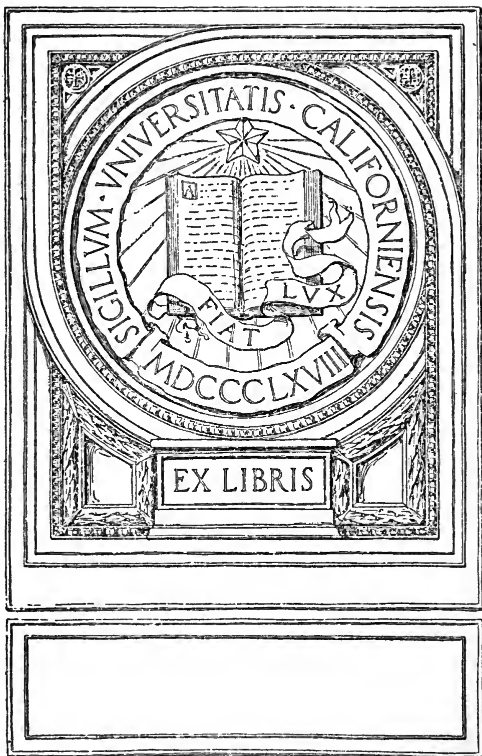
THE
CONSTITUTIONAL HISTORY
AND
LAW OF NEW ZEALAND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THE CONSTITUTIONAL HISTORY AND LAW OF NEW ZEALAND.

THE
Constitutional History
and
Law of New Zealand

BY

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PREFACE.

This book aims at giving a simple account of the origin and development of the chief institutions of government in New Zealand. If we except a compilation of acts and other instruments, published in 1896 by the Government Printer, under the title of "The Constitution and Government of New Zealand," there is no book dealing exclusively with the constitution of the Dominion, and even in the general histories of this country the subjects here presented are treated very briefly indeed. We believe, therefore, that there is room for such a book as this.

Though limited in scope by the exigencies of space, its preparation has involved a good deal of research, and the work has been protracted because the materials are scattered and the libraries of the Dominion are not well equipped for rendering assistance even in matters of local history. It is scarcely possible to mention all the sources which have been used, but the more important are set out in the footnotes and in the bibliography (Appendix C.), which will serve as a list of books useful to those who desire to know more of the particular subjects treated. Our thanks are due to Dr. J. W. McIlraith for the note on provincial government in Chapter XIX., and to the Editor of *The Press*, Christchurch, for permission to use in Chapter XXII. parts of an article previously published in that journal.

The book, being primarily a history, we have striven rather to give a broad view of the general development of the constitution than to concentrate on a detailed examination of the present working of its parts. Special attention has been paid to the origins and early history. These are but little known by the citizens of to-day: yet a knowledge of them is needed for a proper understanding of present-day problems, and they afford valuable illustrations of the general

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principles of British political evolution. While this book, viewed merely as an orderly compilation of facts. should prove useful to the student, the politician, the lawyer, and the journalist, it should not be without interest to the general reader as well, and if it serves, even in small measure, to stimulate an appreciation of the privileges and of the responsibilities of citizenship, we shall be more than repaid for the labour of preparation, and encouraged, perhaps, to present the results of a fuller enquiry into the more recent history of our constitution, and the nature and working of our constitutional law.

J.H.
H.D.B.

May, 1914.

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CORRIGENDA.

Page 10, line 11, for "distrcts" read "districts."
„ 178, line 7, for "District" read "Division."
„ 254, line 5, for "Captain" read "Colonel."
„ 271, line 7, for "Lytton" read "Lyttelton."

Constitutional History and Law of New Zealand.

PART I.

CHAPTER I.

THE MAORI STATE.

1. Sources of Knowledge.

Beyond the carvings of their ancestors, and of various animal forms, a few drawings of curious design and doubtful purpose, and the sticks upon which the family generations were notched, the Maoris had no concrete form of recording events or enshrining thought and emotion. Our present knowledge of their early history is drawn entirely from the genealogies and oral traditions of the tribes, supplemented by the observations of facts, customs, and social characteristics made by European students of Maori life. None the less the available data have very great value. The genealogies and traditions were always carefully guarded by each generation, which made it a point of honour to hand them down to posterity in the precise form in which they were received, and not only was the duty of transmission imposed upon a special caste, but it was also the voluntary function of the whole tribe, the members of which vied with one another in a detailed and accurate knowledge of their ancestors' lives. Hence it is not surprising to find that there is substantial agreement in the traditions, not only of the tribes of New Zealand, but of the various kindred peoples scattered throughout the Polynesian archipelagoes.

2. General Description.

When white men first settled in New Zealand, the life of the Maori was on a plane that seems low to us, but exhibiting certain features with which the early history of civilisation has made us familiar. The country was occupied by a number of independent tribes (*iwi*), each divided into sub-tribes (*hapu*). The members of each community were either free men or slaves, the latter usually prisoners of war. The head of each *hapu* was generally the eldest-born male, though, as among the early Teutons, a minor might be selected if the eldest born lacked the essential military, political, or social virtues. Sometimes even the eldest-born female was recognised as the head of the clan. So, too, the chiefship of the tribe was an hereditary office, with exceptions similar to those admitted in regard to the headship of the *hapus*. There was a tribal council composed of the heads of each family, and unless the chief was a man of quite exceptional *mana* or influence, it was in this assembly of elders that the sovereign power lay.

The unit of Maori social life was the family. Each family held its lands and goods in common, with right against all other families of the tribe. The families lived in villages (*kainga*), built fronting the sea, a lake, or a stream, and usually placed near a strongly fortified hill, to which the whole tribe retreated in time of danger. Individual property had begun to emerge, and barter was found, both fully evolved and in more than one interesting stage of development. The arts commonly practised were fire-making, architecture, canoe-building, navigation, weaving, netting, military engineering, agriculture, medicine, tattooing and design, music and dancing. Their food consisted chiefly of fish, *raupo* bread, fern root, *kumara*, *taro*, gourd, domestic dog, birds, and rats.

Like the other Polynesians, the Maoris were ignorant of iron, pottery, the spindle, and the loom; and their method of kindling fire was extremely primitive. But, in spite of these disadvantages, they had, in many phases of life, attained to a comparatively high degree of civilisation, and, though they delighted in the art of war, the ferocity of their battles was mitigated by deeds of surprising generosity and chivalry, towards foe no less than friend. Rapid and substantial progress in general culture was made by those tribes who came under missionary influence during the twenty-five years immediately preceding the establishment of British sovereignty, European thought and customs being assimilated with a facility and completeness that indicated a high degree of adaptability and mental development.

3. The Migrations.

To the constitutional historian the most important feature of the old Maori state is the system of land tenure, as this had a far-reaching influence on the history of New Zealand as a British Colony. The distribution of the people over the land was determined partly by geographical conditions, and partly by the circumstances of the original immigration.

Tradition tells us that many generations ago the forefathers of the Maori race came to these shores from Hawaiki. Science, still groping, can do little more than make an intelligent guess as to the date of that migration; and the identity of mysterious Hawaiki is still lost in the dim distance of the centuries. Tradition, therefore, remains our only guide.

One story, handed down from a remote past, tells us that these islands were first found by Kupe the

Navigator, descendant of the legendary Maui, and that following upon this discovery the bold Turi set out in his canoe Aotea, and reached the western coast, where he settled at the mouth of the Patea.

According to another, and more circumstantial, tradition, one Ngahue* sailed from Hawaiki, and discovered the islands of New Zealand, to the northern of which he gave the melodious name of Aotearoa.† Returning home with a precious freight of greenstone, he described the beauties of the Long White Cloud, and so stirred the fancy of his countrymen—wearied of strife in Hawaiki—that many of them resolved to try their fortune in the new land across the waves. So Ngahue himself, with Rata, Wahieroa, Parata, and others whose names are forgotten, built the great canoe Arawa, hollowing out the two huge hulks with axes made from the greenstone, which was at once the proof of the new land, and an incentive to further voyage and exploration.

With the Arawa were also built many other canoes whose names have been handed down from generation to generation: most famous of them the Tainui, but with her also are Matatua, Takitumu, Kurahaupo, Tokomaru, and Matawhaorua.

Tamatekapua sailed in the Arawa, first providing for the spiritual needs of his band by decoying on board Ngatoro, the priest, and preventing his return to the shore. He also, in unconscious imitation of Paris, the treacherous shepherd of Ida, carried off for himself the wife of one Ruaeo. The legend tells us of the strange perils of the journey, and of the arrival on the coast of the Long White Cloud. It tells how the Arawa first touched at Whangaparao,

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*There are legends of explorers before Kupe and Ngahue. See Cowan, *Maoris of New Zealand*, Chaps. V. and VI.

†For a discussion of the origin and meaning of this name *Ib.*, pp. 79-80 and 93-5.

so named from the finding of a stranded whale there: how the adventurers, seeing from their boat the rich crimson blossoms of the *pohutukawa,* and not recognising that they were only flowers, flung overboard in joyous indiscretion the tattered plumes of scarlet feathers which they had brought with them from their ancient home, and sedulously guarded through the voyage: how the Tainui touched near the same spot, and a dispute arose between the two vessels as to which had first found the body of the whale: how, in strict accordance with the doctrine of possession,—a doctrine deeply rooted in the human mind, and reproduced in the rules of modern international law—the claim of the Arawas was decorously abandoned upon the discovery in the whale's mouth of a piece of rope belonging to the Tainui, clear proof of prior occupation: how the Arawa set out to explore the north-west, and how the men of the Tainui first followed in the same direction, but soon returned southward to the Tamaki, and dragged their great canoe across the narrow neck at Otahuhu, thus making first use of the portage crossed many years afterwards by Hongi, who visited King George the Third, and returned with a great store of civilised weapons with which he worked vengeance on the Waikatos. From it we learn also how Ruaeo, incensed at the abduction of his wife by Tamatekapua, followed the Arawa to New Zealand, where he met, fought, and defeated his rival; and, his honour satisfied, left the vanquished with the stinging taunt that he might now keep the woman as payment for his defeat. Finally, how Kuiwai, wife of Manaia a dweller in Hawaiki, being vigorously cursed by her husband for not cooking his meat enough, placed on board a canoe the gods of Hawaiki, and with four women companions made the journey to Aotearoa,

where they joined their frinds and kinsmen who had preceded them in the Arawa.

Many other journeys to and from the lost Hawaiki are narrated by the wise men of the Maoris, and by degrees the country was occupied by tribes, each of which to this day proudly traces its origin from the canoe in which its ancestors came from their legendary home.

4. Settlement of the Land.

Remembering the over-population and small area of the islands whence the Maoris came, the special value which they attached to land and the sparse distribution of natural foodstuffs in New Zealand, we may conclude that extensive tribal areas were occupied and defined at no considerable date from the larger migrations; and this conclusion is strengthened by reference to the traditions of the migration, and of the period immediately subsequent to it. Occupation once established, it would be extremely difficult for a people like the Maoris, jealous of their tribal rights and fully seized of the value of land in the economy of life, to abandon a village site or hunting ground except for something of equivalent value; and this would apply even after they had succeeded in acclimatising the vegetables brought from Hawaiki—the *kumara,* the gourd, and the yam—which did not require any large extent of ground for their cultivation. And though one of the most insistent cries raised against adherence to the Treaty of Waitangi was the absurdity of recognising Maori titles to land which it was alleged they had never occupied, there is sufficient evidence to prove that, at the time of the first occupation by British subjects, every part of the country was owned, according to the established native custom, by one

tribe or another. Most of the early explorers and settlers are emphatic in their declaration that there was no hill, valley, stream, forest, or other geographical feature but had its appropriate Maori name. Writing in 1846, Sir William Martin, the first Chief Justice of the Colony, said that the Land Commissioners had nowhere heard of any piece of land not owned by some person or set of persons. There might be several conflicting claimants to the same piece, but in every case there was no doubt that a right of property subsisted in one or other of the claimants.

The territories of any one tribe did not form a continuous district, open to the occupation of every member of the tribe, but were arranged in a number of divisions corresponding to the sub-tribes. Each family group, and, to some degree, each freeman in it, was at liberty to use the *hapu* lands without the leave of any other as its (or his) particular property; but collectively the *hapus* claimed a right of property in what might be called the waste lands of the tribe, lands which, owing to the exigencies of cultivation, it would be necessary to subdue to their purpose at some later date, after their present fields had become impoverished. The use of manure was abhorrent to the Maoris, and they did not practise rotation of crops. Spain, the Commissioner of Crown Lands appointed to inquire into the New Zealand Company's claims, says that in Port Nicholson district, bought by Colonel Wakefield for the Company, there were "seven divisions or families of a tribe, each claiming separate lands of their own, and certain rights and privileges which are sometimes wholly denied, and at others only partially admitted by the rest." As one proof of the collective right of the *hapu* to land, he stated, in 1846, that, in establishing land reserves

for the use of the natives, it had been found very difficult to persuade Maoris belonging to one family to settle on a reserve made within the boundary of land belonging to another even after it had been fully explained to them that the reserves had been made for the benefit of the Maoris generally, and not for any particular tribe or family. "They cannot understand this," he proceeds, "and in several instances that have fallen under my notice they have positively refused to cultivate a native reserve so situated, although at the time in actual want of a spot to grow their potatoes upon."

5. Land Custom.

Within the *hapu*, land might be held by individuals as against other members of the family, but, as in the case of the *hapus*, the rights of individual owners were not absolute, inasmuch as they did not exclude the general right of the family of which the individual owner was a member. Just as each *hapu* held its land subject to the common law of the tribe, and recognised its duty to protect the tribal territory, and to alienate only with the full tribal consent, so the individual cultivator used his land subject to the general will of his community, whether *hapu* or *iwi*. On this subject, in 1856, a Board of Enquiry into Native land tenure reported thus: "Each native has a right, in common with the whole tribe, over the disposal of the land of the tribe, and has an individual right to such portions as he or his parents may have regularly used for cultivations, for dwellings, for gathering edible berries, for snaring birds and rats, or as pig runs. This individual claim does not amount to a right of disposal to Europeans as a general rule, but instances have occurred in the Ngatiwhatua tribe, in the vicinity of Auckland, where natives have sold

land to Europeans under the waiver of the Crown's right of pre-emption, and since that time to the Government itself, in all of which cases no after claims have been raised by other members of the tribe; but this being a matter of arrangement and mutual concession of the members of the tribe, called forth by the peculiar circumstances of the case, does not apply to other tribes not yet brought under its influence. Generally there is no such thing as an individual claim, clear and independent of the tribal right."

If it were not disposed of by sale, the land thus possessed by an individual usually descended from father to son, or more correctly from grandfather to grandson. From what has been stated, it follows that no Maori could claim a piece of land as his own individual property unless he was the only survivor of his family, or unless he had made some private arrangement with the other owners, such as became so common after the arrival of the Europeans as to be recognised by the Crown as an integral part of Maori custom.

Claims to land, whether tribal, sub-tribal, or quasi-individual, were based on various grounds, of which these were common:—(1) The performance on the land either by the claimant or his ancestors, of some act of ownership exercised without opposition, such as building a substantial *whare,* or setting eel-weirs; (2) the occurrence of certain incidents upon the land in question, such as the murder of a friend or the infliction of a wound; (3) gift; (4) bequest and inheritance; (5) payment for help given in time of war; and (6) conquest, provided that conquest was followed by effective occupation, and that the rights of the vanquished were extinguished, either through their enslavement by the victors, their utter and

permanent exclusion from the territory, or their extermination. The first Land Commissioner wrote in 1846, "I have set it down as a principle in sales of land in this country by the aborigines, that the rights of the actual occupants must be acknowledged and extinguished before any title can be fairly maintained upon the strength of mere satisfaction of the claims of self-styled conquerors, who do not reside on, nor cultivate the soil." The Ngapuhis, for example, made extensive conquests in Hongi's time, in the Thames, Kaipara, and Waikato distrcts; but, as they failed to occupy the wasted territory, there was no suggestion that they had thereby acquired a right of ownership over these districts. On the other hand, the Waikatos, who had occupied certain parts of Taranaki which they had conquered in 1831-2, did undoubtedly acquire rights to the land; but these rights did not affect the whole Taranaki district, as several of the original inhabitants eluded their attacks, and succeeded in remaining in effective occupation of some of the coast lands, thereby asserting their independence and their ownership of those parts. Whenever survivors of a conquered tribe were allowed to resume, or to remain in, possession of certain portions of their land, allotted to them by the conquerors, their title was good only in so far as they were able to assert it by might. Generally the presumption was, that the conquerors united the survivors' undoubted claims of descent with their own in order to strengthen the latter, which were derived solely from the fact of conquest. But in accordance with strict native custom, the consent of the original possessors would be necessary to any alienation by the conquerors.

The modes of alienating land had a very direct influence on the early relations between Maori and British. The general rule was clear: the consent of

the majority of the tribe was an essential condition precedent to every alienation by individual, *hapu,* or tribe. The preliminary steps might, and generally would, be taken by representatives of the family or tribe particularly interested. Naturally it was the chief of the tribe who possessed the undoubted duty, or right, to make the first proposal in the alienation of the lands of the whole tribe; but he must do so in the name of the tribe. As to the sale of his own individual land, he was placed on the same plane as every other member of his tribe or *hapu*—he must obtain the consent of the principal men to the transfer. Even though he had the full consent of his family, no chief of a *hapu* could alienate its land without the consent of the tribe of which the *hapu* was a part; and the same rule applied with greater force in the case of individual vendors. The chief of a Maori tribe was always in theory, and largely in practice, emphatically its representative; and he did not always own land himself, beyond what his share of the common tribal right allowed him. Some ten Maori chiefs well versed in the usages of their ancestors, when asked by the Judges of the Native Land Court, to define the *mana* (power, authority) of the Maori chief over land, declared that a chief's *mana* did not affect the lands of his people, but that he had a claim to his own particular portion through his right to the land, derived from the occupation of his ancestors; and that a similar usage existed with respect to the lesser chiefs of the *hapus.*

These simple rules controlling alienation were complicated in practice by various circumstances, the principal being that the influence wielded by the chiefs varied with differences in their personality, and that frequent inter-marriages between the tribes, coupled with the fact that land might be inherited

in the female line, rendered it not uncommon for a Maori to possess claims to land within more than one tribal district. Even when the intending purchaser of a piece of land had secured the consent of the tribe within whose district it was situated, his title might be invalid, through failure to procure the consent of some absent owner or owners. One of the most prolific sources of land disputes occurring after the British occupation, is found in a similar fact,—the right of emancipated slaves, having returned to their former territories, to enjoy all the land rights they had possessed as free men. This custom affords an interesting parallel with the Roman *jus postliminii*, according to which captives, on their return to their country, were re-established in their former rights, the manner of their return being immaterial. The practice of freeing slaves, not unknown before the influence of the missionaries began to modify the Maori ethical code, was enormously extended, just at the period when Europeans were beginning to make considerable purchases of native lands. It must be clearly understood that the rule applied only upon emancipation, and that it was necessary that the freedmen should actually occupy the land within a reasonable time after their emancipation. There does not seem to be any ground for holding that "slaves taken into war, and natives driven away and prevented by fear of their conquerors from returning" retained their full right to land owned by them previously to their conquest. The expediency of the rule is clear: "the admission of the right of slaves, who had been absent for a long period of years, to return at any time and claim their right to land that had belonged to them previously to their being taken prisoners of war, and which, before their return and when they were in slavery,

had been sold by the conquerors and resident natives to third parties, would establish a most dangerous doctrine, calculated to throw doubts upon almost every European title to land—would constantly expose every title to be questioned by any returned slave who might assert a former right to the land, let the period be ever so remote, and would prove a source of endless litigation and disagreement between the two races."* Further complications were introduced by the fact that there were inevitably cases in which might over-ruled right; and some of the white land claimants ("land sharks" was the expressive term applied to the most voracious of them) even went so far as to maintain that the Maori was incapable of conceiving the idea of a right existing in one person, and implying an obligation upon other persons to respect it. Among these was Busby, formerly British Resident, who, writing in 1860, said, "No one (Maori) conceived the idea of authority carrying with it the corresponding obligation of obedience. Such rights and obligations are the creation of law, and cannot subsist without it. The Maoris had no law but the law of the strongest." There is, however, abundant testimony to the contrary from impartial and skilled students like Chief Justice Sir William Martin, who said, in 1861, that though "many cases must have existed in which might overcame right, still the true rule is known and understood—the natives have no difficulty in distinguishing between the cases in which the land passed according to their custom and those in which it was taken by mere force."

*Commissioner Spain, *Report to Governor Fitzroy.*

Chapter II.

TASMAN TO COOK.

1. Discovery of New Zealand.

Though the Pacific Ocean was traversed by European navigators from the first quarter of the sixteenth century, it was not till the middle of the seventeenth that Aotearoa was discovered.

In the course of its competition with English and French merchant adventurers, the Dutch East India Company despatched from headquarters at Batavia in 1642 an expedition to discover and explore the unknown portions of the Great South Land, which was then thought to stretch around the world in southern latitudes and balance the land massed around the North Pole. The command was given to Abel Jansen Tasman, already distinguished for voyages to Japan and the Philippines, and the two ships, the *Heemskerk* and the *Zeehaan* were provisioned for a year. Though the object of the expedition was frankly commercial, Tasman was instructed to take possession for the United Provinces of all lands he might discover, and declare the intention of the Company to establish a colony.

On November 24th, some three months after leaving Batavia, he discovered, named, and landed on Van Diemen's Land (Tasmania). Then, in the entry in his log for 13th December, in latitude 42° 10′, longitude 171° 42′, he says: "Towards the middle of the day, we saw a great land uplifted high. We had it S.E. of us about sixty miles away. We shaped our course S.E., straight on towards the land. At noon we fired a gun and let the white flag fly, whereupon the officers of the *Zeehaan* came on board; and with

them we resolved to stand for the land as fast as possible. . . . Here the great open sea comes rolling in with huge hollow billows and heavy surf; wherefor, according to our judgment, there would be no prospect of landing at this side of the country unless there should be some sheltered bay on the coast.''

Having passed northwards from Cape Foulwind, he lost four men in an encounter with the Maoris in Murderers' Bay, so named by him; then he sailed steadily north along the West Coast of the North Island, naming a few coast features, and left our waters in January, 1643, to discover Fiji and the Friendly Islands before arriving at Batavia after an absence of ten months.

2. Political Results.

Whilst in New Zealand waters Tasman wrote in his log:—''This is the second land that has been sailed past and discovered by us. We have given this country the name of Staaten Landt in honour of their Highnesses the States-General of the United Provinces. For this land may prove to be continuous with Staaten Landt to the east of Tierra Del Fuego, though this is uncertain. It seems to be a very fine country, and we presume that it is part of the coast of the mainland of the Unknown South Continent.''

When, in 1643, Staaten Landt was found to be an island, the States-General changed the name of the territory discovered by Tasman to Nova Zeelanda, naming it after Zeeland, the province in the south-west of Holland.

Tasman's Log is the earliest known European record of New Zealand. His chart was incorporated in the map of the world in two hemispheres made by Quellius in 1662, as part of the pavement in the

Great Hall between the two court-yards of the new Town Hall of Amsterdam.

The question has been asked whether Tasman's discovery did not of itself confer upon the United Provinces full and undisputed sovereignty over New Zealand. International jurists, however, have long agreed that the bare fact of discovery is not sufficient to support a claim of proprietary right over territory discovered. All that discovery does is to set up an "inchoate title," one that must be developed and strengthened by some act of occupation performed within a reasonable time. Vattel, who wrote in 1758, and may be taken as representing the general opinion of those learned in the "law of nations," says: "It is questioned whether a nation can, by the bare fact of taking possession, appropriate to itself countries which it does not really occupy. . . . The law of nations will therefore not acknowledge the property and sovereignty of a nation over any uninhabited countries except those in which it has formed settlements, or of which it makes actual use." This being true of the act or ceremony of taking possession of an uninhabited country, the rule must apply with greater force to the mere discovery of territory occupied by a nation with which the discoverer failed to establish any kind of communication, and of whose political and social organisation he had no certain knowledge.

It is admitted that the discovery of New Zealand was an act of the Netherlands State, since Tasman had been authorised by the Governor, Antony Van Diemen, and Council of the Dutch Indies, to search for new lands, and to take possession in the name of the States-General of any territory he might discover. If, therefore, England or France, or any other State had within, say, a generation from the date of

Tasman's discovery, endeavoured to appropriate New Zealand to itself, then the Dutch would have been justified in pleading the fact of prior discovery by them as an effective bar (though only a temporary one unless followed by occupation) to possession by the foreign claimant. But Tasman's discovery was neither utilised by the Dutch, nor exploited by other nations, from whom indeed the knowledge of its existence was for some time jealously guarded. The veil had been lifted only to fall again.

New Zealand was saved from incorporation in the Dutch dominions by the storm clouds which, at the time of its discovery, were forming and about to sweep over the Dutch Republic. The enactment of navigation laws in England was followed by two exhausting wars with that country; then came a life and death struggle with Louis XIV.; and worst of all, the Republic was divided against herself, and spent her energies in the contentions between the De Witt and the Orange parties. The eighteenth century, which saw England and France aroused to active exploration of the South Seas, was, for her, a period of decay. It was only at the close of the first quarter of the nineteenth century, when English statesmen were slow to undertake the responsibility of creating colonies, that the obsolete Dutch claim was momentarily revived by them as a convenient excuse for refusing to grant official recognition to the Company which then proposed to colonise a part of New Zealand.*

3. Origin of Cook's Expedition.

There is no written record of any visit of Europeans to New Zealand between January, 1643,

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*See Chapter III., page 33.

and October, 1769; but the Maoris have traditions regarding at least four ships that touched at New Zealand during that period. New Zealand is honoured by the important part she takes in the achievements of England's greatest navigator, James Cook, who, on his first South Sea voyage, spent some six months (October, 1769, to April, 1770), in exploring and surveying the coast-line of both islands, and in endeavouring to establish friendly relations with the inhabitants, of whose social and political customs he gave an interesting and generally faithful description. The expedition he commanded had been equipped by the Imperial Government at the request of the Royal Society, which desired to make accurate observations of the transit of Venus, visible in the southern hemisphere in 1769. George III., who had already interested himself in maritime exploration, joined with the Admiralty in seizing the opportunity which the scientific event offered to pierce further into the unknown regions of the South Pacific. Cook, whose service record and whole life had proved him to be possessed of remarkable qualities, was promoted to the rank of lieutenant and placed in charge. He fitted out the barque *Endeavour*, a vessel of the north country collier type, and, in July, 1768, sailed from Plymouth with an efficient crew, accompanied by Mr. Green, an astronomer, and two botanists, Dr. Solander and Mr. (afterwards Sir) Joseph Banks.

He received strict orders, which have never been published and of which no record can be found in the Admiralty books; nor does his journal disclose the fact that he deliberately intended to visit New Zealand. He must, however, have been aware of the existence of this country, and, judging from his proceedings here and from the nature of the secret orders he received from the Admiralty on setting out

on his third voyage,* it would appear that he was instructed to take possession of New Zealand for Great Britain, as well as to explore it.

4. Annexation of New Zealand.

Having duly noted the transit of Venus at Otaheite (Tahiti), the expedition sailed south-westward till it sighted the New Zealand coast on October 7th, 1769. Cook landed on the 9th at an inlet, which he subsequently named Poverty Bay, on the opposite side of the North Island to that skirted by Tasman. Here he was obliged to fire more than once upon the Maoris. From the 4th to the 15th of November, he was at Mercury Bay, where he observed the transit of Mercury. It was here that he took formal possession of the land. As he completed his circumnavigation of the North Island within three months,† this formal act may justly be held to apply to the whole extent of that territory. He says: "Before we left this bay (Mercury Bay) we cut upon one of the trees near the watering place the ship's name, date, etc., and, after displaying the English colours, I took formal possession of the place in the name of His Majesty."‡

Proceeding around the coast he arrived, on January 16th at Ship Cove, Queen Charlotte Sound, some seventy-five miles from Tasman's "Murderers' Bay"; but he found that the Maoris of that locality had not preserved any traditions of Tasman's visit. Then

*"You are also, with the consent of the Natives, to take possession in the name of the King of Great Britain of convenient situations in such countries as you may discover, that have not already been discovered or visited by any other European Power; and to distribute among the inhabitants such things as will remain as traces and testimonies of your having been there; but if you find the countries so discovered are uninhabited, you are to take possession of them for His Majesty by setting up proper marks and inscriptions as first discoverers and possessors."—Secret Instructions for the Voyage, 5th July, 1776.

†On February 9th, 1770.

‡Captain Cook's Journal, edited by Wharton, 1893; entry 15th November 1769.

and subsequently they declared that they had never before either seen or heard of any ship like the *Endeavour.* It is probable that the tribe which had attacked Tasman had long before been destroyed by fiercer migrants from the North. Before leaving Queen Charlotte Sound, Cook took possession on the 31st January, 1770, of the adjacent country, in the manner described in his Journal: "In this p.m. the carpenters having prepared the two posts with inscriptions upon them, setting forth the ship's name, month, and year, one of them was set up at the watering place, on which was hoisted the Union Flag; and in the morning I took the other over to the island which is known by the name of Motuouru, and is the one that lies nearest to the sea; but before I attempted to set up the post I went first to the hippa, having Dr. Monkhouse and Tupia along with me. We here met with the old man I have spoken of before. The first thing I did was to enquire after the man said to be killed by our people, and the one that was wounded at the same time, when it did not appear to me that any such accidents had happened. I next (by means of Tupia) explained to the old man and several others that we were come to set up a mark upon the island, in order to show to any ship that might put into this place that we had been here before. They not only gave their free consent to set it up, but promised never to pull it down. I then gave everyone a present of one thing or another; to the old man I gave silver, three penny pieces, dated 1763, and spike nails with the King's broad arrow cut deep in them; things that I thought were most likely to remain long among them. After I had thus prepared the way for setting up the post, we took it up to the highest part of the island, and after fixing it fast to the ground, hoisted thereon the Union Flag, and I digni-

fied this inlet with the name of Queen Charlotte's Sound, and took formal possession of it and the adjacent lands in the name and for the use of His Majesty. We then drank Her Majesty's health in a bottle of wine, and gave the empty bottle to the old man (who had attended us up the hill), with which he was highly pleased."*

By the 27th March Cook had circumnavigated the South Island, which, by virtue of his proclamation of sovereignty at Queen Charlotte Sound, became an appendage of the British Crown. There is little doubt that his acts of appropriation were State acts, performed in pursuance of the terms of his secret orders, and that he had been invested with general or specific authority formally to take possession of New Zealand. He goes so far as to describe in his "Journal" what, in his opinion was the best place for establishing a colony: "Should it ever become an object of settling this country," he says, "the best place for the first fixing of a colony would be either in the River Thames or the Bay of Islands; for at either of these places they would have the advantage of a good harbour, and by means of the former an easy communication would be had, and settlements might be extended into the inland parts of the country. For a very little trouble and expense small vessels might be built in the river proper for the navigation thereof. It is too much for me to assert how little water a vessel ought to draw to navigate this river, even so far as I was in the boat; this depends entirely upon the depth of water that is upon the bar or flat that lay before the narrow part of the river, which I had not had an opportunity of making myself acquainted with, but I am of opinion that a vessel that draws not above 10 or 12

*Captain Cook's Journal, edited by Wharton, 1893; entry January 31st, 1770.

feet may do it with ease. So far as I have been able to judge of the genius of these people, it does not appear to me to be at all difficult for strangers to form a settlement in this country; they seem to be too much divided among themselves to unite in opposing, by which means, and kind and gentle usage, the colonists would be able to form strong parties among them."

In the course of his two other Pacific voyages Cook revisited New Zealand. In all he spent 326 days in the country, spread over five separate visits. His claim to the proud title of first explorer of New Zealand is undisputed. No country had ever before been subjected to such a comprehensive, detailed, and accurate coastal survey by its discoverer as that which Cook made on his first visit to New Zealand. He achieved, indeed, in six months such a work as usually requires the energies of many men spread over a lengthy period. The excellence of his chart drew a compliment from Crozet, who visited the northern part of the North Island in 1772, and saw Cook's chart on his return to Europe. "I found it," he says, "of an exactitude and of a thoroughness of detail which astonished me beyond all powers of expression, and I doubt much whether the charts of our own French coasts are laid down with greater precision."*

The account of his labours was received in England with great interest, and his wonderfully accurate details gave an excellent idea of the new country and of its inhabitants. Even Boswell was stirred by his discoveries, and confided to his great master that during a conversation with the great navigator he "catched the enthusiasm of curiosity and adventure,

*Crozet's Voyage (Roth), page 22.

and felt a strong inclination to go with him on his next voyage.'' Johnson's reply was characteristic, ''Why sir, a man does feel so, till he considers how very little he can learn from such voyages.''

