which the offender may be tried within the Union, to grant a pardon to any accomplice² in such crime or offence who shall give such information as shall lead to the conviction of the principal offender, or of any one of such offenders if more than one and, further, to grant to any offender convicted of any such crime or offence in any Court, or before any Judge, Justice, or Magistrate, within the Union, a pardon,³ either free or subject to lawful conditions, or any remission of the sentence passed on such offender, or any respite of the execution of such sentence, for such period as to the Governor-General may seem fit, and to remit any fines, penalties, or forfeitures which may become due and payable to Us ⁴ Provided always, that if the offender be a natural-born British subject or a British subject by naturalization in any part of Our Dominions, the Governor-General shall in no case, except where the offence has been of a political nature, make it a condition of any pardon or remission of sentence that the offender shall be banished from or shall absent himself from the Union

And we do hereby direct and enjoin that the Governor-General shall not pardon, grant remission to, or reprieve any such offender without first receiving in cases other than capital cases the advice of one, at least, of his Ministers Whenever any offender shall have

¹ Cf section 35 (1) of the South Africa Act, 1909

² See section 282 of Act No 31 of 1917

³ See section 376 et seq of Act No 31 of 1917

⁴ Cf sections 47, 48, 49, and 51 of the Prisons and Reformatories Act, 1911 (Act No 13 of 1911)

been condemned to suffer death by the sentence of any Court, the Governor-General shall consult the Executive Council upon the case of such offender, submitting to the Council any report that may have been made by the Judge who tried the case, and, whenever it appears advisable to do so, taking measures to invite the attendance of such Judge at the Council. The Governor-General shall not pardon or reprieve any such offender unless it shall appear to him expedient so to do, upon receiving the advice of the Executive Council thereon, but in all cases he is to decide either to extend or to withhold a pardon or reprieve according to his own deliberate judgment, whether the members of the Executive Council concur therein or otherwise, entering nevertheless, on the Minutes of the Executive Council, a Minute of his reasons at length in case he should decide any such question in opposition to the judgment of the majority of the Members thereof.

X Except in accordance with the provisions of any Letters Patent or of any Commission under Our Sign Manual and Signet, the Governor-General shall not, upon any pretence whatever, quit the Union without having first obtained leave from Us for so doing under Our Sign Manual and Signet, or through one of Our Principal Secretaries of State, unless for the purpose of visiting some neighbouring Colony, Territory or State, for periods not exceeding one month at any one time, nor exceeding in the aggregate one month for every year's service in the Union.

The temporary absence of the Governor-General for any period not exceeding one month shall not, if he have previously informed the Executive Council, in writing, of his intended absence, and if he have duly appointed a Deputy in accordance with the above-recited Letters Patent, nor shall any extension of such period sanctioned by one of Our Principal Secretaries of State and not exceeding fourteen days, be deemed absence from the Union within the meaning of the said Letters Patent.

Given at Our Court at Saint James's, this Twenty-ninth day of December, 1909, in the Ninth Year of Our Reign.

APPENDIX VII
THE STATUS OF THE UNION ACT,
NO 69 OF 1934

To provide for the declaration of the Status of the Union of South Africa, for certain amendments of the South Africa Act, 1909, incidental thereto, and for the adoption of certain parts of the Statute of Westminster, 1931

WHEREAS the delegates of His Majesty's Governments in the United Kingdom, the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, the Irish Free State and Newfoundland, at Imperial Conferences held at Westminster in the years of our Lord 1926 and 1930, did concur in making the declarations and resolutions set forth in the Reports of the said Conferences, and more particularly in defining the group of self-governing communities composed of Great Britain and the Dominions as 'autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown and freely associated as members of the British Commonwealth of Nations',

And whereas the said resolutions and declarations in so far as they required legislative sanction on the part of the United Kingdom have been ratified, confirmed and established by the Parliament of the United Kingdom in an Act entitled the Statute of Westminster, 1931 (22 Geo V, c 4),

And whereas it is expedient that the status of the Union of South Africa as a sovereign independent state as hereinbefore defined shall be adopted and declared by the Parliament of the Union and that the South Africa Act, 1909 (9 Edw 7, c 9) be amended accordingly,

And whereas it is expedient that the said Statute of Westminster, in so far as its provisions are applicable to the Union of South Africa, and an Afrikaans version thereof, shall be adopted as an Act of the Parliament of the Union of South Africa,