Chapter III.

EARLY OCCUPATION.

1. Preliminary.

It was a well settled principle of international law, even in the latter half of the 18th century, that a discoverer who is an accredited agent of his state acquires for that state by his act of discovery and annexation, a good temporary title to the new territory, but that such a title fades unless it is strengthened by actual occupation, and by some clear expression of intention on the part of the state to retain the proprietary right thus originated. The two elements of the juristic conception of possession—the fact of occupation and the *animus domini*—must unite if the inchoate title established by discovery and annexation is to ripen into ownership and sovereignty. And where, as is usually the case with new lands, the first occupation is by persons acting individually and without any authority from their state, their occupation must be recognised and adopted by that state before it can be said to have a title to the territory subjected to such occupation. Some space must, therefore, be given to a description, necessarily general and brief, of the character of the early British occupation following upon Cook's annexation of the islands, and to a determination of the degree to which the British Government recognised such occupation as expressive of an intention to render its appropriation of them permanent. Such an investigation will make two facts abundantly clear—that occupation commenced at a very early date and was continued steadily, and that the British Government, for reasons which will be considered

later, distinctly and deliberately disavowed Cook's acts of annexation, and abandoned the temporary title which he had acquired for the British Crown. Upon the first point we must turn to various official publications, and to the few books descriptive of early New Zealand life written by actual settlers or observers, and the present chapter is devoted to a summary of the results obtained from such a study.

Whilst many of the first visitors to, and settlers in, New Zealand were attracted hither by love of adventure and the prospective delights of an idyllic existence among the natives, the primary and general impulse was desire for commercial gain. The first natural products to attract adventurers and to excite the colonising instinct were the seals and the whales which abounded in the coastal waters, and the timber and flax of the land itself. As the exploitation of these was not attempted simultaneously, and as the stream of migrants from England and New South Wales to New Zealand was somewhat intermittent in its earlier course, the use of the chronological method should occasion no confusion.

2. The Eighteenth Century.

Cook's discoveries inspired not a few colonising schemes, among them Benjamin Franklin's philanthropic project, 1771, for the settlement of New Zealand. This, however, had no effect, beyond encouraging Cook in his later visits to introduce the pig and certain useful plants. In 1788 Captain Phillip, the founder of New South Wales, was instructed to open trade with New Zealand, but for some time the Governors of that colony concentrated their attention on Norfolk Island as an out-station. In November, 1791, Vancouver spent about three weeks in Dusky Bay, and Lieutenant Broughton, in com-

mand of the *Chatham*, the second ship of the expedition, discovered the Chatham Islands on the 29th of that month, and took possession of them for the British Crown. Sealing was responsible for the first temporary settlement of Europeans, about a dozen Sydney sealers being established at Dusky for some ten months in 1792-3, when they built the first vessel made in Australasia from local timber. A Spanish expedition under Malaspina visited the neighbouring parts of the coast in February, 1793. By this time the Australasian whale fisheries had been opened up, and in 1794 the firm of Messrs. Enderby began to send vessels to New Zealand waters. In the same year the timber trade, destined to grow to great proportions, was inaugurated by the visit of the *Fancy* to the Coromandel Coast, whence she got spars for the East India Company. On this as on many other occasions contact between Maori and white bred strife, and three Maoris were killed before the first timber cargo was secured. The next year the *Endeavour*, calling at Dusky with the *Fancy*, was beached; and some of her people remained there till 1797. By 1800 other timber vessels had visited the Thames, and it had been clearly shown that New Zealand was a source of profitable trade in whale products, sealskins and oil, and timber.

3. 1801-14.

In 1801 Samuel Marsden, chaplain to the colony of New South Wales, wrote to the Church Missionary Society a memorandum on the establishment of a mission in New Zealand. In this he enunciated the proposition which formed the basis of his work among the Maoris: "The arts and religion should go together. The attention of the heathen can be gained, and their vagrant habits corrected only by the arts.

Till their attention is gained, and moral and industrious habits are induced, little or no progress can be made in teaching them the gospel." Further on in his memorandum he says: "The Society should have their missionaries sent out under the sanction of the British Government in England, and with an official recommendation from the Government to the Governor of New South Wales. From New South Wales they should proceed, under the patronage of and with a recommendation from the Governor to the Chiefs of New Zealand."

Bass, who had won fame by his daring coast explorations in Australia, endeavoured to obtain the monopoly of the Southern New Zealand coastal fishing grounds in 1803; but all trace of him was lost after his departure from Sydney early that year for a sealing and fishing voyage in these waters.

The Sydney "Gazette" was established in 1803 and the general progress of trade with New Zealand can be traced in its pages. For the belief that permanent settlement commenced about this time in the far South there is authority in the statement made to a select committee of the House of Lords in 1838 that Europeans had been living there for thirty-five and even forty years. Mr. McNab dates the regular visits of sealers from 1803. 1805 marks the first mention of a permanent white settler in the north, the first visit of a Maori to England, and the voyage of Te Pahi and some of his sons to Sydney. In the following year the adventures of the mutineers on the brig *Venus* occasioned a fierce inter-tribal Maori war, and Bristow, a whaler, discovered the Auckland Islands, which he revisited and annexed in 1807. In 1809 a regular timber trade was established between the North and Sydney; it was chiefly in kahikatea, kauri not becoming a staple export till 1820. The

other events marking the year 1809 were the recorded discovery of Foveaux Strait and the first survey of Stewart Island by William Stewart, first officer of the *Pegasus*; the discovery by Captain Chase of that ship that the Banks Island of Cook is a peninsula; the massacre of the ship *Boyd* by the Maoris of Whangaroa, who spared only a woman and two children; and the despatch from New South Wales of an expedition to the Bay of Islands to test the capabilities of the district for flax. Next year a similar expedition visited the South, and Hazelburgh discovered Campbell Island and Macquarie Island.

The second decade of the century marked the height of the sealing industry, when some seventy or eighty thousand skins were secured each year, selling in the Sydney markets at fifteen shillings each. At this time, too, about 350 tons of sea-elephant oil were annually imported into Sydney from New Zealand, while the ghastly trade in preserved human heads speedily assumed alarming proportions, and was not abolished till after Governor Darling's proclamation of the 16th April, 1831. He ordered, "that the officers of the Customs do strictly watch and report every instance which they may discover of an attempt to import into this Colony any dried or preserved human heads in future, with names of all parties concerned in such attempt." It was necessary only to point out the scandal and prejudice which the trade could not fail to raise against the name and character of British traders in order to effect the cessation of the mischievous traffic.

In December, 1813, Governor Macquarie took steps to prevent continuance of the outrages inflicted on the Maoris by Europeans resorting to New Zealand. A proclamation forbade any vessel of British or Indian registry to clear from any port within New

South Wales for New Zealand unless the masters and owners were bound in the sum of £1,000 to demean themselves peaceably towards the natives of New Zealand; not to commit any acts of trespass upon the plantations, gardens, lands, habitations, burial-grounds, tombs, or properties of the natives; to leave them to the free, uninterrupted enjoyment of their religious ceremonies; to abstain from carrying off any of the male natives without their free will and consent, and the free will and consent of their chiefs; and to refrain from taking any female native without the written permission of the Governor of New South Wales.

4. Missionary, Trader, and Pakeha-Maori.

The year 1814 opens a new era in our history, for on December 22nd the brig *Active* arrived at the Bay of Islands from Sydney with the first considerable party that intended to make a permanent settlement in the country. It was led by the Rev. Samuel Marsden, who on Christmas Day preached his first mission sermon to the Maoris. In a few weeks the missionary settlement, comprising some twenty-five British, including the first free white women to live at the Bay, was firmly established at Rangihoua. Marsden, acting for the Church Missionary Society, bought for twelve axes some 200 acres of land from the local chiefs, this being the first recorded sale of land by Maoris to a European. In 1822 the Rev. Samuel Lee established a Wesleyan mission at Whangaroa, where he made a similar land purchase. The progress made by these organisations is shown by the fact that in 1840, the year of the establishment of British sovereignty, the Church Missionary Society was spending annually in New Zealand some £14,000, and the Wesleyan Society nearly £4,000.

The first named body had divided the North Island into two districts, each containing six stations, and at the date mentioned there were in all seventy-two schools with 1,796 pupils, and 8,760 persons in attendance at public worship. As early as 1831 James Busby called attention to the beneficial influence of the missionaries upon the Maoris, and the manner in which they were clearing the tangled and devious path to British sovereignty. "The conduct," he wrote, "of the missionaries, however, in such parts of the islands as they have visited, joined to the opinions which have been spread of the power and wealth of the English by those chiefs who have visited Sydney from almost every part of the coast, have produced a respect for the character of the English and a dread of their power, that are not less universal than their desire to cultivate the trade from which they can derive such advantages."

In 1814 certain merchants of Sydney, chief among them Lord and Blaxcell, wished to form a joint stock company, "The New South Wales New Zealand Company," with exclusive trading privileges, which should found a trading colony in New Zealand. The project seems to have been favoured by Macquarie, but Earl Bathurst in 1816 disapproved of the proposal to grant a monopoly.

During 1816-26 John Rutherford was living his adventurous life among the Maoris of the East Coast, if we can accept as authentic the account of him written by Craik in 1830.* In 1819 experiments at the Portsmouth Dockyards proved that strong and pliable ropes could be made from New Zealand flax, sixty tons of which, valued at £2,600, had been exported from Sydney the previous year. The flax

*See Introduction to Drummond's edition of *John Rutherford*, pp. 15-7; also Transactions N.Z. Institute, Vol. XXIII., pp. 453-61.

trade flourished in the late twenties, flax selling freely at £45 a ton. But it soon fell on evil days. Several causes contributed to its decadence, the most important being the increasing unwillingness of the Maoris to dress the fibre, the dirty state in which the flax was shipped, and the close competition of various foreign fibres. The trade was completely checked in 1832, to be resumed later when new methods of dressing were invented.

By the end of the first quarter of the century, the Bay of Islands was fast becoming a popular resort for the South Pacific whalers, which were attracted thither by abundance of shelter, freedom from port dues, and ample means of refitting. The whaling industry grew very rapidly. The Bay of Islands at once became a regular resort for whalers, and in consequence, quite a little town sprang up there at Kororareka. From this time down to 1833, when the first formal step towards the assumption of sovereignty was taken by the British Government, New Zealand was a veritable "No Man's Land," the resting spot of rough, primitive whalers, the home of adventurous traders, and of picturesque ruffians who had turned their backs upon civilisation. Many whalemen and sealers settled on the coast (about one hundred men deserted from the whalers as early as 1824) some of them marrying Maori wives, and developing into that strange romantic type known as the "pakeha-Maori." Stray deserters, too, from the convict settlement in Australia, founded in 1788, made their way, as stowaways on the whaling ships, to the shelter of the Long White Cloud, and many a man for whom the old world was too narrow or too honest, found a haven of refuge in

> "The thoughtful islands
> Where never warrants come."

The gruesome trade in dried human heads went on; the whaler, wearied of his labour, found here a splendid harbour, unlimited rum, and dusky beauties to beguile his hours on shore. Kororareka, now known as Russell, has shrunk to a few houses, and a handful of tame and easy folk, but during the first quarter, and beyond, of the nineteenth century she was a strange, unholy, glowing, and romantic town, and her story contains a wealth of material for the novelist who would revive for us the glories—and the shame—of the old whaling days.

5. First Attempt at Organised Colonisation from Home.

The fifty years official neglect which followed upon Cook's labours must not be attributed to a lack of interest in the country which he discovered. From the outset New Zealand attracted the attention of all who visited her, as being a most promising field for colonisation. As early as 1807, Dr. John Savage in a little work entitled "Some Account of New Zealand" expressed this opinion, which we find continually echoed down to the time when New Zealand became a colony of the British Crown. "The harbours," he says, "are safe and capacious, the country beautiful, the soil favourable to cultivation."

In spite of this and similar eulogies, it was not till towards the end of the first quarter of the century that New Zealand became the object of a systematic plan of colonisation. We refer to Baron de Thierry's project in a later chapter.* A group of British capitalists commissioned William Stewart to establish a colony in the South to develop the flax and timber trades; timber and shipbuilding works were set up

*See Chapter V., page 52.

at Port Pegasus in 1826; but the enterprise failed the following year. A larger company had also been formed in Great Britain to colonise the North Island. Among its promoters were Mr. Lambton (afterwards Earl of Durham), Colonel Torrens, and Lord Heatherton. The Company proposed to form an establishment in the country in order to extend the trade in timber and the manufacture of flax. They asked for assistance and recognition from the British Government, but were met with the reply, that the Dutch had superior claims to the North Island. The Dutch Government, when applied to, promised the Company ample protection and full assistance, confirmation of territorial right, and free trade with Holland. These assurances stimulated the British Government to action, and Mr. Huskisson, then President of the Board of Trade, promised the Company the grant of a royal charter, should the preliminary expedition achieve the object for which it was despatched.

Of this enterprise Edward Gibbon Wakefield said later: "The Company had expended a considerable sum in sending an expedition to New Zealand—about £20,000, all of which was lost. They had obtained from the Crown the promise of a charter of incorporation, and, when the New Zealand Company of 1839 was in the course of being formed, the Company of 1825 stood in the way with its prior claim for a charter."* The £20,000 was spent on the purchase of the brig *Rosanna*, in loading her with agricultural and other implements, and with ten tons of powder, intended as an article of payment for land; and in engaging the services of mechanics of various kinds, such as ship's carpenters, sawyers, blacksmiths, and

*Evidence before House of Commons Committee, 1840.

flax-dressers, suitable for the foundation of a colony of the character contemplated. The expedition was entrusted to the command of Captain Herd, who was well acquainted with the New Zealand coast; and it was the intention of the Company to equip and despatch two similar expeditions, should the result of the first venture warrant such a proceeding.

The expedition, which consisted of some fifty to sixty prospective settlers, sighted New Zealand at Stewart Island, coasted along the eastern shores of the South Island, put in at Queen Charlotte Sound and at Port Nicholson, and arrived in the Hauraki Gulf in the early part of 1826. There it stayed for some months, and bought from the natives an island, on which, however, it could effect no landing.

Proceeding northwards it called at the Bay of Islands, then rounded the North Cape, and arrived at Hokianga, where land was again bought, early in 1827. Captain Herd, who acted as agent for the Company, purchased land from Te Rawene, from Te Tai Papahia, and from Te Ngawe, by agreement, the terms of which the Maoris were willing and even anxious to fulfil even many years later. Colonisation, however, was destined to be postponed beyond another decade; for a war-dance of the Maoris, probably intended as a mark of welcome, terrified the expedition into flight.

Its net effect, as far as New Zealand was concerned, was the acquisition of some four or six of the settlers, Scottish carpenters, who settled on land which they bought from the Maoris—a precedent which provided one stimulus to the formation of the greater Company with which it was afterwards incorporated. The outfit was sold by auction in Sydney, and such of the immigrants as desired to return to the Old Country were shipped back at the Company's expense. The

other two vessels, that were to follow, were never despatched.

6. Continuance of Spasmodic Unauthorised Settlement.

Notwithstanding this failure, and the indifference of the British Government, unauthorised colonisation still proceeded apace, and by 1830 Kororareka was a free community, or primitive republic, of several hundred Europeans. Laws and institutions there were none. The rule of might was tempered only by that sense of rough justice which is never wholly absent from any community of white men, and by such little influence as the missionaries could wield over the units of the ever-changing population. In 1826 there were said to be over one hundred escaped convicts in New Zealand.* In 1827 a ship-building yard was established at Hokianga by a Sydney firm employing some fifty men, and about this time, a comprehensive trading factory was set up at the Bay of Islands by Gilbert Mair, who is said to be the first trader in kauri gum. By 1830 a new industry, shore-whaling, promised to be permanent and to offer special inducement to settlers. The shore-whaling stations were equipped by Sydney capitalists, and dotted the east coast from the far south to the Bay of Plenty. Each station was usually held by a license from the chief of the district in which it was situated; but, in some cases, its site had been purchased outright from the chief and tribe. For example, if we can accept the evidence of his Log and his statement of claim made in 1840, George Hempleman in November, 1839, purchased from the Maoris, among them the notorious chief, Tuhawaiki, a block

*Hobart Town *Gazette* estimate.

of land on Banks Peninsula, described in the agreement as extending "from Mowry Harbour south to Flea Bay north, including Wangoolu as agreed by the undermentioned, viz., by payment of one big boat, by name the *Mary Ann,* including two sails and jib: extent of land fifteen miles east, south inland." The year 1830 ushered in a prosperous era for the whalers. There were then engaged in the sperm whale trade alone 4,000 tons of shipping from New South Wales, whilst more than 7,000 tons entered outwards from Sydney for New Zealand during the first part of the year. As port charges were levied on whale ships visiting New South Wales, vessels were diverted to the Bay of Islands.

In 1830 the first printing press was set up in New Zealand by the Church Missionary Society.

7. The Last Decade before Cession of Sovereignty.

The fourth decade of the nineteenth century is the most critical period in the early history of New Zealand. It opened with a marked advance in the whaling returns, rumours of the establishment of a British Government post consisting of a few troops and a ship-of-war, and further signs of immediate growth of permanent settlement. In 1832 several vessels loaded in New Zealand direct for English ports. Imports of muskets, pistols, cutlasses, gunpowder, lead, bullet moulds, and intoxicants now followed freely, to work havoc on a race that knew not the evils that lurked therein. Bad as things were in this respect, they would have been worse but for the missions which were rapidly increasing their stations. Then on May 5th, 1834, there arrived at the Bay of Islands James Busby, duly accredited as British Resident, of whom more is said in subsequent

chapters. In 1835 New Zealand exports to Sydney were worth £113,000; her imports thence, £31,000.

During the first half of 1836 a hundred and one ships visited the Bay of Islands, and in one day as many as thirty-six were counted there. Next year Marsden made his seventh and last visit to the country to which he had brought the torch of Christianity. By this year eight ships had been built at Hokianga; and the first permanent settlement on Banks Peninsula was made by George Hempleman, who established at Piraki in 1837 a shore-whaling station on land bought from the Maoris. It was stated in evidence before the Committee of the House of Lords in 1838 that more American than British whalers were accustomed to visit New Zealand waters. In 1834 about one hundred English ships, nearly one hundred colonial ships, two hundred and seventy-three American ships, and about fifteen French ships were engaged on the South Seas whaling grounds, and it was estimated that about one-half of the oil sold as southern was caught at New Zealand, and introduced to Great Britain through New South Wales. Towards the end of this decade as many as three hundred persons were established at the shore-whaling stations near Queen Charlotte Sound alone. Farming was being extended and the surplus produce sold to the visiting ships. Bell had established a farm on Mana Island in Cook Strait in 1834, and wool from it and from Clendon's farm at the Bay of Islands was exported to Sydney in 1835. In 1839 Rhodes established a cattle farm at Akaroa, and about the same time Jones stocked his land in Otago.

In 1839 a consignment of New Zealand wool was imported into Hobart Town, exceeding, according to the Hobart Town "Courier," both in length and firmness of texture any wool ever produced in New

South Wales; its quality, it was maintained, afforded additional proof of the wisdom of the British policy of forestalling the French in settling the islands.

In 1838, Broughton, first Bishop of Australia, began a visitation of New Zealand.

By 1840 it was estimated that the white population of the islands amounted to two thousand, comprised of missionaries, "pakeha Maoris," runaway convicts, whalers, traders, timber workers, and farmers. These, together with certain capitalists from the neighbouring colony, claimed to have purchased four-fifths, or nearly forty-five million acres, of the whole area, leaving, if such claim could be established, only one-fifth to be acquired by the British Crown.

The medium of exchange commonly used in New Zealand after it had been opened to commerce and before it became a colony in the political sense, was necessarily that in use in New South Wales, the country with which it was most intimately connected. Rum was the first commodity used, but it never attained here to the important position it occupied, both as medium of exchange and standard of value, in the earlier years of the convict settlement. English coins were extremely scarce, and both flax and whalebone were accepted as money. Other media of exchange were the American dollar, put into circulation by the Yankee whalers, and the Spanish dollar of five shillings coined in Mexico, from which Governor Macquarie in 1813 made two coins—the "holey dollar" and the "dump"—by cutting out the centre. Governor King had coined a two-penny piece, and had proclaimed as legal tender a curious assortment of coins—ducats, mohurs, dollars, rupees, guilders, pagodas—many of which must have passed current among the traders in New Zealand. Promissory notes, issued by leading commercial houses, circulated as bank-notes, cheques,

and post office orders do now. It was not till 1829 that Governor Darling by proclamation restricted legal tender in New South Wales to English money. But in New Zealand the various other media—with the addition of tobacco—continued to be used until after the country was proclaimed to be a part of the colony of New South Wales.

Chapter IV.

THE ATTITUDE OF THE CROWN.

1. The Colony of New South Wales.

It is clear that until the second decade of the century, the British Government had some intention of exercising its claim over these islands, which it evidently regarded as part of the colony of New South Wales. In the "heads of a plan" for the formation of this colony, drawn up by Lord Sydney in 1786, there was a reference to the advantages to be derived from the cultivation of New Zealand flax and the use of the kauri forests. Both James Matra and Sir George Young, who had been among the first to press on the Government the expediency of colonising Australia, used as weighty arguments the possibility of profitable trade in flax and timber. During the debates on the bill of 1783 authorising the Crown to establish new penal settlements, New Zealand had been frequently mentioned as possessing certain advantages therefor. There is little doubt that it was intended to be included in the territories described in the Order-in-Council of December 6th, 1786, setting aside the eastern coast of Australia and the adjacent islands for convict settlement, while in the commission of April 2nd, 1787, appointing Phillip Captain-General and Governor-in-Chief of New South Wales, the colony was defined as including "all the islands adjacent in the Pacific Ocean" within latitudes 10° 37′ and 43° 39′ S. It is true that there was no specific mention of New Zealand in the commission; but neither was there of Norfolk Island;* yet on

*Norfolk Island, however, was mentioned in Phillip's Instructions (23rd April, 1787), whilst no mention was made of New Zealand.

February 15th, 1788, little more than a fortnight after the first fleet had arrived in New South Wales, a ship was despatched from Sydney with orders to form a settlement there. Moreover, as we have seen, special mention of New Zealand flax and kauri timber had been made in the Home Secretary's "heads of a plan."

2. Legislation of Governors of New South Wales for New Zealand.

Certain of the Governors of New South Wales by means of their "General Orders" or Proclamations legislated for New Zealand, sometimes with reference to it alone, but usually for it in common with the other adjacent islands. Two proclamations of Governor King in 1840* refer partly to New Zealand. The proclamations requiring the Governor's permission to ship Maoris from Sydney† and a bond for the good conduct of Sydney seamen towards the Maoris,‡ do not prove anything as to the Governors' views of the legal status of New Zealand. Though Governor Macquarie, in dealing with an application to take a convict from Sydney to assist in the New Zealand flax trade in April, 1813, wrote of New Zealand as being outside the "territory" and "colony," presumably, of New South Wales, yet he seized the opportunity of Marsden's first voyage in the following year to assert definite rights of government. By a proclamation dated 9th November, 1814, he called attention to the gross insults and injury to the natives by commanders and seamen touching at, or trading with, the islands of New Zealand, and more especially that part of them called the Bay of Islands. It is implied that New Zealand is a

*May 26th and August 11, 1804. †May 26th, 1805. ‡December 1st, 1813

"dependency of the territory of New South Wales." Macquarie ordered that no master or seaman of any British ship should in future remove any of the natives therefrom, without first obtaining the permission of the chief, or chiefs, of the district within which the natives in question resided; and that this permission was to be certified in writing under the hand of "Mr. Thomas Kendall, the Resident Magistrate in the Bay of Islands, or of the Magistrate for the time being in the said district." A similar provision applied to the landing or discharge of any person from such vessels within any of these harbours of New Zealand. Any neglect or disobedience of these orders was to subject the offenders to the utmost rigour of the law on their return to Sydney; and those of them who should return to England, without resorting to Sydney, were to be reported to the Secretary of State for the colonies, and proceeded against and punished there. With the view of carrying these orders into effect, the Governor, in the same proclamation, invested three chiefs, Dewaterra (Ruatara), Shunghe (Hongi), and Kora Korra (Korokoro), with power and authority for that purpose and in a General Order of the 12th he notified the appointment of Thomas Kendall as Justice of the Peace throughout New Zealand and its contiguous islands. These magistrates accompanied Marsden in the *Active* and, on December 17th, while the brig was off the North Cape, Marsden seized the opportunity to explain to the local chief, who visited the ship, the purport of the proclamation, and especially the appointment of Mr. Kendall as Resident Magistrate.

Again, on July 19th, 1819, Macquarie commissioned a clergyman named Butler to keep the King's peace and help to preserve "the quiet rule and government of His Majesty's people within and throughout the

British settlements at New Zealand," which were described in the commission as "a dependency of the said territory" of New South Wales. This appointment, as well as Kendall's was no idle one, for Butler apprehended and sent to Sydney persons accused of disturbing the peace; and as late as 1840 the New Zealand Company, relying upon the virtue of this commission, despatched Butler to Port Nicholson to act as magistrate in its first settlement. It is important to note that, though Macquarie took these active measures to assert British authority in New Zealand, the reference in the commissions of the first four Governors of New South Wales to the "adjacent islands," which had been held to include New Zealand, had been omitted in 1810 from the commission appointing the Governor. This omission was subsequently explained by an official of the Colonial Office to have been unintentional.

3. Repudiation of British Sovereignty.

The abuses against which the various proclamations were levelled did not abate, and in 1817 an imperial act* was passed "for the more effectual punishment of murders and manslaughters committed in places not within His Majesty's dominions," by the master or crew of any British vessel. The disavowal of British sovereignty over New Zealand is explicit in this Act, and was confirmed by two important Acts passed in 1823 and 1828. The Act of 1823 empowered the Crown to establish in New South Wales a Supreme Court, consisting of a chief justice, and, if necessary, two other judges. In criminal cases such as those contemplated as originating from acts of British subjects, there was to be a jury of seven military officers, and the accused was to have the right of

*57 George III., Cap. 53.

challenge for interest or affection. Authority was given by the statute to the Crown in Council to extend the jury system. The Act of 1828 introduced English law (statute and common) into New South Wales, and authorized the Crown to delegate to the colonial legislature the power to extend the jury system, established by the Act of 1823 and pursuant Orders, both in civil and in criminal causes. These statutes, which gave authority to the Supreme Court of New South Wales to try piratical crimes, declared specifically that New Zealand was "not subject to His Majesty." The fourth section of the Act of 1828, while empowering the Supreme Courts of New South Wales and Van Diemen's Land to hear and determine "all treasons, piracies, felonies, robberies, murders, conspiracies, and other offences of what nature and kind soever. . . . committed or that shall be committed in the Islands of New Zealand" by British subjects, yet included these words, "The islands of New Zealand, Otaheite, or any other island, country, or place situate in the Indian or Pacific Oceans and *not subject to His Majesty* or any other European Power or State."

Every State, according to international law, has jurisdiction over its subjects in alien territory to this extent, that such subjects on returning to their own dominions are liable to be tried for wrongs committed abroad. The Imperial Parliament, by limiting the scope of the Act as far as it related to New Zealand to British subjects only, was acting consistently with its declaration that New Zealand was not a British possession: any jurisdiction it might possess over residents in an alien State could be exercised only over subjects of the Crown.

In the same year, 1823, when Baron de Thierry (to be mentioned later) applied to the British Govern-

ment for recognition of his purchase of land at Hokianga, he was informed by the Under-Secretary that New Zealand was not "a possession of the Crown."

A little over a year later, we find the first Company formed for the colonisation of New Zealand being denied assistance on its preliminary application to the British Government by reason of the alleged Dutch claim.

In 1828 a difficulty arose in New South Wales with reference to the registry of ships built in New Zealand: by the existing English law no vessel could be registered as British unless it had been built in the British dominions, or, being foreign-built, had been condemned as a prize of war. The question of registering *The New Zealander,* a brigantine built at Hokianga, was referred to the Home Government, which stated that New Zealand "was not a British possession." But in 1833 the Government authorised the Governor to allow vessels built in New Zealand to trade between Australia and New Zealand as British ships.

Again in 1832 a Bill was introduced by Lord Howick to remedy the defects in the law with respect to crimes committed by British subjects "in the islands of New Zealand and other islands situate in the Southern or Pacific Ocean, not being within His Majesty's dominions." This Bill failed to reach the third reading, but is nevertheless evidence of recognition of New Zealand's independent status. This recognition also complicated the administration of the Act of 1833 which gave preference in the British tariff to certain whale products taken by British ships and imported direct from the fishery or from a British possession in a British ship.*

*See McNab, *Old Whaling Days*, Chapter XVI.

4. Explanation of the British Government's General Attitude.

The British Government's reluctance to colonise New Zealand demands some brief explanation. Some of the causes operating to produce this apathy originated in the special circumstances of the country—its vast distance from England, and the warlike character of its native inhabitants; but the most powerful of them had for some time influenced the general colonising policy of England.

The American secession had blighted English sentiment towards the colonies. When the mercantile system received its fatal blow, opinion swung to the opposite extreme. It was generally believed that but small commercial gain could be obtained from colonies. It was not yet clearly seen that both the parties to an act of unrestricted commercial exchange share in its advantages. The public imagination fixed itself almost exclusively on the cost of maintaining the colonies. John Stuart Mill as late as 1861, voiced the opinion of the time when he said:* "England is sufficient for her own protection without the colonies, and would be in a much stronger as well as more dignified position if separated from them, than when reduced to be a single member of an American, African, and Australian confederation. Over and above the commerce which she might equally enjoy after separation, England derives little advantage, except in prestige, from her dependencies; and the little she does derive is quite outweighed by the expense they cost her, and the dissemination they necessitate of her naval and military force, which, in case of war or any real apprehension of it, requires to be double or treble what would be needed for the

*_Representative Government_, Chapter XVIII.

defence of this country alone." Their administration and the wild hopes excited by their foundation, had involved considerable losses of capital, whilst they had been the cause of increased taxation at Home. This impression of costliness was due, in great part, to the acquisition of foreign colonies by conquest during the Napoleonic wars, and to the subsequent necessary outlay for "governing these emanations from despotic states which, widely differing from our own self-planted and self-supporting colonies, were incapable of managing their own affairs."* Moreover, it was felt that any advantages colonies might afford the Mother Country would be only temporary: as soon as the colonies became conscious of their own strength, they would renounce their allegiance, and reap for themselves whatever harvest the Mother Country had assisted to sow. Many thought, with Huskisson, that colonies would one day be themselves "free nations, the communicators of freedom to other nations"; and, as late as 1850, Lord John Russell, experienced as an administrator of colonial affairs, used this probability as an argument for granting liberal constitutions to the colonies. "Some of our colonies may so grow in population and wealth," he said, "that they may say, 'Our strength is sufficient to enable us to be independent of England, the link is now become onerous to us; the time is come when we can, in amity and alliance with England, maintain our independence.' I do not think that time is yet approaching; but let us make them, as far as possible, fit to govern themselves; let us give them, as far as we can, the capacity of ruling their own affairs; let them increase in wealth and population, and whatever may

*E. G. Wakefield in New Zealand Association's Handbook.

happen, we of this great Empire shall have the consolation of saying that we have contributed to the happiness of the world."

Negro slavery had become indissolubly connected in public sentiment with successful colonisation, and, when slavery was banned in the early nineteenth century, colonies shared in this degradation. One of the chief objects of the Wakefield system, to be described later, was to avoid the necessity of slavery by maintaining an ample supply of free labourers from the sale of public lands at a price sufficient both to defray the expenses of their immigration, and to prevent them from becoming colonial landowners themselves until they had served some years as hired labourers. A similar concomitant of colonisation was the system of transportation and assigned labour that had been introduced in the seventeenth century into the American colonies; and towards the end of the eighteenth century transportation had been used as the means of founding the colony of New South Wales. Hence it "inevitably happened that colonisation and crime, emigration and disgrace were associated and confounded in common opinion." The repugnance to colonies might, therefore, be explained by the essential evils of colonising with one class of society. To remedy this was another purpose of the Wakefield system, which proposed that the founders and early settlers of the colony should be drawn in due proportion from every class of the colonising community, so that the colony would be an epitome of the nation from which it sprang. Only in this way could the success of Old Virginia, Maryland, and Pennsylvania be repeated in the lands of the Southern Ocean.

It happened, therefore, by an unfortunate coincidence of circumstances there came a reaction from

colonisation in the period when the most noticeable natural resources of New Zealand were being made known to the civilised world. This reaction is accounted for chiefly by England's experience of her American colonies. Of all the advantages sought to be derived from colonies, some, such as increased revenue, assistance in war, extension of trade, and exploitation of new sources of private profit, were thought to have entirely disappeared with the mercantile system; whilst others, such as the provision of an outlet for surplus labour, had become so intimately associated with crime and poverty as to degrade the name of colony. The benefits of freer trade had not yet been fully won, and were by no means widely appreciated; the capital invested in the colonies seemed to promise no permanent profitable return; the colonies won by conquest were proving expensive to administer,—some of them were even sources of international disputes; and past experience had shown all colonies to be no inconsiderable cause of political corruption in the Mother Country. To trace these causes further back would involve a consideration of the reasons that prompted the American colonies to rebel; and it has already been briefly described how the disaster which induced the period of despair, and, still worse, of apathy, was an outcome of the Mother Country's ignorance of the real needs and conditions of the colonies, of her attempt to use them solely as sources of commercial gain, and of her entrusting their interests to an executive frequently indifferent to anything but its own immediate profit.

These were the predominant sentiments of those in authority, and they were vigorously fostered by the Church Missionary Society, which dreaded the influx of a large white population, and was therefore

opposed to New Zealand becoming a dependency of the British Crown. With these two influences at work the advocates of colonisation could make little progress. Accident, however, brought about a change, and in the end the first tentative step towards the establishment of British influence in New Zealand was forced upon the Home Government by the missionaries themselves.

Chapter V.

THE BRITISH RESIDENCY.

1. Early French Navigators.

The determining cause of the change of attitude on the part of the Church Missionary Society was the fear of French invasion, and before taking up the narrative of events since 1830 it is necessary to digress slightly to see how the French claims arose and how far the missionaries had grounds for their alarm.

Only two months after Cook first sighted New Zealand, and while he was still engaged on his survey of the coast, a French captain, De Surville, in the *St. Jean Baptiste,* sighted New Zealand. This was on the 12th December, 1769; and he anchored in Mangonui Harbour on the 16th.

A little over two years later, in 1772, Marion Du Fresne visited the northern part of New Zealand. On the 11th of May he anchored in the Bay of Islands, where he and twenty-seven of his men were massacred by the Maoris on the 12th and 13th June, for a reason still shrouded in obscurity. Crozet then took charge of Marion's ship, the *Mascarin,* whilst Duclesmur assumed command of the expedition. They took possession of the North Island for the French King. Crozet says:—"We took possession in the King's name of the Island of New Zealand, which the aborigines called Eakenomaouve, and which M. Marion had called France Australe. Captain Cook had called it on his chart Bay of Islands, but we named it, on leaving, Treachery Bay."* After taking more than ample revenge for the massacre,

*Crozet's Voyage (Roth.), page 61.

Crozet left, on July 14th, for the Ladrones and Philippines, having spent sixty-four days in the Bay of Islands.

Admiral D'Entrecasteaux, sent in search of La Pérouse, sighted the Three Kings on the 13th March, 1793. He passed near the north coast of the mainland, but the evil reputation of the inhabitants deterred him from landing. In 1827 Dumont D'Urville occupied two months in the survey of the South Island. He re-visited New Zealand in 1840, in command of two discovery ships, and spent six weeks at the Auckland Isles and on the coast of the South Island.

The French, as well as the Americans, played some considerable part in the development of the whaling industry.*

2. Baron de Thierry.

In 1820 the Baron de Thierry, a French nobleman who was then a student at Cambridge, had given money to the missionary Kendall with which to buy land in New Zealand, and it was well-known that he claimed to have thereby become the owner of forty thousand acres of land at Hokianga. Although he was officially informed in December, 1823, that New Zealand was not a British possession, he tried in 1824 to induce the Government to lend him eight or ten thousand pounds to help in the establishment of a colony in New Zealand planned by himself and his two brothers. When, in 1827, the French warship *Astrolabe*, under the command of Dumont D'Urville, visited New Zealand and surveyed a part of the coast, it was rumoured that the French Government intended to support the Baron's claim. The missionaries were alarmed, and for the first time began to express the opinion that England should step in.

*For the French whalers in Southern New Zealand, see McNab, *Old Whaling Days*, Chapters XV. and XX.

They were vigorously supported in this by the New Zealand Association, to be mentioned in Chapter VI.; but for the time being no action was taken by the Government. Four years later—in 1831—further alarm was occasioned by the report that de Thierry was coming in person with an expedition to take possession of his land, and the missionaries again began to press for action on the part of the British Government. Fortunately the Maoris were not averse to receiving protection. "A number of chiefs of the Northern Island to whom Marsden had recommended that they should make an end of their wars by electing among themselves a King, to whom the whole should yield obedience, unanimously answered that no chief of an independent tribe would ever be brought to acknowledge the authority of another chief, unless he and his tribe were first reduced to slavery. But they unanimously agreed that if King George would send a King they would joyfully submit to his authority."*

Polack also shows, in his evidence before the Select Committee of the Lords, that the Maoris were not hostile to the settlement of more British in the country.

As a result of the counsels of the missionaries a meeting of chiefs was held at Kerikeri in 1831, and a letter was addressed by them to "King William the Gracious, Chief of England," asking for his protection. "We have heard" they wrote, "that the tribe of Marion is at hand, coming to take away our lands. Therefore we pray thee to become our friend, and the guardian of these islands, lest the bearing of other tribes should come near to us, and lest strangers should come to take away our lands."

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*Despatch by James Busby, 1831, afterwards British Resident.

One or two factors contributed to make the time more opportune than the past had been.

In 1830-1 the case of the notorious Stewart, captain of the brig *Elizabeth,* afforded occasion to the lawyers for ingenious argument as to the extent of the jurisdiction exercised by the Supreme Court of New South Wales under the Act of 1828 and made the British Government dimly conscious of its responsibilities in New Zealand. Lord Goderich, in referring to Stewart's crime and similar nefarious deeds, in a despatch of the following year, said: "The unfortunate natives of New Zealand, unless some decisive measures of prevention be adopted, will, I fear, be shortly added to the number of those barbarous tribes who, in different parts of the globe, have fallen a sacrifice to their intercourse with civilised men, who bear and disgrace the name of Christians."

Busby, who was subsequently appointed British Resident, in a despatch of 1832 recommended that a treaty should be made with the Maori chiefs. Trade and justice both demanded closer relations between the British Government and the natives and the establishment of some political sovereign within the islands.

The Sydney Chamber of Commerce urged upon Governor Bourke "the necessity of having in New Zealand a Resident representative of the British Government, especially as the chiefs had themselves voluntarily requested British protection."

3. The British Residency.

These representations bore fruit in 1832, when the British Government appointed James Busby, a civil engineer of Sydney, who had already visited New Zealand, and was then in England, to act as British Resident in New Zealand at an annual salary of £500, to be paid by the colony of New South Wales, with

an additional £200 a year to be expended in presents to the natives.

His credentials took the form of a letter from the King addressed to "the chiefs of New Zealand," in the course of which the duties of the new representative were thus stated:

"The King has sent the bearer of this letter, James Busby, Esquire, to reside among you as His Majesty's Resident, whose duties will be to investigate all complaints which may be made to him. It will also be his endeavour to prevent the arrival among you of men who have been guilty of crimes in their own country, and who may effect their escape from the place to which they have been banished, as likewise to apprehend such persons of this description as may be found at present at large."

He received from Governor Bourke instructions. dated 13th April, 1833. These instructions referred to the acts of violence perpetrated on the natives by the crews of British vessels frequenting New Zealand, and to the necessity of rescuing the former from the evils to which their intercourse with Europeans had exposed them, and of averting from the well-disposed British subjects settled in New Zealand the fatal effects bound to flow from the continuance of such acts of unprincipled rapacity and sanguinary violence, through exciting the natives to revenge their injuries by an indiscriminate slaughter of every British subject within their reach. The Resident's particular and most important duty was "to conciliate the good-will of the native chiefs, and to establish upon a permanent basis that good understanding and confidence which it is important to the interests of Great Britain and of this colony to perpetuate." He was ordered to deliver with some formality the King's reply to the petition of the Chiefs, forwarded in 1831, to explain

his mission to them, and his intention of remaining among them, and to claim from them the protection and privileges which were accorded in Europe and America to British subjects holding in foreign states positions similar to his own. He was recommended to communicate freely with the missionaries upon the objects of his appointment. H.M.S. *Imogene* was placed at his disposal for proceeding to New Zealand, and the Lords of the Admiralty had instructed the officer in command of the Indian Navy to send a vessel from his squadron to New Zealand as frequently as possible. The instructions then outlined the path along which lay the best hope of success in effecting the objects of the mission. "You are aware that you cannot be clothed with any legal power or jurisdiction by virtue of which you might be able to arrest British subjects offending against British or colonial law in New Zealand. . . . You can therefore rely but little on the force of law, and must lay the foundations of your measures upon the influence which you shall obtain over the native chiefs." The attention of the Resident was then directed to what might be effected under the existing law, as established by the Act of 1828, which gave the Supreme Courts of New South Wales and Van Diemen's Land power to inquire of, hear, and determine all offences committed in New Zealand by any British subject. After a proper deposition of facts had been made, a warrant might be obtained from the Supreme Court for the apprehension of the offender and transmitted to the Resident for execution. But the success of this process would be dependent upon the certainty of securing the offender, and of being able to convey him to Sydney for trial, while it was further pointed out that the only legal means of securing an arrest was by sending to New South Wales the persons capable of lodging

an information, upon which a warrant might be obtained under statute 9 of George IV. cap. 83. The somewhat superfluous comment was added that such a process was "at best but a prolix and inconvenient operation," and was not to be lightly applied. Busby was then enjoined to use every effort to apprehend escaped convicts, and to return them to Van Diemen's Land or to New South Wales. He was exhorted to use his official mediation to diminish inter-tribal warfare; and even, if possible, to establish among the Maoris some settled form of government, including courts, capable of taking cognizance of all crimes committed within their territory. Finally, he was to assist by every means in his power the commercial relations of Great Britain and her colonies with New Zealand, and to forward occasionally reports upon the agricultural, commercial, and general statistics of the islands.

The period from 1833 to 1840 is the most momentous in our early history, because it is the period in which the real foundations of the colony were laid.

Mr. Busby's rule—if such it can be called—was quite inadequate, and the subject of much ridicule. Of the letter of instructions Rusden says: "Two things had been asked for by the chiefs—the assumption of guardianship and the coercion of lawless British vagabonds. With neither of these did Lord Goderich or Sir R. Bourke affect to deal, except in the vague language in the letter of the former to the chiefs. . . . Busby was not to blame for doing nothing, after having been officially told that there was nothing that he could do." Mr. W. P. Reeves has aptly characterised his official career as "a prolonged burlesque—a farce without laughter, played by a dull actor in serious earnest." The oft-quoted phrase "a man-of-war without guns" exactly describes the unfor-

tunate man placed in an official position without any force to support him, and it was doubtless an appreciation of this circumstance, coupled with a fear of the French and a singular lack of common sense, that led him to perpetrate his remarkable fiasco of 1835—the only noteworthy incident of his term of office. He hoped to settle the difficulty regarding the registration of locally built ships by the institution of a national flag for New Zealand, which was chosen in March, 1834, and honoured with a royal salute from H.M.S. *Alligator* on being hoisted for the first time. His action in this matter was approved by the Imperial Government, which stated that ships on the New Zealand register would be acknowledged and that the national flag would receive due respect.

Though the Government had requested the Maoris to accord the Resident all such rights as are usually granted to the consular agents of European powers stationed in civilised states, yet there were times when it forgot its own correlative duties. In the *Harriet-Alligator* affair of 1834,* the Sydney Government erred in sending a hostile expedition to the west coast of the North Island, without referring the matter to the Resident among the Maoris, who had been formally recognised by the British Crown as an independent nation by sending them a consul and by presenting them with a national flag.

In October, 1835, the Baron de Thierry, prototype of the Emperor of the Sahara, once again fluttered the dovecotes of Kororareka by issuing from the Marquesas certain high-sounding commissions couched in the royal plural, and describing the Baron himself as "King of Nukuhava and Sovereign Chief of New Zealand." Some of these theatrical paper bombshells reached Kororareka, together with a more moderately

*See McNab, *Old Whaling Days*, Chapter VII.

worded address from Sydney to the white inhabitants of New Zealand, in which the Baron announced his intention of coming to govern within his own territory. Poor Busby at once issued a counter-proclamation, calling upon the Maoris to preserve their threatened independence, and on the 28th of October at a meeting of chiefs at Waitangi the independence of the tribes was solemnly affirmed. Not satisfied with this declaration Busby submitted to the meeting, and procured the adoption of, a constitution for the "United Tribes of New Zealand," for which elaborate provision was made for a representative Parliament on the English model.

Thirty-five chiefs wielding authority as far south as the River Thames signed the declaration. It was proposed to establish, for twenty-one years, a Provisional Government consisting of a Council, presided over by the British Resident and composed half of Maoris and half of Europeans. The country was to be divided into counties administered by councils elected by Europeans and natives. Towns with a thousand inhabitants or more were to receive charters. Unsold and waste lands were to be considered public property, and part of the funds derived from the sale therefrom was to be allocated for the establishment of a State Church. Provision was to be made for borrowing money from the British Government, and for the organisation of a mixed army of Europeans and natives. The provisional Government was to be replaced at the end of the twenty-one years by a House of Assembly, elected by the residents of the counties and the towns, with full power to legislate for the future government of the country. It is hardly necessary to state that this pompous and unnecessary proceeding merely added another to the long list of still-born paper constitutions. The

Secretary of State acknowledged receipt of the Declaration of Independence and said that "His Majesty will continue to be the parent of their (the Maoris') infant state, and its protector from all attempts on its independence," but the Governor of New South Wales smartly snubbed Busby for his part in the opera bouffe. His action was dubbed "silly and unauthorised, a paper pellet fired off at Baron de Thierry," and nothing more was ever heard of the instrument of government ushered into the world with so much ceremony. The ambitious de Thierry landed at Hokianga with a large retinue. Unfurling a silken flag, he assumed the manner of an emperor. His subjects were commanded to retire backwards from his presence, and he offered to make an admiral of the master of the ship which had brought him to his kingdom. Unfortunately, the "Sovereign Chief of New Zealand" was able to secure only three hundred acres of his claim to forty thousand, and when it became apparent that his coffers were as empty as his title, his adherents speedily fell away, and he himself subsided into a harmless and normal member of society. It may here be remarked that without doubt de Thierry had received official encouragement from France. Greswell says that "the Comte de Mole, the President of the Council of France, had expressed his determination to appoint de Thierry as French Consul in New Zealand."* In 1835 the Pope had created Western Oceania a Vicariate, and in the following year had appointed Dr. Pompallier, a Frenchman, Vicar Apostolic of Oceania. Dr. Pompallier arrived at Hokianga in 1838 to establish a mission among the Maoris. His consideration for de Thierry, who championed his cause and protested against any attempt being made to keep him out of an independent

*_Growth and Administration of the British Colonies_, 1837-1897, p. 82.

country, revived the old suspicion of France both in New Zealand and at Home.

Scarcely had Busby's farce been played to its inglorious end, when events began to move towards the deliberate and official colonisation of New Zealand. In 1836, a Select Committee of the House of Commons denounced the "lawless and infamous mode of British colonisation which is now making rapid progress, and which, all testimony concurs in asserting, threatens to exterminate the New Zealand race"; and it confirmed the Maoris in their right to the land.

Next year the missionaries and other respectable European settlers petitioned King William to afford them relief from the evils to which they were subjected through the British Resident's lack of authority and power, stating that the scheme of government drawn up by the confederate chiefs was quite impracticable. Captain Hobson of H.M.S. *Rattlesnake* in a report to Governor Bourke of New South Wales on the state of affairs at the Bay of Islands suggested the propriety of establishing factories and entering into a treaty with the chiefs for the protection of British subjects. No official action was taken on this recommendation. In 1838 there occurred at Hokianga the first execution, after due trial, of a Maori for the murder of a white man. The accused was tried before a mixed jury of six Europeans and six native chiefs, and was provided with the services of counsel. Sentence of death was passed, and was duly executed by a Maori.

In this year a Select Committee of the House of Lords collected a mass of information with reference to New Zealand; its report is quoted in a subsequent chapter.*

During the struggle in England between the New Zealand Company and the Government, to be

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*See below, p. 78

described in Chapter VI., Busby's "rule" over the white inhabitants had altogether lapsed.

Surgeon-Major Thomson tells us in his "Story of New Zealand" that in 1838 Kororareka "was the most frequented resort of whalers in all the South Sea Islands; and its European population, although fluctuating, was then estimated at a thousand souls. It had a church, five hotels, numberless grog-shops, a theatre, several billiard tables, skittle-alleys, finishes and hells. For six successive years a hundred whale-ships anchored in the bay, and land facing the beach sold at £3 a foot. Thirty-six large whaleships were anchored at Kororareka at one time in 1836; and in 1838 fifty-six American vessels entered the bay, twenty-three English, twenty-one French, one Bremen, twenty-four from New South Wales, and six from the coast."

In these conditions it was absolutely necessary that some other authority should be established than that of the "man of war without guns," and in June 1838 a vigilance society, known as the Kororareka Association, was formed with an executive consisting of President, Vice-President, Secretary and Treasurer, and a committee elected by the inhabitants of the town. The formation of this body was clearly the first step towards the establishment of an independent republic.

Rule 13 of the Association commanded every member to provide himself with a musket and bayonet, a brace of pistols, a cutlass, and twenty rounds of ammunition. Nominally the infliction of a fine was the only form of punishment provided, but in actual fact harsher measures were sometimes used, and on at least two occasions offenders against the public conscience were tarred and feathered. On one occasion, Thomson tells us, "the culprit, a white man, already nearly suffocated from being secured all night in a sea-chest,

was first denuded of his garments, then smeared thickly over with tar, and covered with the white feathery flowers of the raupo plant, for want of true feathers. He was then marched along the beach, preceded by a fife and drum playing the Rogue's March, and accompanied by drunken white men and astonished natives to its termination: then the criminal was put into a canoe with the musicians, and landed on the opposite side of the bay, beyond the Association's jurisdiction, with an assurance that his reappearance in the settlement would be followed by another tarring and feathering."

News of the Association and its doings helped to hasten the appointment of a British Consul to New Zealand with full powers to treat with the natives for the cession of sovereignty. Indeed, it was fast becoming obvious that British sovereignty must soon become an established fact; and the increased value this would give New Zealand land was already arousing a spirit of speculation in Sydney, where it is said that New Zealand bade fair "to out-rival hydrogen or bubble companies of South Australia," and where it was clearly seen that the interesting situation in New Zealand—colonisation "without any internal laws, and without any encouragement or aid from any regularly constituted state"—must be of short duration.

Chapter VI.

WAKEFIELD AND THE NEW ZEALAND COMPANY.

1. The Colonisation Society.

It was not from lack either of information, or of pressure, that the British Government refrained from occupying New Zealand. In 1829 (the publication year of Wakefield's "A Letter From Sydney," including an outline of a system of colonisation), some two years after the failure of Herd's expedition, a deputation representing the Friends of Colonisation waited upon the Duke of Wellington, then Prime Minister, and asked him to acquire New Zealand for the British Crown, and to institute a scheme of systematic colonisation there. But the Church Missionary Sociey was opposed to government intervention in its work, and the Duke told the deputation that Great Britain had already enough colonies. The year 1830 is said to introduce the period of systematic British colonisation, for it saw the formation of the Colonisation Society of which Edward Gibbon Wakefield, John Stuart Mill, Molesworth, and Grote were members, and the promulgation of Wakefield's doctrines of colonisation. In 1831 one of the Society's leading principles, that the colonial lands should be sold and not granted, was adopted into the government policy, through the influence of Lord Howick, Under-Secretary of State. He abolished the system of free grants in New South Wales, and established the rule that the lands of the colony should be sold for cash at the minimum upset price of five shillings per acre; the revenue thus obtained was to help to defray the

expenses of importing suitable settlers, including women, of whom there is always a dearth in newly-settled countries.

2. The Commons Committee of 1836.

The next effort of the enthusiastic band of colonists was the establishment of the colony of South Australia, in which the Duke of Wellington assisted. Further evidence of the working of the new spirit was provided by the appointment in 1836 of two select committees of the House of Commons, in whose deliberations New Zealand occupied a prominent place. In the evidence given before the Committee on the Disposal of Waste Lands with a View to Colonisation, this country was frequently mentioned as singularly suitable for British colonisation, provided some systematic and consistent plan were contrived. In Wakefield's evidence, which had considerable influence in colouring the Report, there occurs the following passage: "Very near to Australia there is a country which all testimony concurs in describing as the fittest country in the world for colonisation; as the most beautiful country, with the finest climate and the most productive soil—I mean New Zealand. It will be said that New Zealand does not belong to the British Crown, and that is true; but Englishmen are beginning to colonise New Zealand; New Zealand is coming under the dominion of the British Crown. Adventurers go from New South Wales and Van Diemen's Land and make a treaty with a native chief, a tripartite treaty, the poor chief not undersanding a single word about it; but they make the contract upon parchment with a great seal: for a few trinkets and a little gunpowder they obtain land. After a time, after some persons have settled, the Government begins to receive hints that there

is a regular settlement of English people formed in such a place, and then the Government at Home generally has been actuated by a wish to appoint a governor, and says 'This spot belongs to England: we will send out a governor.' The act of sending out a governor according to British Constitution, or law, or practice, constitutes the place to which a governor is sent a British province. We are, I think, going to colonise New Zealand, though we be doing so in a most slovenly, and scrambling, and disgraceful manner." The Report of the Committee recommended the establishment, at London, of a Central Land Board, responsible directly or indirectly to Parliament, and acting through Local Boards in various colonies. The function of this Board should be to control the sale of colonial lands; its policy so to direct "the stream of emigration as to proportion in each case the supply of labour to the demand," the Committee holding that it would be "perfectly practicable to raise, upon the security of the future land sales, the funds necessary to set on foot a plan of systematic emigration, upon a scale sufficiently large to meet the exigencies of the colonies and of the Mother Country."

The evidence tendered to the Committee on Aborigines in British Settlements depicted in the strongest colours the injuries and depredations that were being committed upon the Maoris. The Committee, of which Gladstone was a member, had been appointed "to consider what measures ought to be adopted with regard to the native inhabitants of countries where British settlements are made, and to the neighbouring tribes, in order to secure to them a due observance of justice and the protection of their rights, to promote the spread of civilisation

among them, and to lead them to the peaceful and voluntary reception of the Christian religion." New Zealand was not regarded as a British possession by the Committee, which reported that, "the increase of national wealth and power promised by the acquisition of New Zealand would be a most inadequate compensation for the injury which must be inflicted on this kingdom itself by embarking in a measure essentially unjust, and but too certainly fraught with calamity to a numerous and inoffensive people whose title to the soil and to the sovereignty of New Zealand was indisputable, and had been solemnly recognised by the British Government."*

3. The New Zealand Association.

Fortunately for New Zealand forces and opinions were working outside Parliament and the Colonial Office. Fortunately, too, in Gibbon Wakefield was found a practical visionary who could not be disheartened by official apathy, by the rumblings of rebellion in Canada, or by the hostility of the missionaries. Strengthened in his convictions by his experience in connection with South Australia, and fired with that interest in New Zealand which is manifested in his evidence quoted above, he determined to form an Association to do the work which it was clear the Government would not do except under pressure of the severest kind.

He was well fitted for the task. In his "Letter from Sydney," he revealed at once his interest in the Colonies, his remarkable insight into colonial conditions, and his appreciation of colonial needs. He had thrown himself with enthusiasm into his scheme for the colonisation of South

*Quoted in Lord Normanby's Instructions to Lieutenant-Governor Hobson.

Australia, and, although his youthful folly had debarred him from public life, he had become personally known to many of the ablest and most influential men of the day. His zeal and interest were unbounded, he possessed in a notable degree the rare gift of firing others, and he was adroit in hiding his personal achievements in the shadow of more prominent, and often less capable, men. In all that he undertook he worked with astonishing energy and within a few months of his giving the evidence quoted above he had succeeded in forming the (second) New Zealand Association, with Sir Francis Baring, the great banker, as its Chairman, and had gathered a considerable body of prospective colonists, representing all classes of society. His letters of the time breathe the spirit of success, and rejoice in the support that was being accorded him by men of influence in the politics of the day.

The Association first met in London, on the 22nd May, 1837. Its origin and early history are vividly set forth in Wakefield's evidence before the House of Commons Committee on New Zealand, which sat in 1840, and they are slightly sketched in the "British Colonisation of New Zealand," which is an account of the principles, objects, and plans of the New Zealand Association, published for the Association in October, 1837.

The Committee of the Association was comprised of some seventeen persons, among whom were the Earl of Durham, Lord Petre, the Rev. Dr. Hinds, and ten members of the Commons. These last included the Chairman, the Hon. F. Baring, the Hon. W. B. Baring, Sir W. Molesworth, and H. G. Ward. The members of the Association were of two classes: the first comprised heads of families and others who had resolved to establish themselves in the proposed

colony; the second consisted of public men "who, for the sake of public duties alone" were willing, as they expressed it to the Government, "to undertake the responsible and not very easy task of carrying the measure into execution." It was entirely from the latter class of members that the Committee was formed.

In his evidence before the Committee of 1840 Wakefield said: "The first principle which we laid down was that the Society should be rather of a public than of a private character, and that, at all events, no member of it should have any pecuniary interest in the object in view. The only object of the Society was to bring the subject before the public and Parliament, and not to take any part as individuals in what might be the result. After putting forth to the public a printed pamphlet in which was published a statement of the objects of the Society, the next step taken was to bring together a number of persons who wished to go out to New Zealand and settle there. Those persons formed themselves into a body which may be properly called an intending colony. They were a body of people who separated themselves from society here and formed themselves into a distinct society for the purpose of establishing themselves in New Zealand, provided the Association should succeed in its public object. As soon as this body was formed, which comprised a number of persons of some station, of good education, and of considerable property, the Association made its first communication to the Government." During the existence of the Association the Melbourne ministry was in office, with Lord Glenelg in charge of colonial affairs and Sir George Grey under-secretary. In making its communication the Association avoided the Colonial Office and went

straight to Lord Melbourne. But the promoters were politely handed over by him to Lord Howick, the Secretary of War. Unfortunately for the success of the venture, the latter statesman had no liking either for Wakefield or Lord Durham, and although these two were then in Canada, engaged upon the work which produced the celebrated "Durham Report," it was well known that they were the leading spirits of the New Zealand Association. The consequence was that Lord Howick met their proposals in a spirit of faultfinding and covert hostility, and proved himself in effect the friend of the Church Missionary Society, whose policy was still, as in the past, quite frankly to maintain the complete independence of New Zealand, now that the first fear of annexation by France had been allayed. He made numerous objections, and suggested numerous amendments to the draft of the Bill which it was proposed to introduce into Parliament. According to Wakefield these were all accepted in the hope of removing Lord Howick's opposition. No definite agreement, however, had been made when the death of the King brought about a dissolution, and for the next six months the efforts of the Association were directed solely to advertising its plans and combating the hostile arguments of the Church Missionary Society. When the matter was once more brought before the Cabinet, opposition was again encountered, this time on the part of Lord Glenelg, who said that "the jealousy of foreign powers might be excited by the extension of British colonies, and that we had colonies enough. They were very expensive to govern and manage, and not of sufficient value to make it worth while to increase their number."*

But after some negotiations the minister committed

*Wakefield's Evidence, 1840 Committee.

himself so far as to say that he would procure a charter for the Association provided it was converted into a joint-stock company, the charter to "be framed with reference to the precedents of the colonies established in North America by Great Britain in the sixteenth and seventeenth centuries." This condition was entirely foreign to the non-commercial purpose of the Association, and was declined. But the Government's criticisms upon "the want of an actual subscribed capital" were not without reason as the sequel showed. There was no certainty that the Association would succeed in its transactions with the Maoris. If the latter refused to yield the sovereignty over their land, the loan, raised on the security of the land proposed to be purchased and expended partly in the preliminary expenses of the undertaking, would be lost to the leaders; and there would be a strong temptation to convert the baulked claim of right into one of might. Lord Howick expressed this later when he said he could not support a Bill "which gave no security against inveiglement of Her Majesty's subjects, nor for observance of justice towards the aborigines."

Recourse was then had to the project embodied in the draft Bill previously submitted to Lord Howick, the directors relying upon the latter's support in view of the fact that they were prepared to adopt all his suggested amendments. This Bill for the "Provisional Government of British Settlements in New Zealand" was accordingly introduced in June, 1838, but to the consternation of the promoters, Lord Howick led the opposition to it, and Gladstone said, "there was no exception to the unvarying and melancholy story of colonisation." The Bill was thrown out by a three to one majority. This disappointment made it clear that it would be impossible to carry the

original project into effect. The Association therefore dissolved.

4. The Wakefield System of Colonisation.

Edward Gibbon Wakefield was the life and soul of the new colonising activity; but the man found the age not unprepared to hearken to his message. The population of the United Kingdom was then in excess of the available employment, and the demand for labour did not easily adjust itself to the supply which had been rapidly increasing owing to the peace, the improvement in the arts of medicine and sanitation, the maladministration of the poor law, and the low standard of comfort among the cottiers of certain districts. In the second place, a warm philanthropic spirit was rapidly spreading through the higher classes who were now taking a more humane interest in the welfare of the artisans and labourers, and among other things, exerting themselves to remove the strong prejudice against emigration. Then the people were gradually learning of the vast fertile empty spaces in the British dominions abroad, and capital, not finding employment at Home either because of a real excess or since the economic conditions obstructed its flow into profitable channels, was being directed in greater volume into external trade and invested in enterprises abroad. All these conditions combined with Wakefield's personal magnetism and energy, and the freshness, simplicity, and reasonableness of the leading ideas of his system to crown his efforts with success.

It remains to note these ideas, for they coloured all subsequent British colonisation; and they are best described in the form in which they were promulgated in connection with the proposal to colonise New Zealand.

The Association sought success by avoiding what it considered to be one of the main causes of the comparative failure of previous British settlements in the South—the cheapness of land. Not least among the evils which this brings in its train is the absence of all "constant labour in combination," unless it can be maintained by slavery or by convictism, as in the early American and Australian colonies. Since with cheapness of land the alternatives are slavery or a primitive society of comparative poverty and low civilisation, an improved system was necessary if the colony was to take firm root and flourish.

1. The grand object of this improved system—already, in some respects, introduced into public policy—"was so to regulate the supply of new land by the real wants of the colonists, as that land should never be either superabundant or deficient, either too cheap or too dear. And it was soon perceived, upon enquiry, that the due proportion between people and land might be constantly secured by abandoning altogether the system of grants, and requiring a uniform price per acre of all new lands without exception. If the price be not too low, it deters speculators from obtaining land with a view to leaving their property in a deserted state, and thus prevents injurious dispersion; it also, by compelling every labourer to work for wages until he has saved the only means of obtaining land, ensures a supply of labour for hire; if, on the other hand, the price be not too high, it neither confines the settlers within a space inconveniently narrow nor does it prevent the thrifty labourer from becoming a land-owner after working sometime for wages. A sufficient, but not more than sufficient, price for all new land is the main feature of the new system of colonisation."

2. The second essential feature of the new system was the employment of the profits from the sale of lands as an emigration fund for the conveyance of labourers to the colony. This, it was maintained, would operate (*a*) to make purchasers of land appreciate the advantage of sales, over grants, of lands, since the purchase money would be more than returned in the shape of suitable labour, and of the increment of value consequent upon the general increase of population; (*b*) to keep the price of land lower than if the purchase money were otherwise employed, since the constant influx of population would allow the price necessary for maintaining the due proportion between people and land to be much lower than if there were no emigration; and (*c*) to shorten the period during which the immigrant labourer would have to work for wages, since, with a lower price of land, he would save in less time the means wherewith to buy a farm for himself and employ labourers on his own account.

3. A less important peculiarity of the system was that the immigration should be controlled, so that the immigrants would be grown up, but young, persons in an equal proportion of the sexes.

4. The whole effect of the system would be produced at once by anticipating the future sales of land—that is, by raising money for emigration on the security of future sales. The Association contended that "in the case of founding a colony there would be less call for thus anticipating future sales if the capitalists about to emigrate should purchase land before their departure and should so provide an emigration fund for the incipient colony; or rather, this course would be, in fact, an anticipation of future sales—a sale by anticipation. If the sum obtained by it were sufficient for the purchase of the colony, any other mode of anticipation would be unnecessary;

but if not, or if at any other time a greater want of labour should occur than could be immediately supplied by the current sales of land, then future sales might be properly anticipated by means of a loan for emigration, secured on the produce of future sales."