THE STATUS OF THE UNION ACT, NO 69 OF 1934 615

Now, therefore, be it declared and enacted by the King's Most Excellent Majesty, the Senate and the House of Assembly of the Union of South Africa, as follows —

1 In this Act the expression 'the South Africa Act' means the South Africa Act, 1909 (9 Edw 7, c 9) as amended from time to time

Definition

2 The Parliament of the Union shall be the sovereign legislative power in and over the Union, and notwithstanding anything in any other law contained, no Act of the Parliament of the United Kingdom and Northern Ireland passed after the eleventh day of December, 1931, shall extend, or be deemed to extend, to the Union as part of the law of the Union, unless extended thereto by an Act of the Parliament of the Union

Union Parliament to be sole sovereign legislature for Union

3 The parts of the Statute of Westminster, 1931 (22 Geo V, c 4) and the Afrikaans version thereof, set forth in the Schedule to this Act, shall be deemed to be an Act of the Parliament of the Union and shall be construed accordingly

Adoption of parts of Statute of Westminster

4 (1) The Executive Government of the Union in regard to any aspect of its domestic or external affairs is vested in the King, acting on the advice of His Ministers of State for the Union, and may be administered by His Majesty in person or by a Governor-General as his representative

King to act with advice of his South African Ministers.

(2) Save where otherwise expressly stated or necessarily implied, any reference in the South Africa Act and in this Act to the King shall be deemed to be a reference to the King acting on the advice of his Ministers of State for the Union

(3) The provisions of sub-sections (1) and (2) shall not be taken to affect the provisions of sections *twelve, fourteen, twenty and forty-five* of the South Africa Act and the constitutional conventions relating to the exercise of his functions by the Governor-General under the said sections

5 Section *two* of the South Africa Act is hereby amended by the insertion after the word 'implied' of the words—

Amendment of section 2 of South Africa Act

"his heirs and successors" shall be taken to mean His Majesty's heirs and successors in the sovereignty of the United Kingdom of Great Britain and Ireland as

determined by the laws relating to the succession of the Crown of the United Kingdom of Great Britain and Ireland'

Amendment of sections 20 and 44 of South Africa Act

6. Sections *twenty-six* and *forty-four* of the South Africa Act are hereby amended by the deletion of the words 'a British subject of European descent' in paragraphs (d) and (c) respectively of the said sections and the substitution therefor of the words a person of European descent who has acquired Union nationality whether—

- (i) by birth or
- (ii) by domicile as a British subject or
- (iii) by naturalization, or otherwise, in terms of Act 40 of 1927 or of Act 14 of 1932'

Amendment of section 51 of South Africa Act.

7. Section *fifty-one* of the South Africa Act is hereby amended by the deletion of the words 'of the United Kingdom of Great Britain and Ireland' where they occur in the oath and in the affirmation prescribed by the said section, and by inserting the words 'King or Queen (as the case may be)' immediately after the words 'His Majesty'

Repeal of section 64 of South Africa Act

8. Section *sixty-four* of the South Africa Act is hereby repealed and the following section substituted therefor —

'Royal Assent to Bills

64. When a Bill is presented to the Governor-General for the King's assent he shall declare according to his discretion, but subject to the provisions of this Act, and to such instructions as may from time to time be given in that behalf by the King that he assents in the King's name, or that he withholds assent. The Governor-General may return to the House in which it originated any Bill so presented to him, and may transmit therewith any amendments which he may recommend, and the House may deal with the recommendation'

Amendment of section 67 of South Africa Act

9. Section *sixty-seven* of the South Africa Act is hereby amended by the deletion of the words 'or having been reserved for the King's pleasure shall have received his assent'

Certain provisions of South Africa Act not

10 Nothing in this Act contained shall affect the provisions of section *one hundred and six* of the South

THE STATUS OF THE UNION ACT, NO 69 OF 1934 617

Africa Act, relating to an appeal to the King-in-Council, or the provisions of sections *one hundred and fifty* and *one hundred and fifty-one* of the said Act inserted by this Act

11 (1) Sections *eight* and *sixty-seven* of the South Africa Act are hereby repealed Repeal of sections of South Africa Act

(2) Section *sixty-five* shall be repealed as from a date to be fixed by the Governor-General by proclamation in the *Gazette*

12 This Act shall be known as the Status of the Union Act, 1934 Short title

SCHEDULE

STATUTE OF WESTMINSTER, 1931

(Sections 1, 2, 3, 4, 5 6, 11 and 12 of the Statute are enacted See Appendix III)

The Status of the Union Bill was sent to the King with a submission signed by the Prime Minister of the Union requesting the King's approval of the Bill The submission, with the King's approval, was in the following form

OFFICE OF THE PRIME MINISTER
AND
MINISTER OF EXTERNAL AFFAIRS.
CAPETOWN

Approved

GEORGE R I

June 22nd 1934

31st May, 1934.