The Association, therefore, proposed in its negotiations with the Government:—

First: That all land which might be ceded to the British Crown, with the exception of a portion reserved to be held in trust for the natives, should be open to private appropriation by British subjects, in unlimited quantities, on payment in ready money of a uniform price per acre, this price to be set from time to time by some competent authority.

Secondly: That this land might be sold to purchasers in England receiving receipts entitling them to select land in the settlement.

Thirdly: That, with certain exceptions stated below, the whole of the fund established by such purchase money should be devoted to paying the cost of the emigration of labourers from Great Britain to New Zealand, and that buyers should be entitled to nominate labourers for a free passage to the settlement.

Fourthly: That the cost of purchasing the territory should be defrayed out of the fund received from the sale of land.

Fifthly: That some small fixed proportion of the purchase money should be employed in the district where the purchase should be made for such local but public purposes as the making of roads, the building of schools and churches.

Sixthly: That the governing authority in the settlement should be empowered to impose duties, rates, and taxes.

Seventhly: That until the purchase money fund should be sufficient to defray the cost of conveying labourers to the settlement, and the cost of establishing and governing the settlement, a loan should be raised "upon the joint security both of the ordinary revenue of the settlement and of the purchase money of public land in all time to come; but that although both funds collaterally should be made the security for the whole of such loan or loans, yet that the portion thereof which may be expended for emigration be a particular charge upon the public land fund, and the portion expended for general purposes be a particular charge upon the ordinary revenue."

5. Government and Religion in the Colony.

The Association admitted that, though Great Britain was the only State possessing any right as against other European States to colonise New Zealand, it did not follow that it possessed such a right as against the aboriginal inhabitants of the country; no attempt should therefore be made to convert any part of the country into British territory without the natives' "full, free, and perfectly understanding consent and approval." Since the tribes were not united but completely independent of one another, it would be impossible to obtain the cession of the whole territory at one time to the British Crown. The first step in a gradual process would be the acquisition of sovereignty over their lands and themselves from tribes already well disposed to abandoning their independence in return for the privilege of becoming British subjects. In their districts there would then be established British settlements with regular government, including, besides the ordinary establishments, courts of justice for the natives, a protector of natives to manage all cases on

their behalf, a native poor law system, native schools, and native missions. A certain proportion of the land acquired would be held in trust for their use and benefit, and the Government would give preference to native labour in times of employment, and would encourage the accumulation of savings from the wages paid therefor. With such a system established in the British settlement it was thought that native emigration would flow thither and that the desire to be incorporated with the British Empire would grow in all the remaining parts of the islands, which, however, in the meantime, should have been strictly treated as the possessions of independent sovereigns.

It was proposed also to defray from the common land fund the expense of erecting churches and of paying the salaries of ministers of religion; this aid being granted to every Christian denomination without distinction. The Crown would be authorised to appoint a Bishop of New Zealand to be paid by the Colony. He would be the chief civilising agent among the natives and incidentally a powerful factor in increasing the "respectability" of the Colony, and in attracting from the Mother Country contributions of money and voluntary service.

To administer this government it was proposed to establish a corporation exhibiting one noteworthy difference from all previous examples of a similar kind. Whereas the governing bodies of former colonies, such as the Council of Virginia, the Company of Connecticut, the Lords Proprietors of Carolina, the Trustees of Georgia, the Directors of the Sierra Leone Company, and the Court of Directors of the East India Company, had consisted of persons holding a private stake in the undertaking, the members of the governing body contemplated by the New Zealand Association (the "Founders of Settlements in New

Zealand") were to be appointed by the Crown in Parliament, but no member was to be chosen chiefly on account of his pecuniary interest in the enterprise. "They would form a corporation and would be authorised to make treaties with native tribes for cessions of territory and all other purposes; to administer upon lands ceded to the Crown, the whole system of colonisation, including the receipt and expenditure of the colonial funds; to establish courts in the settlement for the administration of British law; to make regulations for legal purposes having the force of law within the settlements; to exempt natives in the settlements from the operation of some British laws which are inapplicable to their present uncivilised state, and to make special regulations for their government; to provide for the defence and good order of the settlements by means of a militia, a colonial force of regulars, and a colonial marine; to delegate portions of their authority to bodies or individuals resident in the settlements, and to appoint and remove at pleasure all such officers as they may require for carrying the whole measure into effect." The authority thus delegated by the Imperial Parliament would, however, be exercised only for a brief term of years, at the end of which new provision would be made: moreover, all the orders, rules and regulations of the Founders were to be submitted to a Secretary of State for approval or disallowance, and all reports of their proceedings were to be regularly laid before Parliament.

6. The New Zealand Company.

In 1838 a Committee of the House of Lords, after enquiring into the state of New Zealand and the expediency of regulating British settlement therein, reported that "support in whatever way it may be

deemed most expedient to afford it, of the exertions which have already beneficially affected the rapid advancement of the religious and social condition of the aborigines of New Zealand, affords the best present hopes of their future progress in civilisation." The beneficial exertions referred to are, of course, those of the missionaries, and it was in the Church Missionary Society, seconded by *The Times,* that the New Zealand Association encountered one of the most formidable obstacles in its path.

The objections of the Society, made chiefly through its lay secretary, Dandeson Coates, were founded, first, on the fear of the abuse of power which might be exercised by a colony constituted at the other side of the world from the parent state; secondly, on the assumption that New Zealand was, to all intents and purposes, an independent state, and that the acquisition of sovereignty there would be a violation of the fundamental principles of international law; and, thirdly, on their apprehension of the degrading influence upon the Maoris of many of the emigrants which the establishment of the colony would attract thither, and of the increase of land troubles with the natives, who, in seeking vengeance, would not discriminate between the innocent missionaries and the real culprits. It was significant, however, that Samuel Marsden and other missionaries resident in New Zealand had, from an early date, seen that the establishment of British sovereignty in New Zealand was not only inevitable, but highly desirable.

In this year (1838) two of the leading missionaries saw that the only hope for the country and its people lay in annexation. "The only protection that I can propose," wrote Henry Williams, "is that the English Government should take charge of the country, as the guardians of New Zealand." "If the country is

to be colonised,'' urged Richard Davis, ''let it be done by the British Government.''

Upon the defeat of the Association's Bill,* several of the intending colonists, whose preparations for emigration were nearly completed, decided on August 29th, 1838, to conform to the conditions of the Government, and in October they privately issued the prospectus of the New Zealand Colonisation Company, ''a private co-partnership,'' with a capital of £500,000, half of which was to be paid up.

The first step was the amalgamation of the Company of 1825, the New Zealand Association of 1837, and the New Zealand Colonisation Company, into the New Zealand Land Company, (afterwards the New Zealand Company) with the Earl of Durham as Governor, Mr. J. Somes as Deputy-Governor, and a directorate of some leading public men, including many who had been directors or shareholders of the two previous Companies.† But it was Edward Gibbon Wakefield who was ''the principal founder and principal managing director from the time of its foundation until the summer of 1846.'' The capital of the Company was declared at £100,000 in 400 shares of £25 each, all of which was readily subscribed.

In November Wakefield returned from Canada, and in March of the following year Lord Normanby, who had succeeded Lord Glenelg as Colonial Secretary, was informed that the conditions had been fulfilled upon which the Government had agreed to grant a charter. Lord Glenelg's successor coolly replied that as those conditions had been rejected when first offered, the Government was free from any obligation in the matter.

*See above, p. 71.

†The Company of 1825 transferred its interests to the New Zealand Company in consideration of 400 shares of the latter's stock. The New Zealand Colonisation Company received, upon arbitration, 1,600 shares.

This pettifogging answer only served to rouse the spirit of Wakefield and his colleagues, who at once proceeded to execute a bold and striking *coup d'état*. Foiled by the Government they determined to act without its aid.

A four hundred ton vessel (the *Tory*) was then chartered, and on Saturday, April 27th, eight weeks after Lord Normanby's reply, the Company held a banquet at which its mission was proclaimed, and on the 29th wrote to the Colonial Office stating that it was intended to form a settlement in New Zealand, and that the pioneer ship would sail on May 1st. Letters were asked commending the expedition to the Governors of New South Wales and Van Diemen's Land. In sheer desperation at this vigorous proceeding the dismayed Normanby, in reply, virtually pledged the Government to acquire territorial rights over New Zealand, and stated that in the meantime the Company could not be recognised, nor could a guarantee be given that any purchases it might make from the natives would be sanctioned by the British Government. The promise and the threat were alike too late. They failed to stay the Company's plans, and the preparations for the despatch of the *Tory* were pushed on with vigour. Although no time was wasted she was four days late (May 5th) in leaving London, and she had scarcely done so when the disquieting rumour, whether well or ill founded, was spread that the Government intended to stop her at Plymouth. With characteristic promptitude Wakefield himself took post chaise to that port, and despatched the little vessel without delay. It is not too much to say that Britain almost certainly owes New Zealand to that ride from London to Plymouth. For, stung into unwonted activity, the Government managed, after three months of circumlocution,

correspondence, and delay, to issue a proclamation extending the boundaries of New South Wales so as to include such part of New Zealand as might be acquired in sovereignty by Her Majesty, while Captain Hobson was ordered to proceed to New Zealand to endeavour to obtain the sovereignty of the country, and then to act as Lieutenant-Governor.

7. Policy of the Company.

The Company had decided to direct the course of its land policy mainly on the lines laid down in the defunct Association's Bill. As one of its main purposes was to organise settlement on a definite system to endure through long periods, it was necessary that it should secure at the outset a much greater amount of land than would satisfy the real needs of the settlers, either of the present or the immediate future. Before the *Tory* reached New Zealand, 100,000 acres of land, at £1 per acre, had been sold in London, and the sections, as yet unbought by the Company, had been publicly allocated by lot to the individual purchasers, who received transferable land orders. *The Spectator* (August 3rd, 1839), a strenuous and steadfast supporter of Wakefield, noted with pride that "for the first time in undertakings of this kind was the welfare of the natives really regarded"; for the Company had reserved for the benefit of the aborigines one acre for every ten sold. Seventy-five per cent. of the purchase money was to be devoted to the cost of emigration to the first settlement; the remainder to the emigration of young labourers, with due regard to proportion of sex.

Colonel Wakefield had been provided with a set of explicit instructions for guidance in transactions with the Maoris, whom he was enjoined to treat frankly, and clearly to enlighten respecting the objects of the

expedition. He was not to complete any purchase of land until "its probable result" had been clearly understood by the native proprietors, until all the owners had become "approving parties to the bargain," and until he was assured that each owner would receive his due share of the commodities exchanged for the land. In order that the natives should be protected against their ignorance of the potential value of their land, he was to "take care to mention in every contract for land, that a proportion of the territory ceded equal to one-tenth of the whole, will be reserved by the Company, and held in trust by them for the future benefit of the chief families of the tribe. The intended reserves of land are regarded as far more important to the natives than anything which you will have to pay in the shape of purchase money." The immediate payment was to be "less inadequate" than it had generally been in Maori land sales, and the goods given in exchange were to include "such a quantity as may be of real service to all the owners of the land." Any act of aggression or affront from any of the Company's servants towards the natives was to be considered as a sufficient cause of immediate and public dismissal. The missionaries were to be treated with all the respect "deserved by the sacrifice they have made as the pioneers of civilisation," and their assistance and advice was to be sought in regard to land purchases. If no more favourable site were found, the capital was to be established on the shores of Port Nicholson—an instruction amply justified by the Wellington of to-day, whose civic motto is *"Suprema a situ,"* and of which the Company's words of 1839 are almost prophetic: "a general trading depôt and port of export and import for all parts of the islands, as a centre of commerce for collecting and exporting the

produce of the islands, and for the reception and distribution of foreign goods....the most frequented port of colonised New Zealand."

The *Tory* arrived at Queen Charlotte Sound on August 17th, 1839, and by various purchases made within a few months chiefly from the Maoris, Colonel Wakefield claimed to have acquired for his Company more than twenty million acres of land in exchange for goods valued at £8983, among which appeared two hundred muskets, sixteen single-barrel guns, eight double-barrel guns, eighty-one kegs of gunpowder, two casks of ball cartridges, two hundred cartouche boxes, and twenty-four bullet moulds.

Both the legal validity and the morality of these purchases have been severely impugned: (*a*) Vital parts of the elaborate and carefully designed instructions of the Company were disregarded by its Agent. He made no attempt to secure the advice of the missionaries, who were fully conversant with the peculiarities of Native land tenure, and none of whose dealings in land had ever been questioned by the Maoris; too much confidence was imposed in Barrett, who appears to have been a man of no education,* and jealous of missionary influence. (*b*) It is not clear that the Native owners understood the purpose of the deeds of sale. The Ngatiawa, for example, when they signed the deed of the 8th November, thought that they were parting only with their Port Nicholson lands, whereas the terms of the deed embraced the country from Mokau and Cape Turnagain in the north, down to Hokitika and the Hurunui in the south. (*c*) This deed, too, is an example of another fatal defect, the omission to consult all the owners of the land; its execution

*But Henry Williams's charge that he was wholly incompetent as an interpreter has been clearly disproved.

would have left landless several tribes who had a better title to large portions of the territory than the Ngatiawa. The Wesleyan missionary, Buller, who visited Port Nicholson in January, 1840, said that Wakefield "had bought, or was presumed to have bought, territory by degrees of latitude while in ignorance of the rightful owners." (*d*) No attention was paid to the Maori law whereby Natives who had voluntarily left their land, but expressed an intention to return thither, or who had been enslaved, were, on their return, fully invested with their former rights. For example, Barrett's and Dorset's transaction of February ignored the rights of Wiremu Kingi Te Rangitake, who had left Waitara in 1827 to settle new lands, but with the expressed intention of returning, and of those Ngatiawa who had been enslaved by the conquering Waikato tribes in 1831-2.

The *Cuba*, the ship conveying the Company's survey staff, arrived at Port Nicholson on the 4th January, 1840, and the Company's first immigrant ship, which had left England in September, before any land had been bought, arrived at the Heads on January 20th, and entered the Port on the 22nd, a week before Hobson sailed into the Bay of Islands.

Chapter VII.

ESTABLISHMENT OF BRITISH SOVEREIGNTY.

1. The Instruments of Government.

However grave were the faults committed in the name of the New Zealand Company, to it, mainly, is due the credit of preventing this country from becoming a colony, and in all probability a penal establishment, of some foreign power. It was the intention of the Company to settle in New Zealand, as though it were an independent state, which first impelled the British Government to take the necessary steps for acquiring it for the Crown.

Towards the end of 1838 negotiations were opened between the Colonial and the Foreign Offices with regard to substituting a Consul for the Resident at New Zealand. The Foreign Secretary, Lord Palmerston, agreed with Lord Glenelg as to the advisability of this step, but owing to the persistent objections of the permanent officials at the Colonial Office, nothing definite was settled till the following June, when the *Tory* was well on its way to New Zealand, and two deputations from the Company had been received (on the 6th and the 13th).

On the 13th June the Colonial Office acknowledged itself outwitted by the Company by announcing that "circumstances had transpired which have further tended to force upon Her Majesty's Government the adoption of measures for the providing for the government of the Queen's subjects, resident in or resorting to New Zealand. With that view it is proposed that certain parts of the islands should be added to the

colony of New South Wales as a dependency of that Government, and Captain Hobson, R.N., who has been selected to proceed as British Consul, will also be appointed Lieutenant-Governor.''

On the 15th June the Queen, by letters patent, extended the limits of the territory of New South Wales ''so as to include any territory which is or may be acquired in sovereignty by Her Majesty, her heirs and successors, within that group of islands lying between the latitude of 34° 30′ and 47° 10′ south, and 166° 5′ and 179° east longitude, reckoning from the meridian of Greenwich.'' A treasury minute of the 19th informs us that the salary of the Consul had already been included in the estimate of consular services for 1839, and that the Lords of the Treasury sanctioned an advance by the Agent-General for New South Wales from the funds of that Colony of the amount of the Consul's expenses, with the understanding that the advance was to be repaid from the revenues of the territories proposed to be annexed to New South Wales. This minute, a copy of which was laid before the House of Commons, also referred to the opinion of the Law Officers that ''any territory in New Zealand of which the sovereignty may be acquired by the British Crown may lawfully be annexed to the colony of New South Wales, and that the legislative authority of New South Wales created by the Act of 9th George IV., Cap. 83, may then be exercised over British subjects inhabiting the territory.''

On the 30th July, by Commission under the Royal Signet and Sign Manual, Captain William Hobson was appointed Lieutenant-Governor ''in and over that part'' of the group of islands described in the Letters Patent of the 15th June, ''which is or may be acquired in sovereignty by Her Majesty, her heirs

and successors." The Lieutenant-Governor was to hold office during the pleasure of the Crown, and to obey the lawful instructions of the Governor-in-Chief and Captain-General of New South Wales. Lord Normanby explained the alteration of the Government's original intention to appoint him Consul as due to "circumstances entirely beyond the control of the Government," which departed "with extreme reluctance" from the course originally laid down. Hobson was a Captain in the navy, and had visited New Zealand in 1837 to report on the state of the country.

On August 14th Hobson's instructions were embodied in a despatch from Lord Normanby. The principal object of his mission was therein described as "to mitigate, and, if possible, to avert" the disasters reciprocally inflicted on British subjects and Maoris in New Zealand, and "to rescue the immigrants themselves from the evils of a lawless state of society." He was informed that the Government had deferred the colonisation of New Zealand "because the approximation of civilised with uncivilised man had hitherto proved destructive to the latter, and the white man's progress in the New World had generally been over the bodies of the aborigines." He was to treat with the natives for the "recognition of Her Majesty's sovereign authority over the whole or any parts of those islands which they may be willing to place under Her Majesty's dominion"; and, in discharging this task, he was to avail himself of the assistance of the missionaries and such of the older British residents as enjoyed the confidence of the Maoris. He was to ensure, if possible, that the Maoris should, in future, cede land only to the Crown; and he was bidden "to obviate the danger of the acquisition of large tracts of country by mere land jobbers." He was to obtain by fair and equal con-

tracts the cession to the Crown of such waste lands as might be progressively required for the occupation of settlers; he was to appoint a Protector of the Aborigines; for the purpose of fully investigating all land claims made by British subjects and others, he was to set up a commission which should report to the Governor of New South Wales; and he was to announce by proclamation that no title to land acquired from the natives would be considered valid unless it were confirmed by a Crown grant.

Hobson wrote to Lord Normanby respecting certain defects in these instructions, and referred particularly to the omission to distinguish between the North and South Islands whose "relations with Great Britain and respective advancements towards civilisation are essentially different." He asked leave to plant the British flag in the South Island without the formality of a treaty, as the land was sparsely settled by savage natives, and as the Declaration of Independence and King William's confirmatory letter applied only to the northern part of the North Island. He was informed, in reply, that the instructions referred only to the North Island: "Our information respecting the South is too imperfect to admit of my addressing to you any definite instructions." If Hobson should find this country inhabited only by "a very small number of persons in a savage state," the ceremonial of making a treaty would be a mere pretence, and ought to be avoided. If a treaty were found to be impracticable, then the Crown sovereign rights over the South Island were to be asserted on the grounds of discovery.

Hobson also requested the Colonial Office to define exactly the duties of the Protector of the Aborigines, so that the risk of a conflict between himself and this important subordinate official should be reduced to

the minimum. He expressed himself anxious to learn what methods his superiors would recommend him to follow in executing his instructions to interdict the practice of cannibalism and human sacrifice among the Maoris, but was informed that he must work out a solution for himself, and, if every other way failed, that he might resort to force. He desired more information as to his power to appoint magistrates, to pardon offenders, to establish a militia or a military force, and was referred to the instructions he would receive from the Governor-in-Chief of New South Wales. In one respect Hobson regarded the immediate rather than the remoter future interests of the colony: he strongly urged that he should be allowed to introduce convict labour to assist in making the roads and other necessary public works of the colony. Lord Normanby earned the thanks of generations of grateful New Zealanders by forcibly expressing his "fixed and unalterable opposition" to the proposal.

After Hobson left for Sydney in H.M.S. *Druid,* the New Zealand Company, in a communication to the Foreign Office, drew the attention of the Government to the danger of thus openly recognising the independence of the Maoris, and leaving the way clear for French attacks upon it, notwithstanding that Great Britain clearly had the right of sovereignty over the country by virtue of Cook's discovery; but Lord John Russell, who had in the meantime succeeded Lord Normanby at the Colonial Office, in a memorandum to Lord Palmerston, dated as late as March, 1840, declared that such independence had been consistently recognised "by solemn Acts of Parliament and of the King of Great Britain."

2. Annexation or Cession?

The departure of the *Tory*, and the consequent action of the Government focussed public attention upon the colony-elect, and it was felt by many that the appointment of Hobson was far too indecisive a step. Excitement was roused, and at a public meeting held at the Guildhall on the 15th April, 1840, a resolution was passed requesting the Government definitely to annex New Zealand. A select Committee of Parliament, however, found that New Zealand was an independent state, and the Ministry declined to do anything more than it had done. The finding of the Committee upon this point was in accord with the instructions given to Captain Hobson; but it cannot be accepted as a correct statement of the legal position. New Zealand was certainly no more "independent" than it was at the time when Cook took possession in the name of his sovereign. Such inchoate title as he had acquired had undoubtedly been lost by inaction, and by distinct disavowal on the part of the British Government. We could not, therefore, have legitimately protested against occupation by another power. But to regard the native tribes of New Zealand as forming an "independent state" or power, to affirm that their occupancy of the islands amounted to sovereignty, and to imply thereby that England could not colonise any part of them without a formal cession of territory as from a recognised state, was to give an absurd importance and effect to the burlesque of 1835, and to ignore the clear principles of international law. It may be by a humorous fiction only, as it is sometimes put, that savage tribes are deemed incapable of possessing territory; the fiction is clearly established, and the just moral claims of aboriginals can better be assisted by leaving them to

the humanity and good sense of the colonising power, than by elevating them into the position of sovereignty in the European sense of the term. Granted that in 1840 England had not acquired New Zealand, the fact remains that no other power had done so, and New Zealand was as free for occupation by her as it had been in 1769, when Cook took formal possession.

The point is of more than academic interest, because it was owing to the acceptance by the British Government of the doctrine which is here criticised that Hobson was, upon his arrival, cramped in his action, and placed entirely in the hands of the natives. And it is largely to the measures which he was compelled to take that the vexed native land question owes its origin. In point of fact, however, the actual finding of the Select Committee was immaterial. The decisive step had been taken when Captain Hobson's commission was signed, and it would have been too late in any event to make any alteration. Long before the Guildhall meeting Hobson had reached New Zealand, and definitely committed himself to his course of action there.

3. Hobson's Powers.

Hobson had arrived at Sydney on December 24th and was later provided by Sir George Gipps, Governor-in-Chief of New South Wales, with a letter of instructions, together with the commission extending the limits of the Government of New South Wales, and that establishing the Lieutenant-Governorship, copies of three proclamations respecting New Zealand proposed to be published in Sydney as soon as Hobson should leave, and drafts of two proclamations prepared by himself with the advice of his Executive Council, to be issued by Hobson in New Zealand

with such alterations as circumstances might deem necessary when he reached his sphere of action.

These documents illustrate clearly the constitutional position of a Governor entering upon the administration of the affairs of a new crown colony. Gipps's instructions first defined the relations that should exist between the Governor-in-Chief and the Lieutenant-Governor. All the details of Government were to be left to the latter, but matters of higher moment, some affecting the interest of the people of New South Wales, some regarding the exercise of the prerogative of the Crown, required other arrangements.

(*a*) As to the extent to which titles of lands acquired by purchase from the aborigines were to be recognised by Her Majesty, the Governor-General would take the earliest possible measures for carrying the instructions of the Colonial Office into effect, but nothing conclusive could be done until the Legislative Council of New South Wales should meet in session.

(*b*) Respecting the future disposal of lands, the general rules in force in New South Wales were to be adopted; but the Survey Department of New Zealand should be kept quite distinct from that of New South Wales.

(*c*) The Treasury of New Zealand, though in the first instance to be supplied with funds from New South Wales, would also be kept distinct. It was the financial bond between New South Wales and New Zealand which made it imperative that the Governor-General should exercise some control over the Lieutenant-Governor of New Zealand. On this point Gipps wrote: "My responsibility for the due expenditure of the public money of this colony is one of which I cannot divest myself, and where responsibility is, there also must be control. The extent to

which establishments are to be created in New Zealand, the salaries to be paid to public officers, and the expenditure of money on public works, must, for the present, be fixed by myself, on estimates and reports or proposals to be forwarded by you."

(*d*) Respecting certain powers or prerogatives of the Crown with which Governors of Colonies are usually entrusted, Gipps remarked: "Though I am myself authorised by Her Majesty to exercise them in her name and on her behalf, I have no power to delegate the exercise of them to another. From this, which is an inherent maxim in the law, it will, I believe, follow that you will not have the power to pardon offences or to remit sentences pronounced on offenders in due course of law, though you may stay the execution of the law; that you will not be authorised to suspend officers holding appointments direct from Her Majesty, though you may recommend to me the suspension of them. With respect to persons holding appointments from me, you will have the power of suspension, and over such as hold appointments from yourself a power of dismissal, unless they may have been previously recommended by you for confirmation in their respective offices, in which case your power will extend only to suspension." Though the Lieutenant-Governor could recommend persons for appointment as magistrates, he could not himself appoint them, and the same rule was to hold good respecting the appointment of militia officers, should a militia be enrolled.

Finally, there was enclosed with the instructions a commission issued under the public seal of New South Wales, empowering the Colonial Secretary of Her Majesty's possessions in New Zealand, in the event of the Lieutenant-Governor's absence or death, to

administer the Government during the period intervening between the occurrence of such death or absence, and the time when some other legally appointed person should enter on the Government.

Captain Hobson sailed in H.M.S. *Herald* on the 19th January from Sydney for the Bay of Islands, and upon his departure Gipps issued the three proclamations above referred to, namely, (*a*) extending the limits of his government to any territory which then was, or might be, acquired in sovereignty by Her Majesty within New Zealand; (*b*) appointing Captain Hobson Lieutenant-Governor of such territory; and (*c*) announcing that Her Majesty "will not acknowledge as valid any title to land which either has been, or shall be, hereafter acquired in New Zealand, which is not either derived from or confirmed by a grant to be made in Her Majesty's name and on her behalf, but that care shall be taken, at the same time, to dispel any apprehension that it is intended to dispossess the owners of any land acquired on equitable conditions, and not, in extent or otherwise, prejudicial to the present or prospective interests of the community"; and that claims to land would be "investigated and reported on by Commissioners to be appointed by me, with such powers as may be conferred upon them by an Act of the Governor and Council of New South Wales. . . . that all purchases of land in any part of New Zealand which may be made by any of Her Majesty's subjects from any of the chiefs or tribes of these islands, after date hereof, will be considered as absolutely null and void, and will not be confirmed or in any way recognised by Her Majesty."

Hobson had been provided by Gipps with a civil staff comprising a Collector of Customs and Treasurer, with an annual salary of £600; an Acting-Surveyor,

£400; a Police Magistrate, £300; two clerks; and a sergeant and four troopers of the New South Wales Mounted Police.

4. The Treaty of Waitangi.

Hobson arrived at the Bay of Islands on the 29th January and at once summoned a meeting of British subjects for the following day at the Kororareka Church to hear the reading of the commissions extending the limits of New South Wales, and appointing him Lieutenant-Governor of such parts of the colony as might be acquired in sovereignty in New Zealand. The publication of the commissions was duly performed and formal evidence of the fact was secured in the shape of a document subscribed to by forty witnesses, headed by James Busby, the late Resident, whose office was superseded by that of Hobson. Then followed the publication of two proclamations drafted by Gipps: (*a*) announcing that Hobson had that day entered upon the duties of his office; and (*b*) declaring that Her Majesty would not recognize any titles to land purchased after that date from the chiefs or tribes of New Zealand.

The Lieutenant-Governor's next step was to convene for the 5th February, near the mouth of the Waitangi River, an assembly of natives with which to treat for the cession of sovereignty. Hobson was accompanied to the conference by Busby, the heads of the English and French missions, and the principal European inhabitants, as well as by the Government officials and the officers of the *Herald*. In a despatch describing the proceedings of the conference, Hobson says that he announced to the chiefs the objects of his mission, and the reasons that had induced Her Majesty to appoint him; he explained to them in the fullest manner the effect that might be expected to

result from the measure, and assured them that they might rely implicitly on the good faith of the British Government in the transaction. He then read the treaty which he had drafted, explaining such passages as seemed to require it. Henry Williams interpreted the treaty and Hobson's speech. After the treaty had been read, the chiefs were invited to question the Lieutenant-Governor on any doubtful points, and generally to make any observations they pleased. Some twenty or thirty chiefs addressed the meeting, five or six of whom proved violently hostile. "Send the man away," said one, speaking of Captain Hobson. "Do not sign the paper. If you do, you will be reduced to the condition of slaves, and will be compelled to break stones for the roads. Your land will be taken from you, and your dignity as chiefs will be destroyed." Fortunately a staunch advocate for the treaty was found in Tamati Waka Nene, a chief of the Ngapuhi, who came forward and spoke with a degree of natural eloquence that surprised all the Europeans, and evidently overcame the temporary hostility that had been created in the minds of the Maoris. The conference closed with a strong sentiment in favour of the treaty. The natives were then allowed one clear day to consider the terms. On the 6th the chiefs announced themselves desirous of signing the treaty at once. The officers of the Government were thereupon assembled, and the Lieutenant-Governor with these, Busby, and the missionaries proceeded to the tent "where the treaty was signed in due form by forty-six head chiefs, in the presence of at least five hundred of inferior degree." Twenty-six of the signatories had signed the Declaration of Independence, so that Hobson considered himself justified in stating that the treaty "must be

deemed a full and clear recognition of the sovereign rights of Her Majesty over the northern parts of this Island.'' The treaty runs as follows:—

''HER MAJESTY QUEEN VICTORIA, Queen of the United Kingdom of Great Britain and Ireland, regarding with her royal favour the native chiefs and tribes of New Zealand, and anxious to protect their just rights and property, and to secure to them the enjoyment of peace and good order, has deemed it necessary in consequence of the great number of Her Majesty's subjects who have already settled in New Zealand, and the rapid extension of emigration, both from Europe and Australia, which is still in progress, to constitute and appoint a functionary properly authorised to treat with the aborigines of New Zealand for the recognition of Her Majesty's sovereign authorities over the whole or any part of those islands. Her Majesty, therefore, being desirous to establish a settled form of Civil Government, with a view to avert the evil consequences which must result from the absence of the necessary laws and institutions alike to the native population and to her subjects, has been graciously pleased to empower and to authorise me, William Hobson, a Captain in Her Majesty's Royal Navy, Consul and Lieutenant-Governor of such parts of New Zealand as may be, or hereafter shall be, ceded to Her Majesty, to invite the confederated and independent chiefs of New Zealand, to concur in the following articles and conditions:—

''ARTICLE THE FIRST:

''The chiefs of the Confederation of the United Tribes of New Zealand, and the separate and independent chiefs who have not become members

of the Confederation, cede to Her Majesty the Queen of England, absolutely and without reservation, all the rights and powers of sovereignty which the said Confederation or individual chiefs respectively exercise or possess, or may be supposed to exercise or to possess over their territories as the sole sovereigns thereof.

"ARTICLE THE SECOND:

"Her Majesty the Queen of England confirms and guarantees to the chiefs and tribes of New Zealand, and to the respective families and individuals thereof, the full exclusive and undisputed possession of their lands and estates, forests, fisheries and other properties which they may collectively or individually possess, so long as it is their wish and desire to retain the same in their possession; but the chiefs of the United Tribes and the individual chiefs yield to Her Majesty the exclusive right of pre-emption over such lands as the proprietors thereof may be disposed to alienate, at such prices as may be agreed upon between the respective proprietors and persons appointed by Her Majesty to treat with them in that behalf.

"ARTICLE THE THIRD:

"In consideration thereof, Her Majesty the Queen of England extends to the natives of New Zealand her royal protection, and imparts to them all the rights and privileges of British subjects.

W. HOBSON,
Lieutenant-Governor.

"Now, therefore, we the chiefs of the Confederation of the United Tribes of New Zealand, being assembled in Congress at Victoria in Waitangi, and we, the separate and independent chiefs of New

Zealand claiming authority over the tribes and territories which are specified after our respective names, having been made fully to understand the provisions of the foregoing treaty, accept and enter into the same in the full spirit and meaning thereof. In witness of which we have attached our signatures or marks at the places and the dates respectively specified.

"Done at Waitangi, this sixth day of February in the year of our Lord one thousand eight hundred and forty."

Hobson himself, during the following week, proceeded to Hokianga, where no fewer than 3,000 natives collected at the mission station, between 400 and 500 of them being chiefs of different degrees. The views and motives of the British Government in proposing to extend its protection to New Zealand were then fully explained; discussion was invited and elucidation offered. The result was that fifty-six signatures were added, representing the almost unanimous consent of the head chiefs. Only two head chiefs refused consent at Hokianga, but many of their sub-chiefs added their names to the treaty.

Hobson announced in a despatch of the 17th February his proposal to issue a proclamation declaring that Her Majesty's dominions in New Zealand then extended from the North Cape to the 36th degree south, and stating his intention to issue further proclamations as he proceeded southward and obtained the consent of the other chiefs until he should be in a position to include the whole of the islands. An attack of paralysis prevented his executing this intention in person. He then commissioned Captain Symonds, Lieutenant Shortland,

Captain Nias, Major Bunbury, and the Revs. H. Williams, W. Williams, R. Maunsell and R. Brown to secure the signatures of chiefs in various districts; whilst he despatched Major Bunbury in H.M.S. *Herald* with a commission to visit Stewart Island, the Middle (South) Island, and such parts of the Northern Island as had not been ceded to the Crown, in order to obtain signatures, and to proclaim British sovereignty.

By April 14th all the leading Waikato chiefs had signed; at Kaitaia, on the 6th May, sixty principal chiefs signed; by the 8th May it was reported from Poverty Bay that the leading men there had signed. The Rev. H. Williams, who had gone to Cook Strait for the purpose of obtaining signatures, reported, on the 11th June, that he had experienced some opposition from the influence of Europeans at that place, and that it was not until after ten days that the chiefs had come forward and signed the treaty unanimously. He also secured the signatures of some of the chiefs of the northern part of the South Island.

In the Middle, or South, Island Major Bunbury secured the necessary signatures at Akaroa, Southern Port (Stewart Island), Ruapuke Island, Otago, and Cloudy Bay. Governor Gipps had already (April 3rd) expressed to Hobson the opinion that the assertion of sovereignty over the South Island by virtue of the right of discovery should be made as early as possible; and on the 5th June, when at Southern Port and finding no natives in the neighbourhood, Bunbury in due form proclaimed the sovereignty by right of discovery over Stewart Island. At Cloudy Bay on the 17th he similarly proclaimed the Queen's sovereignty over the Middle Island by virtue of cession by the principal chiefs, who had by that date signed the treaty.

Whilst Bunbury was on his way south to Akaroa, Hobson had issued two Proclamations on May 21st proclaiming the sovereign rights of the British Crown, the one over the North Island by virtue of the cession made by the Treaty of Waitangi, the other over all the islands of New Zealand from 34° 30′ S.* to 47° 10′ S. and between 166° 5′ E. and 179° E. by reason of the royal command to assert those sovereign rights that rested on the ground of Cook's discovery.

5. The Akaroa Colony.

Here, before closing the chapter of history which resulted in the acquisition of British sovereignty over New Zealand, we may briefly refer to the final episode in the attempts of France to establish herself in this country.

In 1839 the Nanto-Bordelaise Company, with Louis Philippe as one of its shareholders, was formed to colonise New Zealand. It consisted of two mercantile houses at Nantes, two at Bordeaux, and certain merchants of Paris. L'Anglois, the master of the French whaler, *Cachalot,* who, at Port Cooper on August 2nd, 1838, or over a year before Hempleman's purchase, had bought a block from the natives of Banks Peninsula, received a one-fifth interest in the Company by way of consideration for his land rights. Banks Peninsula was a favourite resort of the French whaling ships. The Company entered into negotiations with the French Government, which delegated to a Commission the authority to effect an agreement. This agreement between the Company and the Commission was signed on the 11th December. A vessel, the *Comte de Paris,* armed and provisioned for a year, was placed at the Company's disposal, to help in

*In the Proclamation itself "North" was inadvertently written for "South."

establishing its colony in New Zealand, and at least one man-of-war was to be stationed there permanently, to assist in the formation and the protection of the settlement. In return for these privileges, the Company engaged to reserve for the French Government one-fourth of any territory that it might acquire, as well as sites peculiarly suitable for public use. On February 20th, 1840, the French New Zealand Company, a further development of the Nanto-Bordelaise Company, was formed to acquire and settle territory in New Zealand, and to engage in fishing the New Zealand waters.

On March 19th, L'Anglois sailed from Rochefort in the *Comte de Paris* and arrived at Banks Peninsula in August. The departure of the Company's expedition aroused considerable excitement in London, and the petition of the merchants, bankers, and shipowners of the City, presented to the House of Commons in May, deprecated the proposed establishment of a penal colony by France upon Banks Peninsula. Meanwhile, the French gunboat, *L'Aube*, Captain Lavaud, had been sent to prepare the way for L'Anglois, and arrived at the Bay of Islands in July.

Captain Hobson had, as we have seen, already proclaimed British sovereignty over the South Island and Stewart Island, but he suspected French designs on Akaroa, and resolved to be trebly sure. On July 22nd he therefore sent Captain Stanley in H.M.S. *Britomart* to occupy the place, with instructions that if Stanley should find the French commander in occupation or attempting to establish himself at some other point on the coast he was to "impress upon him that such interference must be considered as an act of decided hostile invasion." He was, further, to hoist the British flag, and land a magistrate who should hold a court on shore,

adjourning it from day to day. These instructions he duly carried out.

The *Britomart* arrived in Akaroa on the 10th August, the *L'Aube* on the 15th, and the *Comte de Paris* on the 16th. L'Anglois, however, had already been a few days in the neighbourhood, making further alleged purchases of land from the Maoris. He asserted that he had bought on the 12th, at Pigeon Bay, rights to a tract of land extending across the island, between 42° 20′ and 44° 45′ S. latitude, and that the purchase had been recorded in a deed signed by the parties to the bargain.

An arrangement was made between the British magistrate and Lavaud for the maintenance of order among the immigrants until the conflicting claims should be settled. Lavaud, although disclaiming any national intrusion on the part of his Government was prepared to maintain the claims of the French Company as private individuals.

Some years were to pass before the claims were settled. Hobson proposed to assign the French Company 50,000 acres in the northern part of the North Island, and the Foreign Secretary informed the French Government that he "proposed to deal with the Company connected with the French settlers on the same principle as if they had been a British Company, and to invite them, as a preliminary step, to prove their claims, which, when proved to be just, will be allowed in the North Island, no difficulties being thrown in the way of their naturalisation." But the Land Commissioners saw that the French claims were barred by the terms of Governor Gipps's Proclamation of the 14th January, forbidding and nullifying the acquisition of land in New Zealand after that date, except from the Crown. The French claims were then investigated at Home by the Land and Emigration

Commissioners, who reported that £11,685 had been expended by the French Company in founding its colony. In 1845, Stanley authorised a grant to it of thirty thousand acres, provided that the contract with the Maoris was valid. Not satisfied with this offer, the French Company then opened negotiations for the sale of its claim to the New Zealand Company, and, on the 4th July, 1849, all its rights in New Zealand were ceded to the Chartered Company for the sum of £4,500.

The two chief views taken by the French of their claims to sovereignty found expression in a debate in the Chamber of Deputies in May, 1844. Guizot recognised the prior right of the English Crown. He referred to the appointment of a British Lieutenant-Governor in 1839, and to the issue of the two proclamations of May and June, both of them anterior to the arrival of Captain Lavaud. Thiers admitted the cession of sovereignty over the North Island by the Treaty of Waitangi, but contended that the annexation of one part of New Zealand by England was no valid reason for claiming possession of the entire group. He instanced the case of San Domingo where both Spaniards and French held territory for many years. Another speaker asked whether, if England had relied on treaty right for the possession of both islands, she would have appealed to the right of discovery. When she invoked a doubtful right, like that of discovery, it was because she had not an indisputable one.

Though some of the French settlers subsequently removed to the Marquesas Islands, many remained at Akaroa. M. de Beligny, the local agent of the Nanto-Bordelaise Company, returned to France in 1845. In 1847 Bishop Selwyn reported some eighty French settlers at Akaroa. The French Government, for

some time, appointed an officer to reside among them, and to guard their interests. He was known as the Commissaire du Roi, and ranked as the senior naval officer on the station, but of course exercised no rights inconsistent with the fact of British sovereignty. Captain Lavaud occupied the position till 1844, when he was succeeded by Commodore Berard. A British Magistrate was of course, stationed there from 1840: C. B. Robinson, who came in the *Britomart*, was succeeded, at the end of 1843 by J. Watson.

There is a widespread belief that if the French emigrants had landed at Akaroa before the arrival of the *Britomart* and the hoisting of the British flag there, nothing could have prevented the permanent occupation of Banks Peninsula or even of the whole of the South Island by the French. Our narrative should make it clear that there is no foundation in international law for this opinion. It is plain that before the middle of June, 1840, the whole of New Zealand had been acquired in due form for the British Crown on two grounds—discovery and cession—each of which was undoubtedly valid in the circumstances. Moreover the many settlements established by British subjects on the coasts must be taken into account. They were far more numerous and extensive than those of persons of other nationalities, and if ratified by the Crown, would have helped to constitute a much stronger claim than the French even if there had been no cession of sovereignty to the Crown and if the French gunboat had arrived at Akaroa before the British.

Nor was it necessary that there should be any formal act of annexation or of cession performed by the British at Akaroa in August, 1840. Hobson, in his letter of instructions to Stanley, was clear on this

point. "You will perceive," he said, "by the enclosed copy of Major Bunbury's declaration that independent of the assumption of the sovereignty of the Middle and Southern Islands, as announced by my proclamation of the 21st May last (a copy of which is also enclosed) the principal chiefs have ceded their rights to Her Majesty through that officer who was fully authorised to treat with them for that purpose; it will not, therefore, be necessary for you to adopt any further proceedings." The holding of the court was merely evidence of intention to maintain and exercise the sovereign rights already acquired.

All this, however, does not detract from the French expedition's importance in New Zealand history. The expedition was the concrete expression of the intention of France to colonise New Zealand; and it was the knowledge of its plans together with the proposals of the New Zealand Company, which were also hastened by the rumours of imminent French annexation, that at last moved the British Government to make good its long-standing claims to these islands. The South Island is British, not because Stanley outsailed Lavaud and L'Anglois but because Wakefield and his Company forestalled L'Anglois, and because the action of both induced the British Government to take prompt measures to assert sovereignty and make it doubly sure by cession as well as by discovery and occupation.

Chapter VIII.

THE GOVERNMENT OF BRITISH COLONIES TO 1840.

1. Continuity of Policy.

Though the systematic colonisation of New Zealand falls within one of the later periods of British colonial policy, yet in few, if any, of its phases can it be adequately studied when isolated from preceding examples of its kind; for the colonising policy of England is not a mechanical development, but an organic growth.

England had administered colonies for well over two centuries before entering upon her dominion in these islands. Her novitiate in America and in the East, and the half-century of experimentation in Australia, were rich in lessons of no uncertain application to New Zealand. To a large extent the ideas that first controlled British administration in New Zealand were moulded in the crucible of the past, though necessarily reshaped to fit the peculiar conditions of the new colony.

Our retrospective glance, however, though dwelling upon the main essentials of colonial government, must necessarily rest but lightly upon, or pass by, its minor details. The intention of this chapter is not to give a minute account of the course of government in the colonies existing before 1840, but merely, by citation of special examples, to throw into relief those features of British colonial policy which possess some logical relation—causative, comparative, or antithetical—with our special subject.

The term "colony" has been defined by the Interpretation Act of 1889 as denoting any part of the British dominions except the British Isles (including the Channel Islands and the Isle of Man) and British India. From the point of view of constitutional law, British colonies are usually classified according to two methods. One of these involves a consideration of the degree of control exercised over the colonies by the Home Government. Proceeding on this principle, we divide British colonies into three classes:—

1. Crown Colonies, consisting of three species:—

(*a*) Colonies in which there is but one chief administrative officer, generally a military Governor, appointed by the Crown.

(*b*) Colonies in which the Governor is assisted by an Executive Council nominated, directly or indirectly by the Crown.

(*c*) Colonies in which the Governor is assisted by two Councils—Legislative and Executive—both nominated directly or indirectly by the Crown.

2. Colonies that possess representative institutions, but do not enjoy the privileges of responsible government. A colony with such "representative government" is generally unstable, either advancing to "responsible government" or reverting to the status of Crown colony.

3. Colonies with responsible government, that is, in which the great majority of the administrative officials are appointed by the independent action of the people of the colony, through their parliament. These are now officially known as the "self-governing Dominions" of the Empire.

New Zealand, in the course of its development, afforded an example of each of these three types, as well as an instance of a type of federal government.

The other method of classification emphasises the origin of a colony as the fact determining its species. Was the colony in question acquired by conquest or by settlement? Upon the answer to this question depends the relation of the Crown to the colony in the manner described in Section 5 below. New Zealand is usually regarded as a settlement colony, and, in sketching the earlier stages of colonial policy, we therefore confine our attention to typical colonies of that category.

2. Origins.

We need not describe the motives that aroused the English colonising spirit in the Tudor period. It is enough to note that the constitutional position of the Tudor sovereigns was unusually strong, and the Commons had no prophetic glimpse of the importance colonies were to assume in the development of the realm. They thought of them chiefly as a source of expense, of additional responsibility, and as a possible cause of war, and gladly consigned them to the Royal care. Hence the beginnings of colonisation are marked by numerous grants of Crown charters.* On June 11th, 1578, a patent was issued to Sir Humphrey Gilbert, authorising him to choose a site in heathen lands, unoccupied by Christians, to plant settlers there, and to exercise jurisdiction under the Crown over them. The voyage he made in 1578, however, failed utterly; and in 1583, though he reached Newfoundland and took possession of it for England, he achieved nothing substantial. In the following year, 1584, his half-brother, Sir Walter Raleigh, had the patents transferred to himself, and

*It is worthy of note that, in some respects, the commissions of colonial governors are intimately connected with these charters, conferring similar powers in almost identical phraseology.

attempted to colonise selected portions of Virginia; but the first colony he planted did not last more than ten months.

The first permanent English colony was established in Virginia in 1607, and an account of its origin and early history will be useful for comparison with those of New Zealand founded like Virginia, but over 200 years later, by British emigrants on virgin lands obtained from the aboriginal occupants. Raleigh's territory reverted to the Crown on his attainder, and was re-granted by a charter, dated April 10th, 1606, to certain merchant-adventurers and traders. This charter provided for the establishment of two companies, the London, or Southern Company, and the Plymouth Company (with its management at Plymouth in Devonshire). "The conditions of tenure," says Bancroft, "were homage and rent." One-fifth of the net profits of gold and silver mined, and one-fifteenth of the copper obtained were to be paid to the Crown. But the patentees were allowed to impose a duty on all English and foreign non-members of the Company trading in Virginia, the profits from these duties for the first twenty-one years to be devoted to the uses of the colony, and afterwards to go to the King. There was to be in each colony a Resident Council of thirteen members, appointed and removed as the King might direct. There was also to be a superintending Council of Virginia—a Royal Council consisting of fourteen persons appointed by the King to manage and govern the affairs of the colony subject to his direction. The subordinate Resident Councils were allowed to coin money if they should think fit. Duties might be levied at a fixed rate on imported goods. Leases granted out by the Resident Councils were to be held "in free and common socage," that is, according to

the prevalent English tenure. Finally, the colonists and their descendants were to enjoy "all liberties, franchises, and immunities" "to all intents and purposes" of native-born subjects of the King.

After the Royal Council was nominated, it issued a set of instructions to serve as a basis for the constitution of the first colony of Virginia. These made the Crown absolute sovereign in the colony. The Council nominated a Resident Council whose laws were to be ratified either by the Royal Council or the King. This power of legislation was further limited to matters not affecting life and limb.

On May 23rd, 1609, the London Company was reorganised and received, through the channel of a new charter, all the usual privileges of a corporation. The Council in England was henceforth to be chosen by a majority of the Company, and its chief administrator, the Treasurer, was to be chosen in the same way. This Council was empowered, on behalf of the Company, to appoint the local Governor, who was to supersede the Resident Council, and to govern unchecked by any other authority. Legislative power, too, was vested in the Council, which might exact duties, both on imports and exports, at rates fixed by the charter.

In 1612 there was issued a third charter, which added to the Company's territory and still further regulated its business. On July 30th, 1619, Governor Yeardley summoned the first colonial parliament, which met at Jamestown and consisted of twenty-two burgesses elected by the towns, plantations, and hundreds, each contributing two members to the assembly. The burgesses sat with the Governor and Council, and together with these formed a legislative and judicial body. Their chief function was to make

such laws as might seem good to them for the advantage of the colony.

Two years later Governor Sir F. Wyatt brought a written constitution, which foreshadowed the form of government to be established generally in the American colonies. It was moulded by current belief as to the construction and working of the contemporary English constitution. There was to be in the colony a Governor and Council, appointed by the Company, and an Assembly, which was to meet annually. The Governor was to have the right of vetoing the Assembly's enactments, which in all cases were to be presented for the sanction of the Company. On the other hand, the orders of the Company were not valid until they had received the concurrence of the Assembly. Trial by jury, which had already been introduced, was confirmed by the new constitution.

A spirit of disunion gradually permeated the Company, fostered, it is alleged, by Spanish intrigues. In consequence, the charter was annulled, and the colony was brought under the direct control of the Crown, the Company being reduced to the status of a mere trading corporation. An Order of the Privy Council, issued in October, 1623, ordained that the affairs of the Colony were henceforth to be managed by an English Council, comprising a Governor and twelve Assistants, acting under the supervision of the Privy Council, and empowered to appoint a resident Governor and twelve Assistants to administer the affairs of the colony on the spot. It required an action *quo warranto* before the Company yielded up its charter. The chief argument for the Crown was that the character of the patent, which permitted unrestricted immigration from England, might denude the country of all its inhabitants. "A

solemn declaration" drawn up by the colonists in 1640 tends to prove that their general condition did not suffer by the revocation of the patent. The colonists therein say: "That our present happiness is exemplified by the freedom of annual assemblies. . . . . by legal trials by jury in all civil and criminal causes, by His Majesty's royal encouragement, upon all occasions, to address ourselves unto him by our humble petition, which so much distinguishes our happiness from that of the former time, that private letters to friends were rarely admitted a passage." In fact, this step probably accelerated the movement towards popular government in the Colony, for there was much less interference on the part of the King than there had been from the officers of the Company. Under the Commonwealth the Burgesses elected their Governor and Council.

From 1673 to 1683 Virginia was reduced to the status of a proprietary colony, having been granted by Charles II. to Lords Arlington and Culpepper, who appointed the sheriffs, land surveyors, etc., had all church gifts in their keeping, and restricted the franchise. The Assemblies were summoned only by the Crown and were stripped of all legislative power, with the exception of the right of rejecting or accepting enactments submitted to them after they had been initiated and passed by the Governor-in-Council and approved by the Sovereign. The Assembly was no longer to hear appeals. From 1683 Virginia again ranked as a royal province.

The early history of the other North American English colonies is similar. The Plymouth colony was founded in 1620, and the solemn compact of the "pilgrim fathers," Nov. 21st of that year, is the first written constitution of an American political community of voluntary formation. In 1629 the Governor

and Company of Massachusetts Bay were granted a royal charter, and next year the Company transferred itself to the colony, thus furnishing the first instance in which a colonising company had its headquarters, not in the parent state, but in its territory. The virtual independence of the New England colonies is well shown by the fact that, in the document establishing a government for Connecticut, no mention is made of any exterior authority. Of this document Fiske* says, "It was the first written constitution known to history that created a government." The Governor was to be elected by the freemen of the colony; the Deputies were to be chosen, twice a year, by non-freemen as well as by freemen. These with the Governor and at least four magistrates, were to form the General Court, which, at a later period, was divided into two Houses. There was to be no ecclesiastical test for the admission of freemen, and no oath of allegiance except to the jurisdiction. The colony was thus practically independent.

In 1643 there was formed a Confederation of the four New England colonies, Massachusetts, Plymouth, Connecticut, and New Haven.

During the Commonwealth the colonies came under the immediate control of Parliament, and a new Commission was created for the management of all the English plantations in America. It was to exercise all the authority formerly enjoyed by the Privy Council and the Commission appointed in 1634; but there resulted little interference in the affairs of the New England colonies. Massachusetts declined to exchange her charter for a new one, and continued to coin money on her own account, thus exercising a prerogative peculiar to sovereignty. She even engaged

*"The Beginnings of New England."

in war with the French without the consent of the Home Government,* and claimed, in 1646, that "by our charter we have absolute power of government, for thereby we have power to make laws, to erect all sorts of magistracy, to correct, punish, pardon, govern, and rule the people absolutely." To England they owed only allegiance and fidelity, which they showed sufficiently by "the erecting such a government as the patent describes and subjecting ourselves to the laws here ordained by that government."

3. Classification of Early Colonies.

The beginning of Charles II's. reign was marked by the creation of the Council for the Administration of Foreign Plantations. Henceforth down to the Revolution attempts were made to strengthen the royal power in the colonies, and some of the chartered colonies were converted into royal provinces administered by a governor directly appointed by the Crown. A third form of colony was the proprietary settlement, in which "the powers of the Crown were deeded over to individuals, who thereby became the absolute owners of the regions thus granted. They might in turn let out subordinate feuds to others who went thither to dwell. The proprietors appointed the Governor and called the provincial assemblies at their pleasure."†

The chief examples of this type of colony were Maryland (1632), the Carolinas (1629, 1663), New Jersey (1664), Pennsylvania (1682), and Georgia (1732). Finally there were the colonies acquired by conquest, the chief being New York (1664); and even in these the people enjoyed a high degree of freedom.

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*The early history of Chartered Companies was characterised by much "free fighting"—armed incursions into alien or disputed territory, unauthorised by the Home Government, and undertaken to extend the Companies' spheres of influence.

†Morris, History of Colonisation.

4. Colonial Constitutions after the Revolution.

One result of the Revolution of 1688 was the gradual assimilation of all colonial governments in America to one modelled *mutatis mutandis* on that of the Mother Country. Henceforth in each there was found a Governor who stood in relation to the colony in a similar position to that which the King occupied in relation to England. In the royal provinces this Governor was appointed by the King. A Council discharged some of the functions of the House of Lords, and an Assembly, or House of Representatives, limited, or endeavoured to limit, the power exercised by both.

The King and Parliament sought to restrain any appreciable extension of the colonists' liberties, especially those affecting trade and taxation. Some of the colonies refused to apportion a fixed salary for the Governor in place of an annual appropriation by the representatives of the people. This attitude is explained by their assumption that the Governor should be, not an independent officer, but one who, in some measure, should be amenable to the will of the colony. The same proceeding was adopted in relation to other officials appointed, directly or indirectly, by the Crown.

The new charter issued to Massachusetts and Plymouth in 1691 may be taken as a typical example of the instruments embodying the liberties granted to the colonies at the beginning of the new era. The Governor, Lieutenant-Governor, and Secretary were to be appointed by the King. There was to be an Annual Assembly or General Court, consisting of Governor, Council, and Lower House. The Council, that is, the upper part of the legislature, was to be appointed each year by the General Court. The

Lower House was to consist of deputies, two to be elected from each constituency. The parliamentary franchise was restricted by a property qualification; the imposition and levy of taxes was a function of the General Court, which was empowered to enact laws not repugnant to the laws of England. In 1725 there was issued an explanatory charter, affirming the necessity of the Governor's approval of the choice of a Speaker, and of his sanction for an adjournment of the House for longer than two days. The Governor had the power of rejecting Bills passed by the Legislature, and the Crown, at any time within three years, might annul or disallow the enactments. Courts of Law, except Courts of Admiralty and Courts of Probate, were to be constituted by the General Court. The Courts of Admiralty were to be established by the Crown, the Probate Courts by the Governor-in-Council. From these Courts any cause involving more than three hundred pounds might be carried on appeal to the Privy Council.

5. Summary of Colonial Constitutional Law.

It remains now to summarise some of the more general features of colonial administration, and the most important constitutional principles established before the occupation of New Zealand.

1. In the first place we note the early recognition of the right of the colonists in settlement plantations to a share in their own government. As May says, "In quitting the soil of England to settle new colonies Englishmen never renounced her freedom."* Whilst the degree of liberty varied with the colonies, being highest in Connecticut and Rhode Island, it never fell so low as to damp the ardent colonising spirit and

*Const. Hist., III., 17.

to check the material development of the colonies. "Plenty of good land, and liberty to manage their own affairs in their own way," says Adam Smith, "seem to be the two great causes of the prosperity of all new colonies." It was a legal principle that English citizens going abroad to places under no legitimate sovereign carried with them at least as much of English law as was applicable to the circumstances of their new place of residence. To change such law or to vote supplies for the work of government, a representative legislature was necessary; and this legislature could be established either by the royal prerogative or by act of the Imperial Parliament. In colonies acquired by conquest or cession, however, the Crown had absolute law-making authority; but it was held by Lord Mansfield in the important case of *Campbell v. Hall*, 1774,* that the Crown, having once delegated this unquestioned power of legislation to a local representative assembly in a conquered colony could not thenceforth exercise it; a grant of representative government by the Crown could not be recalled by the Crown alone. Nova Scotia in 1758 and Newfoundland in 1832 were granted representative government by the Crown, and an imperial Act in 1791 conferred it on Canada.

2. This freedom was a necessary consequence, partly of the remoteness of the colonies from the parent state, and partly of the untravelled Englishman's ignorance of the peculiar conditions of colonial life, the regulation of whose details he was content to delegate to those most intimately concerned with them. Only so much of the laws of the Mother Country as was applicable to the peculiar conditions of a colony, was admitted as part of the law operating within that colony. In *Campbell v. Hall* Lord Mansfield said: "It is absurd that in the colonies they

*Cowper, 204.

should carry all the laws of England with them. They carry such only as are applicable to their situation." It was gradually established that after a colony had a Legislature of its own, no English law had force within that colony unless it had been passed expressly for it or for the colonies in general, or had been adopted by Act of the colonial legislature, or had been received and acted on in the colonial courts. As a result of the generous measure of self-government, such laws were passed as best suited the economic conditions of new countries, as, for example, laws requiring the occupants of lands to improve them; reasonable laws of bequest and inheritance; and simple rules for registration of titles.

3. The colonies were not burdened with taxation imposed by and for the Home Country. Even as late as 1776, a writer could declare with truth: "The English colonists have never yet contributed anything towards the defence of the Mother Country, or towards the support of its civil government."*

But the discontent engendered by the commercial restrictions to be described later was rendered more acute by attempts of the Imperial Parliament to tax the colonies, in order to ease the cost of their maintenance. It was sought to justify these taxes on various grounds, the chief of which may be summarised thus:—(*a*) The National Debt, the interest upon which these taxes were intended to assist in paying, had been incurred largely by defending the colonies from foreign aggression, and in wars undertaken for the common cause of the Empire; (*b*) such taxation was the custom of all other colonising states; (*c*) the Crown in Parliament being legal sovereign was competent to establish the taxes; (*d*) none of the charters

*Adam Smith.

and the forms of grant had exempted the colonies from the sovereignty of the parent state; and (*e*) there were precedents for Imperial imposts, such as import and export duties and postage fees, levied without remonstrance. The colonists replied that they disclaimed all responsibility for the European wars, and the costly armaments which it was alleged had been intended to benefit them, inasmuch as they had no voice in shaping the war policy of the Empire. Moreover, they questioned whether the Imperial Parliament could constitutionally tax them without their consent, expressed through duly accredited representatives; and this objection was, after 1770, brought against indirect taxation for colonial purposes as well as against internal direct taxes. Lord Mansfield made the rejoinder that the colonists were "as much represented in Parliament as the greatest part of the people of England were represented," eight-ninths of whom had no vote for electing members of Parliament. Even though Parliament possessed the right to tax the colonies, the American War of Independence is an instructive example of the principle that sovereignty is effectively limited according to the degree of tractability of the governed. Burke, like Chatham, admitted the right of the Imperial Parliament to regulate the colonial trade to the advantage of British merchants, but he opposed direct taxation of the Americans on the grounds of its inexpediency.

In 1766 the Parliament specifically asserted its supremacy over the colonial legislatures in the important Act "for the better securing the dependency of His Majesty's dominions in America upon the Crown and Parliament of Great Britain" (6 George III., Cap. 12), and declared "that the said colonies and plantations in America have been, are,

and of right ought to be subordinate unto and dependent upon the Imperial Crown and Parliament of Great Britain, and that the King's Majesty by and with the advice and consent of the Lords Spiritual and Temporal and Commons of Great Britain in Parliament assembled had, hath, and of a right ought to have full power and authority to make laws and statutes of sufficient force and validity to bind the colonies and people of America, subjects of the Crown of Great Britain, in all cases whatsoever. . . . All resolutions, votes, orders, and proceedings in any of the said colonies or plantations whereby the power and authority of the Parliament of Great Britain to make laws and statutes aforesaid is denied or drawn into question, are and are hereby declared to be utterly null and void to all intents and purposes whatsoever."

Twelve years later the Imperial Parliament, in the Taxation of the Colonies Act, abandoned its right to tax the American colonies, and though, in virtue of its sovereignty, it is competent to re-assert the general right by statute, it has never since attempted to do so. This Act of 1778 provides that the Imperial Parliament "will not impose any duty, tax, or assessment whatever, payable in any of His Majesty's colonies, provinces, and plantations in North America or the West Indies, except only such duties as it may be expedient to impose for the regulation of commerce; the net produce of such duties to be always paid and applied to and for the use of the colony, province or plantation in which the same shall be respectively levied in such manner as other duties collected by the authority of the respective general courts or general assemblies of such colonies, provinces, or plantations are ordinarily paid and applied."

By 1840 it was a fixed principle that the Imperial Parliament would not change the constitution of a colony without its consent. In 1839 the Melbourne ministry proposed to suspend the constitution of Jamaica without consulting the colony, was defeated on the proposal, and resigned. Whenever a matter was of more than mere local interest, extending to the whole Empire, however, the Imperial Parliament strictly guarded its exclusive right of legislation. The Slave Trade Act of 1834 is one of the best examples in the period immediately preceding the acquisition of New Zealand.

4. There was evolved ultimately a certain uniformity of administration within the colonies. The form of government that emerged after many experiments in constitution building was composed of:

(*a*) A Governor appointed by the Crown to guard its interests in the colony, and to act as the channel of communication between the colony and the home country, whilst discharging in the colony certain functions, such as the summons, prorogation, and dissolution of the legislature, assenting to or vetoing laws, which at Home were performed by the Crown. By an Order-in-Council of 1680 Governors were forbidden to leave their posts except by a written order of the King-in-Council. The Governor was the acknowledged channel for communication between the colonial legislature and the Home Government, except in cases where complaint was made by the colonists against the personal conduct of the Governor. An Act of William

III.* provided that if the Governor, Lieutenant-Governor, Deputy-Governor, or Commander-in-Chief of a plantation should after 1st August, 1700, commit any offence "contrary to the laws of the realm or in force within their respective governments or commands," such offence "shall be enquired of, heard, and determined in His Majesty's Court of King's Bench here in England or before such commissioners and in such county of this realm as shall be assigned by His Majesty's commission and by good and lawful men of the same county and that such punishments shall be inflicted on such offenders as are usually inflicted for offences of like nature committed here in England." In 1774, in the case *Mostyn v. Fabrigas*,† it was held that an action lies against a Governor in the courts of England for injuries committed by him in the possession of which he is Governor. In *Cameron v. Kyte* (1835)‡ the Judicial Committee of the Privy Council decided that a Governor has only those powers which are delegated in his commission, and that an act done by him and unauthorised by his commission or instructions is not equivalent to such an act done by the Crown itself, and is consequently invalid,—in other words, the Governor of a colony has not by virtue of his office all the prerogatives of the Crown, but only such as are given to him by his commission and instructions.

*11 & 12 William III., Cap. 12. †Cowper, 174. ‡3 Knapp, 332.

(*b*) A Council nominated by the Crown, through the Governor, to advise him, and to sit as a legislative body in conjunction with

(*c*) A Lower House of Representatives elected on a restricted franchise; members being chosen from colonists possessing certain property qualifications.

(*d*) A judicial system with juries, justices of the peace, superior judges, and courts moulded on those of England, and the right of ultimate appeal to the King-in-Council as essential parts. The judicial supremacy of the home country was placed on a statutory basis by 3 and 4 William IV., Cap. 41, which established the Judicial Committee of the Privy Council as the final court of appeal in colonial causes.