General Hertzog, Prime Minister and Minister of External Affairs in the Union of South Africa, with his humble duty to the King, begs to submit to Your Majesty a Bill 'to Provide for the declaration of the Status of the Union of South Africa, for certain amendments of the South Africa Act, 1909, incidental thereto, and for the adoption of certain parts of the Statute of Westminster, 1931' which His Excellency the Governor-General has reserved for the signification of Your Majesty's pleasure

Your Majesty's MINISTERS for the Union have given their earnest consideration to this Bill and beg to submit that Your Majesty may be graciously pleased to signify Your Majesty's assent thereto by making an endorsement to that effect either on this submission or upon the Bill itself

All of which is submitted by Your Majesty's
humble, and obedient servant,

J B M HERTZOG

APPENDIX VIII

THE ROYAL EXECUTIVE FUNCTIONS AND SEALS ACT, NO 70 OF 1934

To provide for the King's Acts as Head of the Executive of the Union, the use of Royal Seals in connection therewith and the vesting of certain functions in Union officials and bodies

BE IT ENACTED by the King's Most Excellent Majesty, the Senate and the House of Assembly of the Union of South Africa, as follows —

Royal Great
Seal and Signet

1. (1) There shall be a Royal Great Seal of the Union hereinafter referred to as the Great Seal, which shall show on the obverse the effigy of the Sovereign, with his full titles as circumscription and on the reverse the coat of arms of the Union with supporters and the inscription 'Unie van Suid-Afrika' and 'Union of South Africa'.

(2) There shall be a Royal Signet (hereinafter referred to as the Signet) showing the reverse of the Great Seal with the Tudor Crown for crest and the King's full title in Latin on the outer rim and the words 'Unie van Suid-Afrika—Union of South Africa' on the inner rim.

(3) The Great Seal and Signet shall be of a design and size approved of by the King and the Great Seal shall show the effigy of the Sovereign in such manner and of such design as His Majesty may be pleased to approve.

On demise of
Sovereign ex-
isting Seals to
be used tem-
porarily

2 In the case of a change in the person of the Sovereign the then existing seals shall be used until such time as new seals have been struck and put into use.

Prime Minister
to be Keeper of
the Royal
Seals

3. The Prime Minister of the Union or, in his absence, his deputy shall be the Keeper of the Great Seal and the Signet.

Executive acts
of the King
and their con-
firmation

4 (1) The King's will and pleasure as Head of the Executive Government of the Union shall be expressed in writing under his sign manual, and every such instrument shall be countersigned by one of the King's Ministers for the Union.

(2) The King's sign manual shall furthermore be confirmed by the Great Seal on all royal proclamations and he may, by proclamation, prescribe from time to

time which other public instruments bearing his sign manual shall pass either the Great Seal or the Signet

(3) The Keeper of the Seals shall affix either the Great Seal or the Signet, as the case may be, to any instrument bearing the King's sign manual and the countersignature of one of His Majesty's Ministers of State for the Union and required to pass either the Great Seal or the Signet

(4) The provisions of this section shall not affect the exercise of the powers under sections *twelve, fourteen, twenty and forty-five* of the South Africa Act, 1909, by the King or the Governor-General

5. (1) The Governor-General-in-Council may by regulation provide for the making of wafer seals, representing the Great Seal, of such material as he may deem suitable and prescribe the size of the cast to be used for that purpose

Making and use of wafer seals representing Great Seal

(2) The wafer seals made in pursuance of the provisions of sub-section (1) shall be kept by the Keeper of the Great Seal and may be used by him for sealing instruments which are required to pass the Great Seal, and instruments to which such wafer seals have been affixed shall be deemed to be sufficiently sealed in terms of this Act

6. (1) Whenever for any reason the King's signature to any instrument requiring the King's sign manual cannot be obtained or whenever the delay involved in obtaining the King's signature to any such instrument in the ordinary course would, in the opinion of the Governor-General-in-Council, either frustrate the object thereof, or unduly retard the despatch of public business, the Governor-General shall, subject to such instructions as may, from time to time in that behalf, be given by the King on the advice of His Ministers of State for the Union, execute and sign such instrument on behalf of His Majesty and an instrument so executed and signed by the Governor-General and countersigned by one of the King's Ministers of the Union shall be of the same force and effect as an instrument signed by the King.