5. The machinery of government did not, however, always work smoothly. In the first place conflicts were far from rare between the colony, acting through its Assembly, and the Crown or Imperial Parliament. Though some colonies occasionally acted as if they were independent, it was never the rule of the Home Government to treat them as such. The supremacy of the Crown in Parliament was to be asserted at all costs over the colonial legislatures. Such conflicts were most prominent in connection with commercial and financial legislation.

The permanency of colonies in America and the two Indies had not been long assured when English merchants realised how they might be used for the advantage of English commerce. Parliament began to make laws regulating the colonial trade. One of these was the famous Navigation Act of 1651; and

for more than a century this trade was hampered by restrictions imposed by successive Navigation Acts and similar statutes. These were passed mainly in the interests of the British trader, and bore so hard upon the colonists that they formed one of the chief causes of the revolt of the thirteen American colonies.

The Navigation Act of 1651 was directed chiefly against the Dutch, who were then the chief sea-carriers in the world. It provided (1) that merchandise from Asia, Africa, or America should not be imported into England, Ireland, or any plantation or colony, except in ships built, owned, and commanded by Englishmen, and manned by crews of which at least three-fourths of the members were English; (2) that European produce should not be imported into the last mentioned countries except in English ships, or in ships belonging to the country from which the goods came. The first important result of this Act was a war with the Dutch, in which these doughty traders were defeated.

Such interference could create nothing but discontent among the colonists. To them it became plain that they were valued at Home chiefly as a means of increasing the wealth of English shipowners and merchants. In the reign of Charles II., the Navigation Act was confirmed, and there was also drawn up a list of articles that the colonists might sell only to England or English possessions. From time to time this list was extended. In 1660 it was provided that all colonial produce should be exported in English vessels; in 1663 that the colonies should receive no goods whatever in foreign vessels. In William III.'s reign colonial governors were requested to ensure a stricter administration of the navigation laws; and custom-house officers and admiralty courts were afterwards established to facilitate the execution of these

instructions. In the early part of the next century, Parliament enacted that all goods imported into the colonies must be shipped from England, and that no foreigner should do business with the colonies. The result of this legislation was to secure for England a monopoly of the colonial trade, though the smuggling of foreign goods into the colonies was never quite put down. Compelled to employ only English carriers, the colonists had to pay freight rates higher than would have been charged if foreigners had been allowed to compete with British shipowners. These increased rates tended to decrease the return they got for their goods, and at the same time raised the price of articles imported into the country.

English manufacturers needed constant supplies of raw material—of wool, cotton, and leather; they also sought new markets for their manufactured commodities. This explains much of the legislation upon the subject of colonial trade. For the former reason, the colonies were forbidden to export their staple products, which all consisted of raw material, to any country but England; whilst, because of the latter, they were compelled to import only from England all the manufactures they needed. They were also forbidden to export manufactures of their own, lest they should interfere with the sale of English goods abroad. In 1699, for example, an Act was passed prohibiting the exportation of woollen cloths made in the American colonies, and forbidding their sale even from one colony to another. The establishment of many manufactures and trades in the colonies was absolutely forbidden by the English Parliament, in order that England alone might be able to supply the colonists with goods at high prices.

It is true that, in return, England bought the raw products of the colonies; but many of the privileges

she professed to grant were privileges only in name. She undertook, for example, not to grow tobacco within her own borders—an industry that could never prosper in her soil and climate. The American colonists were not content to remain a farming people throughout the course of history. Their lands were naturally suited for many industries which the law would not allow them to establish, but which, once established, would reduce the cost of living very much. They grew dissatisfied under laws that regarded their welfare as secondary to that of the British manufacturer, merchant, and sailor; and, when a short-sighted ministry in George III.'s reign sought to impose further burdens upon them, they broke into open rebellion and won their independence.

Conflicts also arose between the Governor and the Lower House, which was accustomed to insist on the possession of privileges claimed, and for the most part enjoyed, by the House of Commons with respect to money legislation. Thus the Governor and Council of the Carolinas rejected a Bill initiated and passed by the Assembly eight times in four years, during which period the Assembly was six times dissolved. Governor Cornbury, in New Jersey, removed three members of the Assembly for refusing to pass his Militia Bills and Supply Bills. In such cases the Governor often appealed to the Crown, and the Assembly to one of the Secretaries of State. It has been pointed out that such deadlocks were inevitable, since the colonial constitutions were imitations of the English constitution before responsible government had been developed. The Council and the Governors were completely in the hands of the Crown, whilst the Assemblies were elected on a broader basis than that of the House of Commons in England. The difference, therefore, between the constitution of the

democratic house and that of the excutive body was much greater than was the case in England.

Canada was the stage on which the drama of colonial government was being played in its most interesting form in the period immediately preceding the colonisation of New Zealand. Upon the cession of Canada in 1763 a Governor and nominated Council were appointed by the Crown. In 1774 the Quebec Act provided for its government by a Governor, and nominee Executive and Legislative Councils, freed the Roman Catholics from disabilities, recognised the French civil law, enlarged the boundaries of the province, and instituted English criminal law. The immigration of the United Empire Loyalists from the United States after the declaration of independence was followed by the Canada Constitutional Act of 1791, which established the two provinces, Upper and Lower Canada, each with a Governor, nominee Executive and Legislative Councils, and an elected Assembly. Grave difficulties arose. The people had no control of the administration, the provinces were governed largely from England, they were exposed to all the evils that attended changes of ministers at Home, and much of the local revenue was still raised under imperial Acts. In Upper Canada, where the colonists were English, the direction of affairs fell into the hands of the "Family Compact," intensely conservative and greedy of lands and offices. When the demand for ministerial government was refused, (the control of the revenue had been relinquished in both provinces by the Imperial Government in 1832) there came in 1838 the rebellion under Mackenzie, the leader of the Opposition. In Lower, or French, Canada, the struggle between Executive and Legislature over taxation, lands, and patronage was embittered by the fact that whilst the Executive was

English, the Assembly was French. The popular agitation was for an elective Legislative Council. Papineau's rebellion in 1837 ensued upon its failure.

The situation demanded decisive measures; the constitution of Lower Canada was suspended in 1838 by an imperial Act, and the Melbourne Ministry appointed the Earl of Durham High Commissioner and Governor-General of Canada to restore order and to report upon the condition and future government of the provinces. His Report, presented to Parliament a few months before the despatch of *The Tory* to New Zealand, will demand our attention when we deal in Chapter XVII. with the introduction of responsible government in New Zealand.

There are very many instances of the royal assent being withheld from the enactments of colonial legislatures. There was also a well-established rule that laws passed by these should have no validity if repugnant to the laws of England, a rule that was confirmed by a statute of William III.

6. Matters relating to the aborigines were, for the most part reserved for the Home Government, acting through special commissioners appointed for Indian affairs. The Governors, moreover, were strictly instructed to allow no unlicensed private purchases of land from the aborigines.

7. The political offices in the colony were frequently bestowed on incompetent men, simply because they were related to persons of high station and influence at Home. Others again received the gifts of colonial offices from their friends in high places and sold them, or leased them, to deputies. It was not till 1782 that a Place Act was passed in the endeavour to remedy this grave abuse.

8. Even in the case of the earliest colonies, such as Virginia, the New England colonies, and Maryland,

there had been no attempt on the part of the Crown to impose a religious establishment on the new communities. The colonies, indeed, were rather welcomed as purging the Mother Country of those dissatisfied with the idea of a State Church at Home. The religious animosities of the Motherland were not slow to appear in some of the colonies, but they were the result of the mixed society of the settlements and typical of their age, and were not a direct consequence of any active interference by the Crown.

6. Colonial Administration at Home.

So far we have described chiefly the form of government in the colonies themselves, but, before we can judge the strength of the bonds uniting these with the Mother Country, we must note in historical sequence the various media through which the Crown exercised control over the colonies.

We have seen that the Crown grants establishing "plantations," whether in chartered colonies, in royal provinces, or in proprietary settlements, were made by the Crown, acting upon the advice of the Privy Council. Although the feudal theory was moribund in England, it survived in the colonies in so far as regards the relations of the Crown and the Proprietors and Companies.

Long before the establishment of the colonies of the 17th century the business of the Crown had grown to such an extent that it was discharged by a body of servants to whom it was specially entrusted. Till the full development of the Cabinet system in the eighteenth century, these ministers of the Crown did not completely come under the control of Parliament. Hence at the inception of the British colonial system it was natural that the Privy Council should take the most active part, under the influence of the sovereign,

in establishing these colonies, though the claim of the Privy Council to colonial control was not always well received by the Parliament, even as early as James I.'s reign. It has been thought that James I. intended to use the Royal Virginia Council as a separate Privy Council, or at least as a committee of the Privy Council, for general colonial purposes. In the instructions issued in 1609, the year in which the Virginian charter was granted, he says that this Council is to have "full power and authority at our pleasure in our name and under us to give directions to the council for the colonies for the good government of the people to be placed in those parts."

A constant and necessary tendency in English constitutional history has been to specialise in the discharge of governmental functions, and nowhere is this more marked than with the Privy Council, which—itself an offshoot of the larger Ordinary Council—found it convenient to act through committees even at an early date. In 1634 certain Lords Commissioners "for the making laws and orders for government of English colonies planted in foreign parts" were appointed by writ under the Privy Seal "to make laws, constitutions, and ordinances pertaining either to the public state of those colonies or to the private profit of them."

During the Commonwealth two similar Committees were created, in 1643 and in 1655 respectively. But it is from the Restoration that the "Colonial Office" takes definite shape. The Council of Trade, formed of members of the Privy Council and representative merchants, was constituted a standing committee (November 7th, 1660) "to consider the general state and condition of our foreign plantations and of the navigation, trade, and commodities arising therefrom," to advise the Crown as to colonial fiscal policy,

and in these matters to take advice or information from the "Council appointed and set apart by us to the more particular inspection, regulation, and care of our foreign plantations." The body referred to in the last sentence was created on the 1st December, 1660, "to advise, order, settle, and dispose of all matters relating to the good government of the colonies." The functions of these bodies were so closely related that they were amalgamated in 1672 into the Council of Trade and Plantations, with a President and Vice-President, but about the end of 1675 this Council was abolished, and its business was transferred to a committee of the Privy Council, consisting of the Lord Treasurer, the Privy Seal, and seventeen other members. There is sufficient evidence to show that all these Councils were regarded as committees of the Privy Council.

In 1695 a similar Council was again established by William III. It is generally known as the Board of Trade and Plantations, and was given power over "the plantations in America and elsewhere," including authority to recommend to the Privy Council the names of suitable candidates for colonial offices, including that of Governor, and the duty of scrutinising the acts of colonial Assemblies when sent Home for the royal assent. It consisted of fifteen members, and was continued under various commissions till 1782, when it was abolished by statute as costly and inefficient.* Colonial business was for a brief period transacted in the Plantations Branch of the Home Office. Burke's measure of economical reform, which extinguished this Board, provided that its functions might be discharged by any committee, or committees, of the Privy Council, appointed by the

*See Burke's Speech on Economical Reform.

sovereign during his pleasure and receiving no emolument therefrom. This provision was fulfilled in 1786, when an Order-in-Council created the Committee of the Privy Council for Trade and Plantations, composed of eighteen members, eight of them being officials. This is the body known as the Board of Trade since a statute of 1862. It was not till 1817 that a statute authorised the payment of a salary to the Vice-President of this Committee, who was a member of the administration but not a Cabinet minister. Ten years later, a salary was allocated to the office of President. The Board was in existence at the time of the establishment of British sovereignty in New Zealand. Since 1867 the President has been a member of the Cabinet and the Vice-President has become a Parliamentary secretary with powers similar to those of an under-secretary of state. The Board, as a Committee of the Privy Council, was of course re-appointed at the beginning of each reign.

There was, however, in colonial administration another agent who became active during the eighteenth century. This was that particular Secretary of State within whose purview colonial matters came. The development of the office of Secretary of State is another example of the specialisation of governmental functions. From Henry III.'s reign on to the second quarter of the 15th century, there was only one Secretary; in the Tudor period the office acquired a definite status. Till the Act of Union with Scotland (1707), there were usually two Secretaries, or rather the secretariate was shared by two officials, one termed the Northern, or First, the other, the Southern, or Second, Secretary. From the beginning of the eighteenth century the work of the Southern department included colonial, as well as Home and Irish, affairs.

From 1707 to 1746, there was a third and subordinate Secretary for Scotland. During the American troubles (1768-82), colonial matters attained to such importance that a special Secretary of State for the Colonies (American Department) was appointed, the patent of appointment stating that "the public business of the plantations and the colonies increasing, it is expedient to appoint one other principal Secretary of State besides the two ancient Secretaries." After being held successively by three men, Lords Hillsborough, Dartmouth, and Sackville Germaine, the office was abolished by the Act which swept away the Board of Trade.

In this year, 1782, the Northern Department became the Foreign Office, and the Southern was converted into the Home Office. The care of the colonies was again entrusted to the latter, which for some time afterwards maintained a special "Office for Plantations" staff. In 1794 the increased work involved in army administration, resulting from the French Revolution, caused the creation of a Secretary of State for War. This official was also nominal Secretary for the Colonies, the business of which was actually transferred to the War Department in 1801.*

During the period between the establishment of British commercial interests with New Zealand and the proclamation of British sovereignty over these islands, the colonial affairs of the United Kingdom were administered, in the name of and on behalf of the sovereign, by the Board of Trade, acting through its effective working members, and by the Secretary of State for War and the Colonies. Both, as ministers or servants of the Crown, were responsible to the

*In 1854 the Secretary of State for War and the Colonies was relieved of his duties in respect of the Army, and a new Secretary of State for War was created. In 1858 a fifth Secretary was appointed for Indian affairs.

Crown in Parliament, and ultimately to the electorate of the House of Commons, for acts done and advice given in their ministerial capacity; but in the history of New Zealand, both before and after the proclamation of sovereignty, we hear much of the Secretary of State and little of the Board of Trade. The latter body had come merely to exercise a scrutiny over the acts of the legislature, and its scrutiny was only nominal with respect to Acts that did not affect the commercial relations of the Empire. Its functions were consultative rather than properly administrative.

7. Evils of the System.

The method thus naturally evolved was justified by the fact of its evolution, but it brought with it certain direct disadvantages which were felt in negotiations between settlers in New Zealand and the Home Government.

1. In the first place there resulted a certain confusion of powers and considerable overlapping of jurisdiction. There were three authorities before which colonial affairs might come: the Privy Council; its Committee, the Board of Trade; and a Secretary of State. Though the Secretary of State was a member of the Council and of the Committee, in accordance with custom from the time of Clarendon, there was no provision for forcing him to attend their meetings. This overlapping of powers led to vexatious delays. Up to 1752 colonial governors had sent reports both to the Board of Trade and to the Secretary of State, but it was then decided that all ordinary accounts should be directed to the Board of Trade.

One of the beneficial results of the American rebellion was to draw attention to the grave defects of this Board, which was destined soon to relax its grasp

of colonial administration. It had always been hampered by lack of executive power. It had in theory full power to gather valuable information on colonial affairs, and to advise the sovereign to pursue courses of action guided by the results of its investigations. It might even issue instructions to the colonial authorities. But, with no voice in the deliberations of the Cabinet, and no ready means of access to the sovereign, it was devoid both of responsibility for its advice and of power to enforce its instructions. The real executive power lay in the hands of the Secretary of State. And when, after its resuscitation, the Board of Trade became intimately linked with the Cabinet, this official was so firmly established as the responsible colonial minister that the Board, though exercising extensive authority in other spheres, was left with little beyond nominal powers so far as control of the colonies went. In 1849, however, it was strengthened by Earl Grey, and it reported to the Colonial Office on the form of constitution to be granted to the Australian Colonies.

An Act or despatch from the colonies was usually sent to the Secretary of State, who, as adviser of the Crown, presented it for the consideration of the sovereign.* The latter would then lay it before the Committee of the Council for Trade and the Plantations, which finally advised the Crown as to its further action. Complete control of colonial affairs had thus been secured by the Imperial Parliament before New Zealand became a British colony—a transference of authority that was theoretically justified by George III.'s surrender of his right in the Crown lands in return for a fixed annual income from Parliament.

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*Colonial Acts are also submitted to the Law Officers of the Crown for their consideration and report.

2. In proportion as the chief power passed to the Secretary of State, three evils became more pronounced. The Secretary's tenure of office depended on the length of time during which his party could secure the confidence of a majority in the Commons. In the period from 1801 to 1840, when the colonisation of New Zealand was being vigorously discussed in England and in the young colony of New South Wales, there were no fewer than eighteen changes in the secretariate.*

In the period, 1840 to 1856, during which New Zealand, though a colony, was without responsible government, and therefore directly dependent on the Home Government, there were ten such changes.†

One result of this was that frequent changes occurred in the general policy of the Colonial Office. A second was that the chief weakness of government by amateurs was intensified. Either the Secretary was not sufficiently long in office to become fully acquainted with the details of his work; or, if the fortunes of his political party enabled him to enjoy a reasonable length of tenure, there was still no certainty of its permanence, and therefore no special inducement for him to put forth his best efforts. The major portion of the work, too, was left to subordinates, with some of the inevitable evil consequences of a bureaucratic system, while, worst of all, the course of affairs in the colonies was dependent on the state of political parties in England, which bore no necessary relation whatever to the special needs

*1801, Lord Hobart; 1804, Lord Camden; 1805, Lord Castlereagh; 1806, W. Wyndham; 1807, Lord Castlereagh; 1809, Lord Liverpool; 1812, Lord Bathurst; 1827, F. Robinson; 1827, W. Huskisson; 1828, Sir G. Murray; 1830, Lord Goderich; 1833, E. Stanley; 1834, T. Spring Rice; 1834, Duke of Wellington; 1834, Lord Aberdeen; 1835, C. Grant, Lord Glenelg; 1839, Lord Normanby; 1839, Lord J. Russell.

†1841, Lord Stanley; 1845, W. E. Gladstone; 1846, Lord Grey; 1852, Sir J. Pakington; 1852. Duke of Newcastle; 1854, Sir G. Grey; 1855, (Feb.) S. Herbert; (May) Lord J. Russell; (July) Sir W. Molesworth; (Nov.) H. Labouchere.

of new states constituted on the other side of the world.

3. The union of colonial administration with that of the army from 1801 to 1854 was responsible for much of the disorganisation that existed in colonial affairs. The combined department was over-weighted with business; the colonies were largely used for finding positions for those connected with the War Office; and colonial administration was tainted with the military spirit which tended to limit the choice of Governors to army men, the natural bent of whose minds was opposed to constitutional freedom.

(This sketch of the constitutional development of the Colonies is continued in part of Chapter XVII., pages 257-8 and 266-9)

Chapter IX.

NEW ZEALAND A DEPENDENCY OF NEW SOUTH WALES.

1. Proclamation of British Sovereignty.

We have already described the steps taken by Hobson to secure the signatures of the Maori chiefs to the Treaty of Waitangi, and his despatch of H.M.S. *Britomart* in August to forestall the French corvette *L'Aube* at Akaroa. In March Gipps had sent him a small military force consisting of a field officer, a captain, two subalterns, four sergeants, and eighty rank and file, as well as two police magistrates.

The incidents described in the next section impelled Hobson to hasten his proceedings, and, on May 21st, he proclaimed the Queen's sovereignty over the North Island on the ground of cession by the natives, and also over all the islands on the ground that he had been commanded so to do. Proclamations specially relating to Stewart and the South Islands were, as already stated in Chapter VII., made by Bunbury on the 5th June, by right of discovery, at Southern Port, and on the 17th June, by right of cession, at Cloudy Bay.

2. The Port Nicholson Council of Colonists.

In the meantime, one more little comedy had to be played out before Hobson, armed with Her Majesty's commission and the Treaty of Waitangi, could feel that both natives and *pakehas* were subject to his rule. The New Zealand Company's immigrants had begun to land at Port Nicholson in January, and they proceeded to take steps for the preservation of law and

order in their settlement. A Provisional Constitution had been drawn up in England on September 14th, 1839, and signed by the emigrants then awaiting their departure in the Thames, that is, whilst New Zealand was still outside the British Dominions,a fact which had been emphatically stated by the British Government itself. This Constitution provided for a president; a committee of twenty-five, with taxing powers; a court consisting of an umpire with seven assessors in criminal cases and two arbitrators in civil; and a court of appeal of five members of the committee. The committee, generally known in New Zealand as the Council of Colonists, held its first meeting in the colony on March 2nd, 1840, near Petone, when it was arranged to obtain the sanction of the chiefs to the constitution. The chiefs signed the deed of ratification and confirmation of the constitution, which provided *inter alia* that the first Council should continue in office throughout the year 1840, and that, on the first day of each succeeding year a fresh Council should be elected by vote of the majority of those male inhabitants of the Colony who had resided there for at least three months previously; that the President of the Council should remain in office for five years from the 1st January, 1840; that he should have a veto upon all the resolutions of the Council, but that any resolutions so vetoed, if adopted by a succeeding Council, should have the force of law; that the Council might perform all acts not repugnant to the law of England which the "native sovereign chiefs" might exercise and perform; that the latter would not levy any taxes without the advice and consent of the Council; that all the native inhabitants were to possess perfect equality of rights with the colonists save that, for the first five years, they were not to vote at elections of the Council, nor

to serve as assessors, except in cases in which their own rights and interests were concerned, when at least three of the assessors should be natives; that during the same period no law was to be made affecting the rights of the native population without their specially obtained consent.

The officers of the Company's settlement were divided into two classes:—(1) Those appointed by the Company, comprising the Principal Agent of the Company (Colonel William Wakefield), a surveyor-general, a first assistant-surgeon, two assistant-surveyors, a harbour-master, a consulting physician, a surgeon, a storekeeper-general, an assistant-storekeeper, an agent for emigrants, a superintendent of the Company's works, an agent for natives and interpreter, and a pilot. (2) The officers of the Colony as provided for in the Provisional Constitution, viz.: umpire (Dr. Evans), a secretary (Samuel Revans), a magistrate (Major Baker), and two district constables.

This eminently practical and necessary scheme of self-government was hardly likely to commend itself to the representative of the Crown, and it had scarcely been put into operation when his attention was directed to it in a sensational way. On April 14th, 1840, one Captain Pearson of the brig *Integrity* had trouble with the charterer of his vessel (a resident of Hobart, V.D.L.), and was summoned to appear before the umpire of the infant community. He questioned the jurisdiction of the local court, disobeyed the summons, was committed for contempt, and arrested. Placed on board the *Tory* he escaped, and having made his way to Kororareka, denounced the provisional government and its proceedings to Captain Hobson. The latter, acting with the best intentions, but with a sad lack of judgment, charged the Company's settlers—"these demagogues" as he

phrased them—with high treason in having usurped Her Majesty's authority, by promulgating a constitution, appointing magistrates, and levying taxes, and, as he wrote to the Colonial Secretary, he, "without an hour's delay despatched Mr. Willoughby Shortland and Lieutenant Smart to Wellington, with an armed force of thirty-five men, and a proclamation which commanded all persons to withdraw from the illegal association; and, upon the allegiance which they owe to Her Majesty Queen Victoria, to submit to the proper authorities in New Zealand legally appointed." Direction was also given for publication of copies of the proclamations of sovereignty issued on May 21st. The persons thus guilty of high treason received Shortland with open arms, tendered him a loyal and dutiful address, but declared in emphatic terms that their action was justifiable. In a spirited speech Colonel Wakefield urged the settlers to demonstrate their loyalty, with no shrinking from responsibility for past acts, neither denying nor retracting any act or word to which he had been a party, but to prove that, although whilst left to themselves they knew how to maintain law and order, they seized the first opportunity to claim the protection of the government, whose authority they had never disputed, and in whose support they were ready to render their cordial and dutiful services. Shortland salved his feelings by sending in June a despatch to Governor Hobson, reporting "that Her Majesty's Government is fully established, and that both the European and native population are in a very satisfactory state."

Shortly after this Colonel Wakefield visited Captain Hobson at Kororareka, and on his return to Wellington referred in generous terms to the Governor's kindness of heart and nature, and his straightforward conduct, characteristics of his profession.

3. Foundation of the Capital.

One of Hobson's earliest cares was the selection of a site for the seat of government. Naturally the Bay of Islands was the place that first suggested itself to him. Kororareka was the principal settlement in the colony, and he obtained from Captain Clendon a town site, four miles by water from Kororareka, in exchange for 10,000 acres to be selected by Clendon south of the Waitemata. The government offices were erected and the infant town named Russell,* but it was soon found that the country was poor and the geographical situation inconvenient, and that no population was attracted thither, even from Kororareka.

Realising his mistake, Hobson promptly looked elsewhere, and without hesitation, selected the spot on the shores of the Waitemata where the city of Auckland now stands. The site commended itself to him, "first by its central water position, secondly by the great facility of internal water communication by the Kaipara and its branches to the northward, and the Manukau and Waikato to the southward; thirdly from the facility and safety of its port, and the proximity of several smaller ports, abounding with the most valuable timber; and, finally, by the fertility of the soil, which is stated by persons capable of appreciating it, to be available for every agricultural purpose, the richest and most valuable land in the Northern Island being concentrated within a radius of fifty miles."

The site was purchased from the natives of Orakei in May through the Protector of the Aborigines and Captain Symonds, the agent of the New Zealand

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*When the capital was removed the name was transferred to Kororareka, though it did not come into general use until after the sack of that town in 1845.

Manukau and Waitemata Company. The British flag was hoisted on the 18th September. In January, 1841, the Government removed from Russell to the new capital, which was named after Lord Auckland, the Governor-General of India. The subsequent history of Auckland justified Hobson's selection. It was placed so as effectively to separate the northern tribes from those of the Thames and Waikato, and its situation was consequently found to have considerable strategic value during the Maori wars. Until the occupation of the South Island it was nearer the geographical centre of the settlements than Wellington, which became the capital a quarter of a century later, and it is at present the most populous city of New Zealand.

The public sale of town and suburban allotments resulted in some remarkably large prices being obtained. Settlement followed rapidly, and the town soon sprang into being though the first government immigrants from the United Kingdom did not arrive till October, 1842. The selection, however, was distasteful to the Company's settlers some 400 miles further south. Somes, the deputy-governor of the Company, protested in November, 1841, to Lord Stanley against the establishment of the capital in the wilderness when there was at Port Nicholson a settlement of 2,000 souls, and referred to Hobson's "petty vanity" and his "poor jealousy of those who presumed to begin the colonisation of New Zealand." On the protest being repeated in June, 1843, Stanley replied disclaiming any responsibility to the Company, and stating that "complaints of the acts or omissions of a governor, transmitted from a colony, without intervention of the Governor or the simultaneous communication of such complaint to him, could not be entertained until the Governor should have obtained and reported on a copy of the complaint."

4. Finance.

The cost of establishing an effective form of government in New Zealand was rendered unusually heavy by the scattered nature of its settlements. There was not, as there had been in New South Wales, and in South Australia, one centre from which the Colony grew outwards; but there were several almost independent groups of settlers planted along the coast—at Russell, Hokianga, Auckland, on both sides of Cook Strait, and at Banks Peninsula—and these were shortly to be increased by the New Zealand Company's plantations at Wanganui, New Plymouth, Nelson, Otago, and Canterbury. To administer the affairs of these isolated communities required a large number of officers and an expenditure that overtaxed the resources of the revenue.

During 1840, whilst the Government expenditure in New Zealand amounted to nearly £20,000 (£19,798), the revenue for that year did not total one thousand (£926). The sales of land in April, 1841, realised £21,299 9s.; but a certain proportion of this sum had to be expended, in accordance with imperial law, upon immigration, and a considerable amount of it was also allocated to defray the expense of purchasing and surveying native lands. By May, 1841, the loan from the New South Wales Treasury had increased to £43,347. On the erection of New Zealand into a separate colony, this debt was transferred to the English Treasury.

5. Separation from New South Wales.

The colonists felt that the development of New Zealand would be hindered if its policy were to be shaped by the Legislative Council of New South Wales, since both colonies were competitors for the

labour and capital of the Mother Country. It was feared that heavy dues might be imposed on the New Zealand ports, and that the sale of land might be obstructed through fear of drawing off immigrants from New South Wales. Moreover, in many of the subjects of legislation, particularly land, some of the New South Wales councillors had direct pecuniary interests. The separation of New Zealand from New South Wales was indeed essential for the good government of both. It was demanded by a consideration of the jealousies then existing between the two possessions, of their conflicting interests, of the repugnance of New Zealand to supervision by a penal settlement, of the distance separating them, of the lack of sufficient acquaintance of the Governor and Council of New South Wales with the special circumstances and needs of New Zealand, and of the consequent inability of that body to legislate for the younger colony in such a manner as to command the respect and obedience of its inhabitants.

The settlers were therefore pleased when Lord John Russell announced in a despatch of 10th November, 1840, the Queen's intention to erect the dependency into a separate colony.

Other facts connected with the government of New Zealand at this initial stage are treated more conveniently in Chapters XV. and XVI., which are devoted to a continuous account of the New Zealand Company and to the land policy of the Crown Colony period.

CHAPTER X.

THE CONSTITUTION OF 1840.

1. The Charter of 1840.

New Zealand was raised to the dignity of a separate colony by letters patent under the great seal of the 16th November, 1840, issued under the authority conferred by the statute, 3 and 4 Vict. C. 62, August 17th, 1840, which enacted that it should "be lawful for Her Majesty by Letters Patent, to be from Time to Time issued under the Great Seal of the United Kingdom, to erect into a separate Colony or Colonies any Islands which now are, or which hereafter may be, comprised within, and be Dependencies of, the said Colony of New South Wales," and to constitute for any new colony so created a Legislative Council, consisting of no fewer than seven persons, inclusive of the Governor or Lieutenant-Governor of the Colony, holding their places at the pleasure of the Crown, and competent to make such laws as might be required for peace and good government. The laws so made were to be consistent with the law of England, so far as the circumstances of the Colony might admit, and to be subject to confirmation or disallowance by the Crown. Moreover, the Council was to be guided in its legislation by any instructions issued by the Queen-in-Council for that purpose. All instructions issued by the Crown in pursuance of the Act, and all laws of the Legislative Council, were to be laid before the Houses of Parliament within one month from the date of issuing the instructions, or from the arrival in the United Kingdom of copies of the laws, should Parliament then be sitting, or, failing their arrival during a session of Parliament, within one month from the commencement of the next session.

The Charter proclaimed the boundaries of the Colony to be the parallels of 34° 30′ north* and of 47° 10′ south latitude, and the meridians of 166° 5′ east and 179° east longitude. The principal islands, then commonly known as North Island, the Middle or South Island, and Stewart Island, were henceforward to be known respectively as New Ulster, New Munster, and New Leinster; but these names seldom emerged from the obscurity of official documents, and have long been obsolete. The Charter authorised the Governor or the Lieutenant-Governor of the Colony, and at least six other persons chosen from such public officers within the Colony or such other persons as might from time to time be appointed by the Crown for that purpose, to constitute the Legislative Council, all the members of which were to hold their places at the pleasure of the Crown. In making all laws and ordinances necessary for the government of the Colony, the Council was to conform to such instructions as the Crown, with the advice of the Privy Council, might make for its guidance.

The Governor was also authorised to summon an Executive Council, composed of persons to be named in his Instructions; to keep and use a public seal of the Colony; to issue, with the advice and consent of the Executive Council, proclamations dividing the Colony into districts, counties, hundreds, towns, townships, and parishes; to make and execute grants of Crown waste lands to private persons for their own use and benefit, or to any persons, "bodies politic or corporate," in trust for public uses, it being expressly provided that nothing in the Charter should affect or be construed to affect "the rights of any aboriginal natives of the said Colony of New Zealand

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***North : This error was rectified in the Charter of April, 1842. See page 171.**

to the actual occupation or enjoyment in their own persons, or in the persons of their descendants, of any lands in the said Colony now actually occupied or enjoyed by such natives;" to constitute and appoint judges and other necessary officers for the administration of justice and the execution of the laws; to remit fines, penalties, or forfeitures payable to the Crown, provided they did not exceed the sum of £50 in any one case, and to suspend the payment of any such fine exceeding the sum of £50 pending the signification of the Crown's pleasure; to grant to any offender convicted of crime within the Colony a free and unconditional pardon or a respite of the execution of his sentence; and, finally, to suspend any person exercising an office under the Crown, such suspension to continue only until the pleasure of the Crown should be made known.

In the event of the Governor's death or absence from the Colony, it was provided that his power should be vested in the Lieutenant-Governor, or failing the appointment of such an officer, in the Colonial Secretary, who should possess all the powers and authorities granted to the Governor.

2. The Governor's Instructions.

On the 24th November, Captain Hobson, the Lieutenant-Governor of the Dependency, was, by commission, appointed Governor and Commander-in-Chief of the Colony of New Zealand. His instructions, which were dated December 5th, make a lengthy document of sixty-three clauses. As soon as convenient after receiving them in the Colony, he was to publish the Charter, to take the usual parliamentary oaths, and the Colonial Governors' oath of office, which were to be administered by the chief magistrate of the Colony. He was then in turn to administer

the appropriate oaths to each of the chief officers of the Government who might then be present.

The Colonial Secretary, the Attorney-General, and the Public Treasurer were to be *ex officio* members of the Legislative Council; the remaining members were to consist of those three justices whose names stood first in order on the commission of the peace, provided that they held no office at the pleasure of the Crown. The commission being revocable and renewable from time to time by the Governor, this clause gave him power to remove any obnoxious non-official member.

Regulations for the guidance of the Legislative Council were included in the Instructions. The Governor was to propose all laws and questions for debate, but any member was given the right to suggest laws and questions to the Governor. The minutes were to be regularly forwarded to the Crown through a secretary of state. The Governor was to propose or assent to no ordinance repugnant to the terms of the Charter, or the Instructions, or any Act of Parliament; any such ordinance was to be regarded as absolutely null and void.

Clauses 12 to 22 specified other types of ordinances which the Governor was forbidden to propose and to which he should not give his asent: such as ordinances impeding persons in the free exercise of their religion; lessening or impairing the Crown revenue, or diminishing or infringing the royal prerogative, or modifying the number, salary, or allowances of any public officers previously sanctioned by the Crown; authorising the issue of bills of credit or other negotiable securities, or establishing any government paper currency, or declaring such bills, paper currency, or any coin except the legal coin of the realm, to be legal tender; subjecting persons not of European

birth or descent to any disabilities or restrictions to which persons of European birth or descent would not also be subject; raising money by lotteries; naturalising aliens, except with a clause suspending and deferring the operation of the ordinance until the pleasure of the Crown should be known; dissolving the marriage tie; imposing any tax or duty on the trade or shipping of the United Kingdom, or any tax upon transient traders from which other traders would be exempt; making a grant of money, or land, or other donation or gratuity to the Governor; affecting the property of any individual in which there was not a saving of the rights of the Crown; and of all corporations and other persons, excepting those at whose instance or for whose benefit the private ordinance in question might be passed. Finally, the Governor was neither to propose, nor assent to, any ordinance to which the royal assent had once been refused, except with the express leave of the Crown.

No ordinance was to take effect until the pleasure of the Crown should first be made known in the Colony, except only in the case of ordinances for raising the annual supplies and "in any other case in which the delay incident to a previous communication with us would be productive of serious injury or inconvenience." In such cases the Governor was empowered, with the advice of the Council, to determine the time at which the ordinance should take effect; but the Crown reserved to itself full power to confirm and finally enact, or to disallow, any ordinance passed by the Council. No laws were to be made to continue for less than two years except in cases of unforeseen emergency.

Clause 29 ensured that all moneys levied by laws or ordinances should be granted or reserved to the Crown for the public uses of the Colony and the support of its government.

Clauses 30 to 36 provided for the constitution of the Executive Council, which was to consist of the Colonial Secretary, the Attorney-General, and the Treasurer.

In executing all his powers and authorities, the Governor was to consult and advise with this Council, and to exercise them upon its concurrence and advice; but he might act without this assistance in cases in which delay would be unavoidably incident to the meeting of the Council, or which might appear not to be of sufficient importance to require a meeting, or in which the Crown's service might sustain material prejudice by consultation with the Council. If the Governor saw sufficient cause to dissent from the opinion of the majority, or even the whole, of the Council, he was given full authority to execute his powers in opposition to their opinions.

The Governor was instructed to begin a thorough survey of the Colony, dividing it into counties, each, as nearly as may be, 40 miles square; to sub-divide each county into hundreds of 100 square miles each; and to mark off each hundred in parishes of approximately 25 square miles. The inhabitants of such counties, hundreds and parishes were to be granted all "the franchises, immunities, rights, and privileges" which were then enjoyed by the residents of the counties, hundreds and parishes in England, in so far as the circumstances of the Colony might admit of the grant. The Surveyor-General was to be instructed to reserve lands for public uses, such lands to be closed to occupation by private persons. The waste lands of the Colony were to be offered for sale at one uniform price per acre to be fixed, from time to time, by one of the Secretaries of State. Provision was made for the purchase of land by residents of the United Kingdom, who were to be entitled either

to the free conveyance to the Colony of emigrants named by them, in a certain proportion to the amounts paid for their land, or to the payment of a bounty on the introduction of emigrants into the Colony.

All appointments made by the Governor were to be regarded only as temporary until the notification of the Crown's allowance or disallowance of them. The judge who had presided at the trial of any offender condemned to death was to send a report of the case to the Governor for consideration at the next ensuing meeting of the Executive Council, to which he was to be specially summoned.

Finally, the well-being of the natives was recommended to the Governor's particular care. He was bidden to the utmost of his power to promote religion and education among them, and especially to protect them in their persons and in the free enjoyment of their possessions; by all lawful means to prevent and restrain all violence and injustice that might in any manner be practised or attempted against them; and to take such measures as might appear necessary for their conversion to the Christian faith and for their advancement in civilisation.

3. Proclamation of Separation.

The documents relating to the establishment of the Colony did not reach the Lieutenant-Governor till April, 1841. On the 3rd May he assembled at Auckland the majority of the officers of the Government, and, the Royal Charter and the Commission appointing him Governor having been read, he publicly took the necessary oaths, and forthwith installed the following persons in their respective public offices: Colonial Secretary, Lieutenant Willoughby Shortland; Attorney-General, Francis Fisher; Colonial Treasurer

and Collector of Customs, George Cooper; Surveyor-General, Felton Mathew; Sheriff and Clerk to the Legislative and Executive Councils, James Coates; Chief Protector of Aborigines, George Clarke; Colonial Storekeeper, Henry Tucker; Superintendent of Works, William Mason; Colonial Surgeon, John Johnson; Harbour Master, David Rough; Postmaster-General, Thomas Paton; Registrar of the Supreme Court, R. A. Fitzgerald; Coroners, J. Johnson, W. Davies, and J. Fitzgerald; Commissioners of Land Claims, E. L. Godfrey and Matthew Richmond.

Chapter XI.

HOBSON'S ADMINISTRATION.

1. General Features of the Crown Colony Period.

New Zealand was now a Crown Colony of the strict type*. Fortunately, however, the Councillors whom Governor Hobson gathered round him, were for the most part, men of a quality and capacity very rarely to be found or expected in so young a country, and with their advice and assistance there was passed in the first two years a long series of well-drawn ordinances which made provision for all the important departments of social and civic activity. Courts of law were established, and provision made for the licensing of public houses, the collection of customs, the regulation of harbours, the grant of copyright, the registration of deeds, and for a system of conveyancing purged of many of the technicalities and historic anomalies of English real property law. Most of these, and of the many other valuable ordinances which were rapidly passed, were drawn by Swainson, who in 1841 succeeded Fisher as Attorney-General. He possessed a rare skill in this difficult art, and a zeal for legal reform which was always adequately controlled by sound knowledge and caution. Many of his ordinances, though now concealed in consolidating acts, still remain both in substance and in letter upon the statute book, and the Colony owes him a particular debt of gratitude for having, by a single enactment of most technical character, but drawn with lucidity and conciseness, successfully swept away from the

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*See above, page 109.

conveyancing system a host of awkward survivals of feudal and technical rules.

The Constitution of 1840 was that under which the infant colony was governed for the succeeding twelve years. This period of necessary tutelage comprises three governorships—the short and troublous term of Hobson, the vacillating and bungling rule of the well-meaning but mischievous Fitzroy, the strong hand of Governor Grey. It is the period which embraces the slow and weary settlement of land claims; the dark days of the maligned New Zealand Company, stung into rashness by a policy of procrastination in the settlement of its demands, in circumstances where expedition above all things was essential. It is the period of land-grabbing, induced very largely by Fitzroy's abandonment of the right of pre-emption, secured by the Treaty of Waitangi; of the dishonour of the same ruler's drafts on the English Treasury; of paper money issued in defiance of instructions; of virtual bankruptcy, and universal depression. It covers the cutting down of the flagstaff at Kororareka, and the consequent war with Heke; the lurid sacking of the former capital; Grey's strong repression of the native troubles brought about by his predecessor's weakness; and his vigorous measures for the restoration of commercial ease. It witnessed both the gradual death of the Company which had done so much for the establishment of the Colony, and the birth of new settlements, each with a history of the deepest interest, in the districts of Wanganui, Taranaki, Nelson, Otago, and Canterbury. Finally, it was a period of growing desire for complete representative government, a system well suited to the temper and quality of the 12,000 selected colonists who had settled in New Zealand by 1850.

2. First Session of the Legislative Council, 1840.

The first session of the Legislative Council was opened on May 24th, 1840. The Governor said that the Charter brought British law into full operation throughout the Colony, and that the measures to be proposed to the Council were intended to be temporary, as during the recess he would prepare laws suitable to the conditions of New Zealand.

A month's discussion crystallized into six ordinances. The first declared the laws of New South Wales, so far as they could be made applicable to the conditions of the Colony, to be in force in New Zealand, from the date of the Royal Charter, and indemnified the Lieutenant-Governor and other officers for certain acts done between the date of the Royal Charter and the passing of the ordinance. This ordinance was repealed on the 25th April, 1842. The second ordinance repealed the New South Wales Act that had authorised the issue of the Land Commission,* and vested similar powers in the Governor of New Zealand; it will require detailed notice in Chapter XV. on the Land Policy. The third ordinance established the customs duties subsequently described in section 5 on Finance. The fourth set up Courts of Quarter Sessions and repealed within New Zealand certain Acts of New South Wales, concerning the administration of Justice, which had been adopted within the Colony. It provided for the holding of General and Quarter Sessions at Auckland, Port Nicholson, and Russell, and such other places as the Governor might from time to time appoint; defined the powers of the court and the qualifications of jurors; and authorised the Governor to institute Courts of Petty Sessions of two or more Justices, and to appoint visiting justices for the more distant parts of the Colony. With the

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*See p. 209 below.

exception of a few unimportant clauses, this ordinance was entirely superseded or repealed by several subsequent laws:—by the County Courts Ordinance (Session II.) which repealed it so far as it related to General and Quarter Sessions of the Peace; by the Jury Ordinance (Session II.), which repealed the clause relating to juries; by the Summary Proceedings Ordinance (Session II.), which established one uniform course of practice for the regulation of summary proceedings in all cases before justices of the peace; and by the Jury Amendment Ordinance (Session III), which was substituted for those provisions of the Quarter Sessions Ordinance which affected the constitution of juries and the formation of the jury list. The fifth ordinance prohibited distillation under a penalty of £100 to £500. One half of the fines imposed under the ordinance was to be paid to the Crown, to be applied to the public uses of the Colony, the other half to those persons who had given information or evidence leading to the conviction of the offenders. The sixth ordinance established Courts of Request or Courts of Civil Jurisdiction; but it was repealed by the County Courts Ordinance of the ensuing session.

3. The Governor and the Company's Settlement.

Early in the year a petition had been signed by many of the Port Nicholson settlers and forwarded to the Queen, requesting the recall of the Lieutenant-Governor on the grounds of his neglect and misconduct. He had not visited Port Nicholson, had not granted its settlers the slightest help, had placed the seat of government elsewhere, and was bribing the Company's labourers to assist him in erecting it. A counter-petition in Hobson's favour was circulated in the north and at Sydney. In a

despatch to the Secretary of State in May, Hobson maintained that the real source of the Port Nicholson petition was his refusal to study the exclusive advantage of the Company by fixing the permanent seat of Government in the south. At the same time he observed that the counter-petition must be attributed to his having placed the seat of government on the Waitemata. In his opinion, the prices obtained by public sale for the Auckland allotments had confirmed the wisdom of his choice. He represented himself as anxious to readjust all differences between the Government and the southern settlers, and detailed a number of measures he proposed to adopt for their benefit, and for the benefit of all other colonists at a distance from Auckland, such as the institution of local courts and municipal corporations. The effect of this more generous measure of local government he hoped to increase by establishing and maintaining more frequent intercourse between the capital and the remoter stations of the Colony. In his reply the Secretary of State approved of Hobson's proceedings and of the intended measures enumerated, and more particularly of those for the benefit of colonists resident at a distance from the seat of government.

Hobson first visited Wellington (known as Britannia till November, 1840) in August, 1841. He found one portion of the community in a ferment of discontent, agitated by "a venal press" and a few malcontents, but he received the most cordial support from the largest and most influential section of the colonists. One* of those who had taken a conspicuous part in supporting the petition of May, he selected to serve in the Legislative Council by

*G. B. Earp.

placing his name at the head of the list of justices of the peace, instead of that of Colonel Wakefield, the Principal Agent of the Company, who declined to accept the appointment. The native chiefs had given him an expression of full confidence in the Government, and of obedience to its orders; but they asked for protection against the encroachments of the Company, who, they alleged, had misappropriated their lands. The Secretary of State considered Hobson's answers to the charges of the petitioners to be sufficient except in the case of the "abduction of labourers," for which he was reproved.

4. Second Session of the Legislative Council, 1841-2.

The session of the Legislative Council which commenced in December, 1841, is in many respects the most important of all the twelve sessions held; for its work consisted in providing such a comprehensive body of law as should render unnecessary the operation of the laws of New South Wales within the Colony. The Chief Justice and the Attorney-General,* who had been sent out from Home by Lord John Russell, had been at work building up a judicial system, which was embodied in the first five ordinances passed. The first, which established the Supreme Court, was superseded by a similar one of the third session. The second established County Courts of civil and criminal jurisdiction, and repealed the ordinance of the first session which had set up Courts of Quarter Sessions; but it was itself repealed by the Court of Requests Ordinance, 1844. By the third ordinance a jury system was established. The fourth ordinance extended the powers of police

*Sir William Martin and William Swainson.

magistrates to deal summarily with certain charges of larceny and with parties who made confession, and provided that a police magistrate was to have the power of two justices. This ordinance was repealed in 1846 (Session VII.). The fifth ordinance prescribed one uniform course of practice for the regulation of summary proceedings in cases before Justices of the Peace. All fines recovered under the ordinance were to be paid to the Crown for the public uses of the Colony, and the support of its government. In certain cases an appeal was allowed to the County Court.

The sixth ordinance provided for the establishment and regulation of municipal corporations, the creation and constitution of boroughs, the powers of the borough councils, the qualification of burgesses and the mode of electing the aldermen, the appointment of the corporate officers, the meetings of the council, and the imposition of rates, tolls, and dues. On the 27th May ensuing, a proclamation extended the operation of the ordinance to Wellington, which was erected into a borough on the 21st July, a council being duly elected on the 3rd October. But the ordinance was disallowed by the Crown, the disallowance being published on the 6th September, 1843, on the ground that it yielded to the corporations the Crown's exclusive power of erecting beacons and lights, and vested in them certain waste lands within the limits of the boroughs. The borough council of Wellington, the only self-governing body in the Colony, thereupon ceased to exist, all its papers, and its seal, being deposited for security in the Union Bank.

The seventh ordinance of this session was also disallowed at the same time. Its object was to promote the building of churches and chapels, and

to provide for the maintenance of ministers of religion; it sanctioned the advance of moneys for this purpose from the Colonial Treasury, and regulated the appointment of trustees to administer the funds, and to exercise care over the sites and buildings; power was given to grant stipends to ministers in localities without churches. The ordinance was inconsistent with the Governor's Instructions respecting the free exercise of religion in the Colony.

The eighth ordinance, which proposed to establish post offices and generally to regulate the conveyance and postage of letters was also disallowed, the Secretary of State intimating that the Postmaster-General had undertaken the conduct of that service, and that there was no place left for the operation of the local enactment. In accordance with this intimation, new regulations, issued by the Postmaster-General, were published in the Government "Gazette" on the 1st September, 1843. But under the authority of 3 and 4 Vict. Cap. 96, the Post Office was again placed under the control of the local Government in September, 1848, when Governor Grey abolished all postage rates previously paid on newspapers, as a preliminary to the reduction, in the following December, of the rate of inland postage.

Ordinances nine, ten, and thirteen were concerned with the land.* The eleventh ordinance was passed to render valid marriages performed by ministers of the Christian religion not episcopally ordained; for doubts had arisen whether such marriages were good according to the common law of England, whereby marriages within the Colony were governed.

The twelfth ordinance regulated the sale of spirituous liquors; the fourteenth the business of

*See below, Chapter XV.

auctioneer, imposing a duty of one per cent. on all auction sales;† and the fifteenth the administration of harbours and quarantine. The sixteenth provided for the summary recovery of compensation for damage done by the trespass of cattle—an important consideration in a pastoral state. Proclamations were subsequently issued bringing Auckland (14th May, 1842) and Wellington (19th June, 1843) within its operation.

The seventeenth ordinance imposed a tax of £20 a year on houses made of raupo, nikau, toi-toi, wiwi, kakaho, straw, or thatch, existing in towns, and provided that after a certain date no such houses should be erected therein. By proclamation of 16th May, 1842, part of Auckland was brought within the operation of the ordinance; on the 30th March, 1843, a similar proclamation was issued in respect to Wellington; and on the 28th January, 1850, it was proclaimed that the ordinance would be enforced within Dunedin and Port Chalmers.

Ordinance eighteen secured to authors the copyright of their printed books for twenty-eight years, or for the full term of their lives.

The last ordinance of the session provided that "whereas fitting provision has now been made for the good government of the Colony of New Zealand by the Governor and Legislative Council thereof," the first ordinance of the preceding session and all laws, acts, and ordinances of New South Wales that had theretofore been in force in New Zealand, should be repealed within the limits of the Colony, and that no law, act or ordinance of New South Wales should thereafter have any force in New

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†Hotelkeepers' annual license fee £30 (£40 in boroughs); auctioneers, annual license fee £30.

Zealand: the ordinance to go into operation on the 25th April, 1842.

On the 27th July ensuing, the Governor, following his instructions to subdivide the Colony for the purposes of local administration, proclaimed the boundaries of the County of Eden, at Auckland. But the progress of survey and settlement was necessarily slow, and it was not till November, 1848, that the county which contained the capital was divided into hundreds.

On the 28th July of the previous year, 1841, the prisons at Auckland, Russell, and Port Nicholson had been proclaimed to be common gaols of the Colony; that of Wanganui had been similarly proclaimed on the 20th October; and by May, 1850, the gaols at Nelson and Dunedin had been added to the list.

5. Finance.

Hobson had received from the Secretary of State, along with his Instructions as Governor, a schedule containing an estimate of the charge of defraying the expenses of the Colony "for the first year elapsing after the receipt there of the Governor's Commission." The total expenses were estimated to amount to £19,300. He was instructed to appropriate the proceeds from land sales to defray the expenses of the Land Department "including surveys and other such works as might be indispensable to give exchangeable value to the land." From the surplus he was to make a deduction for the indispensable exigencies of the public service and for the benefit of the aborigines, never exceeding fifty per cent. on the net proceeds of the year, and this deduction was never to be made except in so far as there might be a well ascertained deficiency of other funds for such

services. At least fifty per cent. of the net proceeds was to be expended on emigration from the United Kingdom.

Hobson's own estimates, adopted by the Legislative Council, for the year commencing the 2nd May, 1841, anticipated a net revenue available for Government purposes of £38,317 13s. 9d., and an expenditure of £50,922 3s. 4d. The abstract of the estimated expenditure is as follows:—

No.	Service.	Amount of Estimate. £	s.	d.
I.	His Excellency the Governor, Salary ..	1,200	0	0
II.	The Chief Justice	1,000	0	0
III.	Civil Establishment	16,609	16	10
IV.	Survey Department	6,164	12	6
V.	Department of Public Works & Buildings	5,354	0	0
VI.	Judicial Establishment	3,068	11	3
VII.	Police and Gaols	7,957	9	3
VIII.	Ecclesiastical Establishment	450	0	0
IX.	School Establishment	140	0	0
X.	Miscellaneous	8,977	13	6
	Total	£50,922	3	4

The actual expenditure, however, exceeded £80,000, while the revenue did not amount to half that sum (only £37,000), the greater part of it derived from the land, and half of this being required for immigration purposes. In January, 1842, Hobson intimated to the Secretary of State that he could not carry on the government of the Colony without assistance from Home, and, acting on the advice of his Executive Council, he began to draw bills on the English Treasury to make up the deficiencies in the revenue. During the year 1842 drafts to the extent of £10,000 were met by the Treasury; but the Governor was informed that future bills of a similar nature would be dishonoured. In 1842 the revenue exceeded £35,000, nearly a third being derived from the land sales, and the expenditure

£54,000. During his term of office, Hobson was granted in all £60,000 by the Home Government to assist him to defray the expenses of administration.

Customs duties had been instituted by the third ordinance of the first session of the Council, on the 17th June, 1841; and Custom Houses were opened for the first time on July 1st. In 1841, £5414 was collected as Customs duties at a cost of £2147, whilst in 1842 the respective amounts were £17,316 and £4474.* The imports for 1841 had been valued at £134,000, the exports at nearly £18,000; the corresponding amounts for 1842 were £249,000 and £24,000.

A branch of the Union Bank of Australia had been opened at Port Nicholson as early as January, 1840, on the Petone beach, whilst shortly afterwards the New Zealand Bank was established at Auckland by the New Zealand Banking Company, with branches at the Bay of Islands and at Port Nicholson. During the second session of the Legislative Council a private ordinance was passed to simplify legal proceedings by and against the New Zealand Banking Company. A similar ordinance with reference to the Union Bank of Australia was not passed till July, 1844. Both these Banks were empowered to issue notes, which were strictly convertible on demand, and not recognised as legal tender.

6. Maori Affairs.

Both the Crown and the New Zealand Company had from their first entry upon colonisation in New Zealand expressed themselves as deeply solicitous for the welfare of the Maoris.

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*The Customs Revenue of New Zealand for the year 1912 amounted to £3,336,000; the Imports to £20,977,000; and the Exports to £21,771,000.

Halswell, the Company's Protector of Aborigines, received his Instructions on the 10th October, 1840. The Company always maintained that the real consideration for which the Maoris had sold their land to it was not the goods paid them but the reserves, which now amounted to 110 sections or 11,110 acres, being one-tenth of the area offered for sale to the public at the preliminary sales. The "wilderness land" purchased by the Company, had been, it contended, valueless to the natives; but it acquired value entirely from the capital expended in immigration and in settlement.

The duty of executing the Government measures essential to the continued well-being of the native was, in accordance with the Royal Instructions, entrusted to an officer, styled the Chief Protector of Aborigines. The first occupant of this post was Clarke, a missionary catechist, who was assisted later by sub-protectors. It was at first thought that the purchase of the surplus lands of the Maoris might be made through these officials, but insuperable difficulties soon arose, and Hobson reported:—"The natives are a shrewd people, and are not a little apt to attribute all the kindness and advice Mr. Clarke may offer them to the more sordid view of obtaining their land; besides which he is often obliged to place himself in a false position with regard to them, whilst resisting their unreasonable demands for large payments." The office of Protector of Aborigines was not favourably regarded by the colonists, especially by those settled on the lands claimed by the New Zealand Company; for the Protectors were not seldom over-zealous in guarding the interests of the natives, and they were inclined to prejudge all white settlers as having nefarious designs upon the aboriginal lands. The office was

abolished by Governor Grey, who substituted that of Native Secretary in each of the two Provinces of New Ulster and New Munster.

In March, 1842, there occurred the first trial by jury of a Maori. A young Maori named Maketu had murdered four persons at the Bay of Islands in November, 1841. After some delay his father gave him up to the police. The Maoris held frequent debates as to whether they should, without protest, allow Maketu to be tried according to Pakeha law. The counsel of Waka Nene and other chiefs friendly to British rule prevailed, though, as the accused had confessed to the crime, they thought it superfluous to hold a trial and cruel to put a period between the announcement of the death sentence and its execution. Maketu was hanged on March 7th, the natives acknowledging the justice of his punishment.

About the same time, a white settler was sentenced to two years' imprisonment with hard labour for shooting with intent at a Maori, and, though the term was subsequently commuted to one year, the incident had the effect of convincing the Maoris of the earnest desire of the Government to deal out justice evenly to both races.

7. Hobson's Death.

Hobson had suffered severe ill-health during the whole period of his service in New Zealand; and this misfortune was aggravated by the persistent misrepresentation of his intentions and actions by the settlers of the New Zealand Company, the difficulties of finding a solution of the land question, and the increasing burden of debt. He died at Auckland on the 10th September, 1842. Our first Governor had a strict sense of duty, and an unswerving resolve to do justice to all classes of the community; and it

is now generally recognised that he saw further into the future than most of his contemporary critics, whose personal interests prejudiced their view of the ways along which the Colony should develop. He had peacefully secured the cession to the British Crown of a territory almost as large and as rich in natural resources as the United Kingdom itself, and he had won and maintained the respect and goodwill of a people quick to detect any human weakness. The Maori judgment of him is summed up by the chief who wrote to the Queen:—"Let not the new Governor be a boy or one puffed up; let not a troubler come amongst us; let him be a good man like this Governor who has just died."

CHAPTER XII.

SHORTLAND AND FITZROY.

1. Shortland's Administration.

By virtue of the Royal Instructions of 1840 the administration of the Government, passed, upon Hobson's death, into the hands of the Colonial Secretary, Lieutenant Willoughby Shortland, who in his tenure of the humbler office had never succeeded in gaining the respect of the colonists. On the 4th April, 1842, the Queen had issued Letters Patent enlarging the boundaries of the Colony to include the Chatham Islands and correcting the verbal blunder in the Charter of 1840. These boundaries were proclaimed by Shortland, on the 1st November, to be the 33rd and 53rd degrees of south latitude, and the 162nd and 173rd degrees of east longitude. On the 26th of November it was intimated that Her Majesty had been pleased to confirm the choice of Auckland as capital of the Colony.

The question of the status of Maoris as British subjects was raised by native troubles at Tauranga. It was proposed to seize Tongeroa the chief offender, but the Attorney-General argued that, as Tongeroa had not signed the Treaty of Waitangi, and did not otherwise acknowledge the Queen's authority, he could not be considered a British subject and amenable to British law. This argument was so manifestly wrong that it is generally considered to have been a cunning device to preserve the infant colony from the horrors of a savage war. Although not agreeing with Swainson's opinion, Shortland took no action in the matter beyond a report to Lord Stanley, who in reply emphatically asserted that New Zealand and all its

inhabitants were within the British dominions, and that no person denying this could be permitted to act any longer under the Queen's Commission. He held, however, that there was "no apparent reason why the aborigines should not be exempted from any responsibility to English law or to English Courts of Justice in all cases in which no person of European birth or origin had any concern or interest." And as a matter of fact the right of the British to interfere in matters between Maori and Maori was not boldly and effectively exercised until after the arrival of Governor Grey.

The revenue of the Colony fell far short of the expenditure. Whilst, in 1843, in the northern division the expenditure exceeded £30,000 the revenue did not reach £13,000; but in the southern division the revenue of £13,000 almost equalled the expenditure. Bills were again drawn on the Imperial treasury and though they were at first dishonoured, their amount was subsequently allowed as a loan.

During this period a County Court was opened at Nelson. On October 14th, 1842, the first session of the Supreme Court was opened at Wellington. At the sittings of April, in the following year twelve prisoners were sentenced to transportation to Van Diemen's Land.

The same month, a petition was sent from Auckland, praying that Shortland might not be appointed Governor. The Company's settlers at Wellington were also in a state of discontent. "We are now," said a writer in the "New Zealand Gazette and Spectator" (July 12th, 1843), "the subjects of an absolute colonial monarchy, inspected and supervised by a deputed staff of paid authorities, and an armed vessel comes around every two months to collect a tribute from us, which is carried away to be expended in a

distant place, and which recent accounts show to be the only regular resource on which the Government can rely.'' In June Fox summarised the chief causes of the dissatisfaction in the Company's settlement as "the want of land, the source of all production; the hostile influence exercised over the mind of the natives; the distance of the seat of Government; the abstraction of our revenue and its expenditure at a remote settlement; together with the inefficient state of the executive local administration. . . . Some of these evils,'' he goes on to say, "might possibly have been removed, or even prevented, had the settlers possessed a voice in the Legislative Council. The present constitution of that body entirely excludes popular opinion. Its members are the Governor, the Colonial Secretary, the Colonial Treasurer, the Attorney-General, and the three magistrates whose names stand highest on the commission—a position which they assume or descend from at the pleasure of the Governor.''

After the Wairau "massacre'' in June, in which Captain Wakefield and twenty-one others were killed by the Maoris as the result of a dispute over land, the discontent became acute. The Nelson colonists at once requested military assistance from Governor Gipps of New South Wales and Governor Wilmot of Van Diemen's Land; and, in order to protect their town, the Wellington settlers formed an armed association, which, however, was disbanded by a proclamation of the 26th July, declaring such an assembly unlawful. Thereupon the Wellington settlers petitioned the Queen, claiming that they were entitled to have "an adequate proportion'' of the military force of the Colony residing among them, in consideration of their contribution of more than £12,000 a year to the revenue of the Government, and of the fact that

their population numbered 10,000, whilst that of the northern part of the Island was only about 2,500. Shortland wisely maintained his policy of inaction, pending the arrival of the new Governor.

No meeting of the Legislative Council was held during the fifteen months of his administration.

2. Fitzroy's Task.

Captain Fitzroy, who had visited New Zealand in December, 1835, as commander of the *Beagle*,* assumed the office of Governor on the 26th December, 1843. He appointed Dr. Sinclair as Colonial Secretary, in place of Shortland, who had resigned the office, partly because of Fitzroy's publicly expressed approval of certain hostile criticisms upon his policy. The addresses presented to the Governor from the various centres expressed the colonists' many grievances. They emphasised the land disputes, the bankruptcy of the Government (many salaries were in arrears, and the debts amounted to a year's revenue), the suspension of land sales, and the paralysis of commerce. They demanded the prompt settlement of the land disputes, the abolition of the Crown's right of pre-emption over native lands, and of the customs duties, which were generally thought to be one of the chief causes of the commercial depression. The discontent was shared by the natives, chiefly on account of their inability to sell their land during the bankruptcy of the public Treasury, and of the imposition of the customs, which had increased the prices of those commodities of which they were large consumers, and had driven away the whalers, who had proved their best customers for pork and potatoes.

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*With Darwin on board.

The Governor speedily set to work to effect the necessary reforms; but it soon became clear that his lack of tact and self-control would lead him to mistakes fatal to good government. He commenced well by appointing a second Judge of the Supreme Court for the southern district, and by summoning the Legislative Council, of which three sessions were held during his term of office. The outstanding event of his administration was the rebellion of some of the tribes of the northern peninsula, led by Heke and Kawiti, which resulted in the sack and burning of Kororareka in March, 1845; but this war scarcely comes within the scope of our work, except incidentally in the treatment of the land question.

3. Finance.

At the beginning of 1844 there was a debt of £24,000; it was increasing fast, and Fitzroy was able to borrow only £2,000 even at 12½ per cent. on the security of the usual Imperial vote in aid of £7,545. The revenue for the year was estimated at £20,000, and the amount for expenditure voted by the Appropriation Ordinance (6th June) was £35,991 1s. The Governor had been strictly forbidden to resort to the expedient of drawing Bills on the Imperial Treasury, and in April he was obliged to report to the Secretary of State the necessity of issuing debentures to be paid to Government creditors as a negotiable recognition of the money due to them.

The fourth Ordinance authorised the Governor to issue debentures of face value varying from 2s. 6d. to £50, bearing interest at 5 per cent., and to make them a legal tender within the Colony. On the 20th June, the Customs Ordinance was amended (III., No. 6) by repealing the old duties, imposing new and higher rates, and providing more stringent regulations against smuggling.

The Customs duties had produced in 1843 only £10,000 at a cost of £4,000. They were a constant source of unrest to the Maoris, and partially explained Heke's exploits. Yielding to the popular outcry against them, Fitzroy made a volte-face and summoned the Council for its brief fourth session, of which the second Ordinance, passed on the 28th September, repealed the Customs Ordinances, and imposed a rate on property, or, more correctly, a combined property and income tax. This rate proved even more unsatisfactory than the Customs duties. The cost of collection was not covered by the returns, and the tax was felt to be inequitable since a Government official, drawing a salary of £400 would pay only half the sum exacted from a settler who had invested £600 in a farm, and was endeavouring to make £200 a year from it.