Governor-General to act for King in certain cases

(2) The Governor-General's signature on such an instrument shall be confirmed by his Great Seal of the Union and a resolution of the Governor-General-in-Council shall be the necessary authority for affixing the same

Vesting of
powers of the
King in Council
under Statutes
of United King-
dom: Parlia-
ment in Gover-
nor General in-
Council

7 In the absence of any Act of the Parliament of the Union providing otherwise, the powers of the King to be exercised by His Majesty in Council or by Order-in-Council, under Acts of the Parliament of the United Kingdom passed prior to the commencement of the Statute of Westminster, 1931, and extending to the Union as part of the law of the Union shall, in respect of the Union, after the commencement of this Act, be exercised respectively by the Governor-General-in-Council or by him by Proclamation in the *Gazette* unless the Governor-General-in-Council decide that the exigencies of the case require that the procedure prescribed by such Acts be followed. Provided that the King-in-Council shall in the latter case act or purport to act in respect of the Union only at the request of the Prime Minister of the Union duly conveyed and it be expressly declared in the instrument containing the King's pleasure that the Union has requested and consented to the King-in-Council so acting in respect of the Union.

Vesting of func-
tions of British
functionaries
under Statutes
of United King-
dom: Parlia-
ment in Union
functionaries

8. The powers vested in, or duties imposed on, the Lord Chancellor, a Secretary of State, a Commissioner of the Treasury, the Treasury, the Admiralty, the Board of Trade, or any other functionary or authority of the United Kingdom under any Act of the Parliament of the United Kingdom referred to in section *seven*, or under any rule, order or regulation framed thereunder shall after the commencement of this Act, in respect of the Union, be vested in or performed by such Minister, Department of State, functionary or authority in the Union as the Governor-General-in-Council may by proclamation in the *Gazette* designate.

Sections 7 and 8
not applicable
to section 106
of South Africa
Act

9. Sections *seven* and *eight* shall not apply to appeals to the King-in-Council under the provisions of section *one hundred and six* of the South Africa Act, 1909.

Short title and
commence-
ment of Act

10. This Act shall be known as the Royal Executive Functions and Seals Act, 1934, and shall come into operation on a date to be fixed by the Governor-General by proclamation in the *Gazette*.¹

¹ The Act came into force on December 3, 1934, by Proclamation No. 232 of 1934, dated November 30, 1934.

APPENDIX IX

SOUTH AFRICA ACT AMENDMENT ACT, NO 45 OF 1934

ACT

To amend and extend the provisions of section *one hundred and forty-nine* of the South Africa Act, 1909

BE IT ENACTED by the King's Most Excellent Majesty the Senate and the House of Assembly of the Union of South Africa, as follows:

Amendment of Section 149 of South Africa Act

1 Section *one hundred and forty-nine* of the South Africa Act is hereby deleted and the following new section substituted therefor

149 Parliament shall not—

Petition by
provincial
council
necessary for
alteration of
provinces or
for abolition
of provincial
councils

- (a) alter the boundaries of any province, divide a province into two or more provinces, or form a new province out of provinces within the Union, except on the petition of the provincial council of every province whose boundaries are affected thereby,
- (b) abolish any provincial council or abridge the powers conferred on provincial councils under section *eighty-five*, except by petition to Parliament by the provincial council concerned.

Short title

2 This Act shall be known as the South Africa Act Amendment Act, 1934

When introducing the above measure, the Minister in charge of the bill, Mr O Pirow, K C, stated 'The juridical value of this bill is not great. Parliament can enact it with a majority of one and can recall it with a majority of one. But it is a declaration of policy and is of great moral value to the people who attach any importance to the retention of the provincial system' (House of Assembly, May 24, 1934.)

Note The Government announced its intention of introducing the Union Constitution Bill early in 1935. This bill aims at re-enacting the South Africa Act, as amended, as a schedule to the proposed act, in English and Afrikaans. This enactment will not affect the legal position as stated in this book.

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