Fitzroy had already, in March, proclaimed the Crown's waiver of the right to pre-emption over native lands, on the payment of a duty of 10s. per acre on all land sold, and in October, upon pressure from the Maoris and settlers, he reduced this duty to 1d. These proceedings he hoped that Her Majesty would be graciously pleased to sanction "in consideration of the unprecedented nature of the case, and in the most critical condition of the Colony."

In March, 1845, the Legislative Council again assembled. The Appropriation Ordinance (V., No. 2) voted £23,872, which, with the Supplementary Ordinance of the 5th October, authorising the expenditure of £2,660, made a total expenditure of £10,000 less than that of the previous year, and £30,000 less than that of Shortland's year. On the 8th of April the fourth ordinance abolished the obnoxious property rate, and revived the Customs Ordinances. The actual income of 1844 amounted to £17,144; the

expenditure to £38,626. In 1845 the respective amounts were £13,972 and £40,151.

A private ordinance of Session III facilitated proceedings by and against the Union Bank of Australia, and made its promissory notes payable at sight or on demand, in sterling money or other legal tender of the Colony. This Bank had established branches at Wellington and Nelson.

4. Maori Affairs.

The Secretary of State had given Fitzroy no precise instructions regarding Maori policy, the problems of which must be solved on the spot. In January, 1844, he visited Wellington to pronounce judgment on the bitter land disputes. His attitude was firm. He informed the settlers that he must remind them that "our countrymen were there (at the Wairau) the aggressors; that the principal magistrate was acting illegally." In February he held a conference with the natives at Waikanae and heard Te Rauparaha's account of the "massacre." In his judgment speech he said the colonists had been in the wrong; that they had no right to build houses upon the land, the sale of which was disputed by the natives, and upon the ownership of which the Land Commissioner had not yet decided. As the colonists were greatly to blame, having brought on and begun the fight, and as the natives had been hurried into crime by their misconduct, he had decided that he would not avenge the deaths of Wakefield and his fellow victims; but he endeavoured to show the Maoris the enormity of the crime they had committed in murdering the men who had surrendered. Though his resolve was framed with the best intentions, it could not but lower the prestige of the British settlers in the eyes of the Maoris, who, in accordance with their law of *utu*,

rarely failed to exact full punishment for an act of aggression suffered and to consider as rank cowardice any disinclination to retaliation.

Before leaving the south, Fitzroy arranged for a more direct administration of the local affairs by appointing Major Richmond Superintendent of the Southern District, with a salary of £600 a year, and with the title of Honourable. His duties were similar to those of the subsequent Lieutenant-Governors.

Owing to the circumstances of the Manaia-Kawau case at Auckland in February, the Legislative Council passed in July the Native Exemption Ordinance, to exempt, in certain cases, the aboriginal population of the Colony from the ordinary process and operation of the law. In cases in which natives were concerned, the Protector of the Aborigines was to direct a warrant to two principal chiefs, who were to apprehend the accused. Except in cases of murder and rape, the accused on making a deposit, might be allowed to go at large until trial, the deposit to be forfeited upon his non-appearance. If a native were convicted of theft he was, in place of other punishment, to pay four times the value of the property stolen, the value to be determined by the jury, and in some cases to be awarded to the prosecutor. No native was to be liable for imprisonment in civil suits. It was thought that this Ordinance would result in the apprehension of many offenders who would otherwise defy arrest; and, in the opinion of the Attorney-General, the colonists would not be dissatisfied with its exceptional character, since they would secure the restitution of their property, or the possession, at least, of its equivalent value. The Ordinance was repealed by Governor Grey (VII., No. 15), but some of its provisions were embodied in the Resident Magistrates' Courts Ordinance of the same session.

Another ordinance passed under the authority of the Imperial Act (6 Vict. Cap 22), enabled Maoris and half-castes to give evidence upon making affirmation in lieu of oath. Bearing false evidence upon affirmation was to be treated as a misdemeanour.

5. Legislation.

Governor Fitzroy held three sessions of the Legislative Council, the first extending from January to July in 1844, a short session in the following September, and the third in March and April of 1845. The first session bore fruit in twenty-one ordinances, a dozen of which concerned subjects that had been already legislated upon in the two previous sessions, and therefore consisted largely of amendments in and additions to the existing law.

A private ordinance naturalised some one hundred and twenty Germans who had recently settled in the Colony. Several Naturalisation Ordinances were passed by the Legislative Council during the Crown Colony period, and, as doubts had been cast upon the validity of laws for naturalising aliens passed in various British colonies, an Imperial Act (10 and 11 Victoria, Cap. 83) was subsequently passed, to declare the powers of the colonial Legislatures in this respect. In the first place it gave validity to all colonial Naturalisation Acts previously passed, declaring them valid from the time of their enactment; secondly, it provided that all Naturalisation Acts thereafter passed by any colonial legislature should, within the limits of the colony concerned, have the force of law, any law or statute to the contrary notwithstanding; thirdly, both the retrospective and prospective operation of the Act was confined to colonial Acts which authorised the enjoyment of the privileges of naturalisation within the limits of the colony within which

such Acts had been or should be made; fourthly, it declared that such naturalisation laws should be subject to the rules regulating the enactment and disallowance of colonial laws on any other subject; and, fifthly, it declared that 7 and 8 Victoria, Cap. 66* does not extend to the British Colonies.

Several of the ordinances concerned the administration of justice. The first of the session established the Supreme Court in the form in which it existed down to 1858. This court of record was to have jurisdiction in all cases as fully as the courts of Queen's Bench, Common Pleas, and Exchequer at Westminister, and all such equitable jurisdiction as the Lord High Chancellor then possessed in England; it was also to have exclusive jurisdiction in testacy and intestacy, and the validity of wills of personal property as fully as any ecclesiastical court in England; its exclusive powers also extended to the grant of probate and letters of administration. It was to appoint and control guardians of infants and "also committees of the persons and estates" of such as were of unsound mind; and was to be an instance Court of Vice-Admiralty. It was not to take cognisance of any criminal case where the offence had been committed previous to the 14th January, 1840, the date of Gipps's proclamation constituting New Zealand a dependency of New South Wales. The court was to be composed of a judge, or judges, working within the district or districts proclaimed by the Governor; of registrars, and certain inferior officers; of barristers, who should also be allowed to act as solicitors; and of solicitors who were to be allowed to act as barristers. Sheriffs were to be appointed for the several counties or districts, with the powers and duties of sheriffs of the superior courts

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*Hutt's Act.

at Westminister. All questions of fact and of unsoundness of mind were to be decided by the verdict of a jury of twelve men. Provision was made for the holding of circuit courts for civil and criminal business and for the formulation by the judges of rules for practice and procedure.

The second Ordinance of this session amended the previous Jury Ordinance by further regulating the constitution of juries and the method of forming the jury list. Natives possessing certain qualifications were allowed to sit on mixed juries in trials affecting the property or person of a native. The County Courts were abolished but the Courts of Request authorised by the eighth Ordinance for recovery of small debts never sat, and were superseded by the Resident Magistrates' Courts (Session VII., Ordinance 16). By the Supreme Court Rules Ordinance (September 26th, 1844, Session IV.), the Legislative Council confirmed the rules, forms and tables of fees which had been settled by the two judges of the Supreme Court and sanctioned by the Governor and Executive Council. These rules provided for civil and criminal sittings of the court at Auckland and Wellington every March and September, for criminal sittings every June and December, and for the holding of circuit courts for civil and criminal business at such places and times as might be proclaimed by the Governor. There might be enrolled as barristers only such persons as had been admitted barristers or advocates in Great Britain or Ireland, or such as might be admitted thereafter in the Colony under the authority of any law passed for the purpose. A similar rule, *mutatis mutandis,* was made with reference to solicitors. The barristers of the court were to be allowed to act also as solicitors, and the solicitors to act also as barristers

for a period of five years after the passing of the Ordinance; but provision was made for prolonging the existence of this rule.

Three Ordinances, Nos. 3, 11, and 20, dealt with the land question, and will come up for consideration in Chapter XV.

The seventh Ordinance made provision for the relief of imprisoned debtors who had become indebted without any fraud or negligence.

The remaining Ordinances of the third session referred to minor matters. No. 19, which provided a summary mode of "abating" the "nuisance of dogs wandering at large in towns," may be quoted as an example of the necessarily parochial character of some of the legislation of the superior assembly in a Crown Colony with no form of municipal government.

The fifth session was held at a most critical period in the history of the Colony, marked as it was by the sack of Kororareka and the threatened invasion of Auckland. The first measure authorised the raising of a militia for the Colony. Power was given to the Governor to call together, arm, and array as a militia every British subject, not an aboriginal native, between the ages of 18 and 60, with the exception of Supreme Court judges, members of the Legislative Council, and clergymen, and to cause them to be trained for a period not exceeding twenty-eight days in each year. The Governor might grant commissions to officers to convene courts-martial for the trial of offences committed by the forces. The Governor, or the principal civil authority in any settlement, was to call the militia into active service in all cases of actual invasion, or upon any imminent danger to the safety of the settlement. The militia

was to be subject to the current Articles of War; regimental courts-martial might be held by an officer commanding, not under the rank of captain, together with an appropriate number of other officers, for the trial of any offence committed by any sergeant, corporal, drummer, or private under his command; but the sentence of such court-martial was to be submitted to the District Commandant for his approval, or mitigation, or remission.

This Ordinance was passed on the 25th March in the face of strenuous opposition. Both within and without the Council, it was maintained that it would materially delay, and perhaps effectually obstruct the grant of permanent military assistance from England. Under its provisions, martial law was proclaimed in the Bay of Islands district on the 26th April following. The Ordinance was not repealed till 1858 (No. 8).

Ordinances 2, 4, and 5 concerned the finances of the Colony, and have already been noted.* The third imposed fees payable on the delivery of Crown grants of land to those entitled to them.

The sixth empowered owners and occupiers of land within certain districts to repair and maintain highways and other public works therein, and to make and levy rates for defraying their expenses. It is important as being the first measure of local government granted to the colonists, and provided for the annual meeting of freeholders within such districts as might be proclaimed by the Governor. At the meeting in each district the amount of rate for the ensuing year was to be determined, and a Board of seven Commissioners for the district, was to be elected to carry into effect the provisions of the Ordinance.

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*See p. 176.

The seventh Ordinance amended the law of assault.

The eighth Ordinance brought into operation within the Colony four English Acts,* to be applied in the administration of justice in New Zealand in the same manner in which Acts of the Imperial Parliament, passed before the establishment of the Colony, were applied.

The private legislation of the fifth Session consisted of two Naturalisation Ordinances.

6. Recall of the Governor.

The Secretary of State could not overlook Fitzroy's disobedience to his Instructions in issuing debentures to discharge the functions of paper money, and his violation of the Land Act of 1840 by his proclamations allowing the colonists to purchase native lands on the payment of a commission to the Government, first of 10s., and then of a penny per acre. Moreover, the Governor's communications to the Colonial Office had been so irregular and partial as to deserve severe censure. He was, therefore, recalled in June; and Captain George Grey, then Governor of South Australia, was directed to assume the duties of the office as soon as possible. Fitzroy had proved himself unequal to the very difficult task with which he had been charged; but he had done good service in restraining the southern settlers from further intemperate proceedings against the Maoris. His chief defect was lack of tact, and his difficulties had been undoubtedly increased by the prevalent rumour that the Committee of the House of Commons which enquired into New Zealand affairs in 1844,† had

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*4 and 5 Vic. C.56; 6 Vic. C.10; 6 and 7 Vic. C.85 and C.96.

†See page 226.

recommended the confiscation of the native waste lands, by the suspension of the New Zealand Company's operations early in the same year, and by the refusal of the Imperial Government to provide him with adequate financial and military assistance.

Chapter XIII.

GREY'S FIRST ADMINISTRATION.

1. First Steps.

Captain Grey* began to discharge his duties as Governor at Auckland on November 18th, 1845. Within five days of landing he had sent the Secretary of State a despatch in which he pictured the existing confusion in finance and Maori affairs and the general state of maladministration, and outlined the reforms he intended to propose to the Legislative Council. On the 13th December the Council facilitated the suppression of the rebellion by passing an ordinance providing for the strict regulation of the importation and sale of arms and ammunition. The non-official members of the Council were changed, and the Secretary of State was recommended to advise the appointment of a Lieutenant-Governor as chief executive officer in the southern district.

2. Finance.

After bringing the war to an end and granting a general pardon to the rebels, Grey devoted his chief efforts to financial reforms. He had already, a few days after his accession to office, called in and partly paid, with money brought with him from South Australia,† the debentures issued by his predecessor at various dates since April, 1843, and then circulating in the Colony. Those not discharged in cash, amounting to £22,829 7s. 9d., were made a fixed loan

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*His Commission appointed him "Lieutenant-Governor," but he always exercised the full powers of a Governor.

†£1,800, spent in paying off one fourth of the Debentures for £70 and over.

at eight per cent. He had found the colonial debt to be £75,000; the expenditure of 1845 well over £40,000; and the income, including the imperial grant, only £25,000. He therefore informed the Secretary of State that he must draw upon the Imperial Treasury in excess of his Instructions, but that he would use all due economy. He relied upon the Customs duties as the most equitable mode of raising revenue, both for Maoris and colonists. In 1846 he secured a grant of £36,000 from the Imperial Government; and this, with the £22,000 he hoped to raise locally, made an estimated revenue of £58,000. As a matter of fact the local income proved to be £23,000, and the actual expenditure £51,000.

The Council met for its seventh session in October, 1846, and entered upon the legislation made necessary by the circumstances of the Colony. New customs duties were imposed, a uniform fee of 20s. was made payable on the delivery of Crown grants; and the Appropriation Ordinance (No. 13) voted £34,322 9s. to defray the expenses of the Government during the year 1846-7.

In the following session (1847) the Debentures Security Ordinance made the outstanding debentures a charge upon the general revenue of the Colony, and provided that holders of the 8 per cent. debentures might convert them into new 5 per cents.

No. 16 authorised the establishment of a Colonial Bank of Issue by the Government of New Zealand, and prohibited the making and issuing of paper money by private individuals. The Union Bank of Australia, however, was to continue to issue its own bank notes, to the extent of the amount in circulation during the two years preceding the 1st July, 1847, until a date fixed by the Governor-in-Council, of which a year's notice was to be given.*

*See also XI., Nos. 13 and 14, 1851, and XII., No. 3, 1853.

The loyalty of Waka Nene and his brother, Patuone, was rewarded by grants under No. 15 Session VIII.; but the first general pension law was not made till 1849 by No. 3, Session X., which authorised the payment of pensions out of the general revenue of the Colony to those wounded in the northern rebellion. For the expenses of New Ulster during 1849-50, £26,176 13s. 6d. was voted. An enumeration of the classes of expenditure will give some idea of the arrangement of executive work at the beginning of the Provincial period. The duties of administration were apportioned among the following Departments:—Governor and Establishment, Native Secretary's, Council, Colonial Secretary's, Colonial Treasurer's, Audit, Survey, Public Works, Road, Commissioner of Crown Lands, Post Office, Customs, Government Schooner, Harbour, Police, Medical, Judicial, Law Officer's, Registrar of Deeds, Resident Magistrate's, Sheriff's, Colonial Chaplain's, and Miscellaneous.

The scheme of taxation in force in New Zealand in 1848 therefore comprised:—(*a*) Customs duties as described on pages 167 and 176; (*b*) an auctioneer's annual license fee of £40; (*c*) a publican's annual license fee of £30; (*d*) a publican's annual provisional license fee for new settlements of £40; (*e*) bush publican's license fees, the amounts of which were fixed in particular cases by the Governor and Executive Council according to the probable trade; (*f*) a fee of 20s. on the issue of a Crown grant; (*g*) various small fees levied on transactions in the Courts of Justice, the Sheriff's Office, the Land Claims Office, and on the registration of deeds; and (*h*) rates on land levied under the Public Roads Ordinance by the Highway Commissioners of road districts. All the

proceeds from taxation were to be applied only for the public uses of the Colony.

3. Military Policy.

In response to Grey's urgent request for a permanent force, 500 Royal New Zealand Fencibles were sent from England. These, in 1846, formed four military settlements near Auckland, at Howick, Panmure, Otahuhu, and Onehunga. They were engaged for seven years' service, and each was entitled to occupy a cottage and one acre of land, with the privilege of buying four additional acres at the end of seven years, at a low price. Each officer was given a house and forty acres, with the right to purchase one hundred acres more at the expiration of his service. These military settlers were occasionally drilled, and brought into Auckland to do garrison duty.

In 1846 the Governor discontinued martial law in the north; but no fewer than five times during 1846-7 was he obliged to proclaim it in the southern district as a result of the petty warfare waged around Wellington and Wanganui. No. 13, Session VIII., 1847, indemnified all those who had performed acts authorised by the various proclamations of martial law.

Certain ordinances were made to preserve peace among the Maoris themselves as well as between Maoris and colonists. No. 2, Session VII., 1846, instituted an armed constabulary (repealed by No. 18, 1886); the Arms Ordinance of the same session was directed against the trading in guns and powder between the more unscrupulous settlers and the Maoris; No. 1, Session VIII., 1847, provided for the discipline of a body of Native troops for the service of the government subject to the same laws as the

imperial troops; and No. 2 prohibited the unlicensed keeping of gunpowder in large quantities.

In 1848 there were from 800 to 1000 Imperial soldiers in garrison in New Munster alone. In Auckland, where the Commander-in-Chief was stationed, there were the 58th Regiment and the New Zealand Fencibles, commanded by a Major. In the southern district there was a Deputy-Quartermaster-General, who was also the officer commanding the troops of the district; a Major; a Staff-Sergeant; two deputy assistant Commissary-Generals, besides other officers. By this time New Zealand had been made a separate naval station with headquarters at Auckland, and in March, 1848, there were five warships on the station.

4. Maori Policy.

Grey made every effort to carry into successful practice those theories which he had set forth in various publications with respect to the civilisation of aborigines, being careful to modify them to suit the special conditions of the Maoris. He took an early opportunity of assuring the natives of an impartial administration of justice. "Maoris and Europeans," he said, "shall be equally protected and live under equal laws; both of them are alike subjects of the Queen, and entitled to her favour and care; the Maoris shall be protected in all their properties and possessions, and no one shall be allowed to take anything from them or to injure them; nor will I allow Maoris to injure one another; an end must be put to deeds of violence and blood."

In Session VII., he repealed, by Ordinance 15, Hobson's Police Magistrates' Ordinance, and Fitzroy's Native Exemption Ordinance; and, on the same day

(7th November, 1846) passed the Resident Magistrates' Courts Ordinance, which made special provision for the administration of justice in cases between native and native or native and European, as well as in certain cases between Europeans. Where civil disputes arose between persons wholly of the native race, a simpler and more expeditious procedure was provided, in the form of Courts of Arbitration, consisting of a Resident Magistrate or any other person appointed by the Governor, assisted by two native assessors, one to be chosen by each of the parties.* No. 3, Session VIII., 1847, was to limit the use of intoxicants by the Maoris and was not repealed till 1881 (No. 21).

The employment of Maori constables and the institution of native magistrates materially increased the confidence of the Maoris in the British. But these were only a few of the many methods used by the Governor to gain their loyalty and advance their well-being. He formed bonds of intimate friendship with many of the most powerful chiefs, whom he treated as confidential advisers, and to whose followers he distributed government rations when they were engaged in quelling rebellion. He employed many tribesmen upon useful public works intended to benefit them in common with the colonists, and he established schools in which the younger Maoris were taught the more useful arts, so that their knowledge and skill might raise the general standard of life of the whole race.

5. Judicial System.

Besides establishing Resident Magistrates' Courts, Grey constituted Courts of Sessions of the Peace

*Repealed by No. 13, 1867.

(VII., No. 20). These consisted of two or more Justices of the Peace and were courts of record with the same power and authority to hear and determine felonies and indictable misdemeanours as those of the Courts of Session or Quarter Sessions of the Peace of any county in England.* He also established a more satisfactory system of appeal by VII., No. 3, which constituted a Court of Appeals within the Colony from the decisions of the Supreme Court. Until there should be a sufficient number of judges to constitute this new body, the Governor and the Executive Council, with the exception of the Attorney-General, were to sit as a Court of Appeals, but the Ordinance was not to be construed to affect the power of the Crown to admit an appeal to the Crown-in-Council from any judgment whatever, either of the Supreme Court or of the Court of Appeals. Further provision was made for regulating the appointment and duties of Sheriffs, whose office had been created by the Ordinance (III., No. 1) under which the Supreme Court was established. Another enactment of the same class (VII., No. 5) empowered the Governor to appoint coroners with the same status as that of coroners in England.

The judicial system in 1848 thus embraced courts of summary proceeding, Courts of Sessions of the Peace, Resident Magistrates' Courts, the Supreme Court, and a Court of Appeals, whilst the subject's right of ultimate appeal to the Judicial Committee of the Privy Council was regulated by ordinance.† A full body of rules, modelled as the Courts themselves were, upon the English plan, but with an eye to the special needs of the Colony, controlled the

*Repealed by No. 30, 1858.

†Subjects might also, independently of the local legislature, be granted special leave to appeal as a matter of grace.

practice and procedure of these institutions. There was as ample security for the independence of the judges, and the liberty of the subject, as then existed in the United Kingdom itself.*

6. Other Social Legislation.

The remaining legislation of this period, with the exception of the important land ordinances to be described in Chapter XV., are mentioned only to show the nature of much of the work of the Legislature of the infant Colony. Those of Session VII. naturalised a few aliens (No. 1), established English standard weights and measures (No. 10), provided for the summary recovery of compensation for damage done by trespass of cattle (No. 17), and for the maintenance of destitute persons, illegitimate children (No. 19), and lunatics (No. 21).

Those of Session VIII. controlled the management of savings banks (No. 4); regulated the slaughter and impounding of cattle (Nos. 5 and 6), the solemnisation of marriages (No. 7), the registration of births, death, and marriages (No. 9), the establishment and use of footpaths (No. 12); and encouraged the fencing of land (No. 8).

No. 10 is remarkable as the first educational enactment. The education was to include, as a necessary part, religious education, industrial training, and instruction in the English language; but provision was made whereby the children of parents dissenting from religious doctrines taught in any school, might be taught without receiving doctrinal instruction. The general superintendence and management of the schools was to be in the hands of the Bishop of New Zealand, the Bishop of the Roman Catholic Church,

*For the subsequent history of the Judicial System see Chap. XXV.

the Superintendent of the Wesleyan Mission, and the chief minister of any other religious body engaged in the education of youth in the colony. The principle of State aid was adopted, and the total amount of money to be voted annually under the Ordinance was restricted to within one-twentieth of the estimated revenue of the Colony. This Ordinance was repealed by No. 41, 1867.

Chapter XIV.

THE CONSTITUTION OF 1846.

1. The Act of 1846.

During this period of necessary tutelage there grew both steadily and rapidly a desire for representative government, a feeling that the irksome constitution of the Crown Colony should be replaced by one framed in a more generous spirit, and better suited to the temper and quality of the colonists. These were nearly all persons of an admirable type, and their number in 1850 was estimated at about twelve thousand. As was only to be expected the desire for representative institutions was particularly strong among the Company's settlers, who had from the first bitterly resented the attitude of the Crown as represented by successive Governors. But it was not confined to them. It was shared with almost equal intensity by the settlers in the north, and from Port Chalmers to Kororareka the strong desire for a representative constitution was soon to find vigorous expression in private utterance and public meeting.

In February, 1846, the Directors of the Company suggested that the settled portions of the Colony should be divided into municipal districts, whose inhabitants should enjoy extensive powers of local government, whilst the districts in the occupation of natives should be proclaimed as exceptional districts in which native custom should be allowed to prevail until the natives themselves might demand the introduction of British law. They also observed that such an administrative scheme could best be carried out by an association with a proprietary charter, similar to

those companies which had proved so beneficial in the initial stages of American colonisation.

Nothing was done to give effect to the Company's wishes until after the accession of Lord John Russell's ministry to power in June. Then indeed the Company had powerful friends at court. Colonial affairs were placed under Earl Grey, who, as Viscount Howick, had always taken a keen interest in the Company's welfare. Hawes, another of its champions, was Under-Secretary. On the 28th August an Act was passed to "make further provision for the government of the New Zealand Islands" (9 and 10 Vict. cap. 103). It repealed the Act of 1840 and all charters, letters patent, instructions, and orders-in-council issued in pursuance of it; but provided that all the laws made and acts done in pursuance of them should thereafter be as valid as if the repealing Act had not been passed. It authorised the Crown to create within the Colony by letters patent municipal corporations, and to grant to them any powers which it might grant to the inhabitants of any borough in England or Wales; to divide the islands into two or more separate provinces; to establish in each province an Assembly comprising a Governor, a Legislative Council consisting of persons appointed by the Crown, and a House of Representatives elected by the mayors, aldermen, and common councils of the municipal corporations within the Province, such Assembly to have full power to make laws for the Province not repugnant to the laws of the United Kingdom nor to those of the General Assembly of the Colony; to establish a General Assembly for the Colony, consisting of the Governor-in-Chief, a Legislative Council appointed by the Crown, and a House of Representatives to be appointed by the Houses of the several Provinces from their own members.

This General Assembly was authorised to make laws:—(1) for the regulation of customs duties; (2) for the establishment of a General Supreme Court, both of original and appellate jurisdiction; (3) for determining the extent of the jurisdiction and the procedure of the General Supreme Court; (4) for regulating the coinage and currency; (5) for determining weights and measures; (6) for regulating the post offices; (7) for establishing bankruptcy laws; (8) for erecting and maintaining lighthouses; and (9) for imposing shipping charges. Its laws made on these subjects were to supersede those enacted by the Assemblies of the separate Provinces.

In exercise of the powers conferred by the Act a Royal Charter was issued on 23rd December, 1846, under which the colony was divided into the provinces of New Ulster and New Munster, each with a Governor and Lieutenant-Governor. With the Charter were also issued voluminous instructions which afford a striking example of the power of the Crown, with the advice and concurrence of the Privy Council, to legislate for a Crown Colony under authority derived from the British Parliament. They provided, amongst other matters, for the settlement of waste lands, for the treatment of the aborigines, for the establishment of Executive Councils nominated by the Governor, and for the quadrennial election by the Provincial Houses of members from their bodies to form the colonial House of Representatives. New Ulster was defined as "the whole of the Island hitherto called the Island of New Ulster" except those parts adjacent to Cook's Straits which the Governor might by proclamation exclude; and by proclamation dated 10th March, 1848, the Governor accordingly excepted from New Ulster that portion of the North Island which lies south of a line drawn

due east from the mouth of the Patea River. The area so excluded, with the remainder of the colony, formed the province of New Munster, and a separation was thus effected between the Company's settlements in the south and the other settlements in the north. The first application of the revenue of the General Assembly should defray the expenses of its collection, management, and audit. Any surplus was to be applied to those specific purposes prescribed in the Ordinance imposing it. If there were still a surplus, it was to be paid over to the provincial treasuries, to be used for the public benefit in such manner as the Provincial Assemblies might think fit, the division between the Provinces varying with the proportion of the gross amount of the tax raised by each Province. Aboriginal districts were to be established, within which the laws, customs, and usages of the natives, so far as they were not repugnant to the general principles of humanity, should be maintained. To interpret and execute these laws in cases in which the Maoris alone might be concerned, native chiefs or other persons were to be appointed by the Governor-in-Chief.

2. Grey's Action.

It is doubtful whether the colonists had reached that condition of self-control in which they might safely be entrusted with any considerable powers of self-government with dominion over the aborigines; nor were the Maoris likely to acquiesce in the confiscation of their waste lands which the Governor was instructed to effect. Grey was therefore constrained to proceed warily with the establishment of the constitution. At a time when English public opinion set little value on the maintenance of the

bonds between the Home land and the colonies, one grievous blunder in administration might involve their immediate severance. In Grey's view, the constitution was not a truly representative one; conferring as it did upon a small section of the inhabitants exclusive power over a large number of their fellows, whose interests in many respects were totally opposed to their own. The exclusion of the Maoris would not have militated against the success of the constitution but for the probability that the colonists would eagerly seize the opportunity it afforded to legislate so that they might acquire the native lands, even at the cost of war. The scattered and defenceless British settlements contained only some ten or twelve thousand people—less than a tenth of the Maori population. The Maoris were exceedingly well informed on political questions, were keenly alert to all the rumoured changes, and extremely jealous of their rights. The first certain indication of the violation of the Treaty of Waitangi would have been the signal for the uprising of a courageous people, possessed of great military skill, who would have experienced little difficulty in annihilating the white intruders upon their territories. The European minority, Grey feared, would certainly be tempted to arrange the taxation in such a way as to compel the Maoris to contribute the greater part of the money used in paying soldiers to coerce them—a course which was certain to end in disaster.

Another important consideration was the fact that those "to whom the new powers were to be entrusted would benefit largely from expenditure, and would have a direct interest as great as possible" in legislating to increase the Government expenditure. The inhabitants of Wellington especially were largely

interested in Government contracts for making roads and military works. Moreover the majority of the few votes cast would support the New Zealand Company in its proceedings, many of them directly opposed to the best policy of the Imperial Government and to the general interests of the Colony.

After mature consideration, Grey decided that he could best guard the fair fame of England by strictly adhering to the solemn promises, made on several previous occasions by the Imperial Government, to confirm the natives in the possession of all their land rights recognised by the treaty. The mere rumour of an intention to use the native waste lands without compensation had driven the northern tribes to rebellion; and he remembered the pledges of Lord Stanley that the provisions of the Treaty of Waitangi would be honourably fulfilled. It was their trust in the honesty of these promises that had impelled friendly natives, such as Waka Nene, to offer that assistance which had proved essential to the suppression of the rebellion.

Once the Constitution was in force, it would be extremely difficult to amend it. The Governor himself had no power to alter it beyond moving the boundaries of the municipal districts. It did not commend itself to him as the type of constitution with which the Imperial Parliament should endow a free colony. Such an enthusiastic and far-sighted Imperialist as Grey was not ignorant of the lessons to be learnt from the history of Canada during the period 1791-1840, when its two provinces of Lower Canada (Quebec) and Upper Canada (Ontario) were governed by a Legislative Assembly of Representatives conjointly with an Executive nominated and controlled by the Crown. In both Provinces, but especially in Quebec, where race differences increased

the complexity of the political situation, conflicts between the Governor and the Legislature grew in number and intensity until affairs were brought to a head by the rebellions of 1837. In colonies with such a form of government the Assemblies would naturally endeavour to secure control of the patronage, which, in the hands of the New Zealand Company, would prove a most dangerous instrument, liable to be used without due regard to the ultimate interests of the Colony. The independence of the executive would of itself tend to create a feeling of irresponsibility on the part of the Assembly, and convert the orderly and healthy rivalry of party statesmen into the clack and clamour and insidious intrigue of irresponsible politicians. "If a dominant country grants to a dependency, popular institutions and professes to allow it self-government, without being prepared to treat it as virtually independent, the dominant country by such conduct mocks its dependency with the semblance of political institutions without the reality. It is no genuine concession to grant a dependency the names and forms and machinery of popular institutions, unless the dominant country will permit these institutions to bear the meaning which they possess in an independent community; nor do such apparent concessions produce any benefit to the dependency, but, on the contrary, they sow the seeds of political dissensions."*

If it were not prepared to grant New Zealand full autonomy, the Imperial Government would have done better in preserving the Crown Colony system in its integrity. Instead of placing irresponsible power in the hands of men unlikely, from their circumstances, to take a general view of the situation,

*Lewis—On the Government of Dependencies.

apart from their own narrow and immediate interests, it should have allowed the Governor and officers full scope as impartial arbiters between the settlers and the natives, protecting the latter from unscrupulous treatment, and encouraging the former in the employment of all fair means for overcoming any obstacles raised by the aborigines to the rapid industrial and commercial development of the Colony.

Genuinely influenced by these considerations, which were no doubt seconded by his autocratic temperament, Grey decided not to give effect to that part of the instructions relating to the Assemblies, and he asked the Secretary of State to modify the constitution. In taking this step he was supported by the opinions of Bishop Selwyn, Chief Justice Martin, and the Wesleyan Mission Committee.

3. Suspending Act of 1848.

Though Grey was bitterly assailed from one end of the Colony to the other, his endeavours to secure a modification of the constitution were unremitting. In November, 1847, the Secretary of State yielded, and informed him that Parliament would be asked to pass a Bill, enabling the Queen to suspend the Constitution. A grant of representative institutions once made is irrevocable by the Crown, but the paramount authority of Parliament remains.

The Act, which was passed on the 7th March, 1848 (three days before Governor Grey divided the Colony into Provinces in accordance with the Instructions of 1846), suspended for five years the operation of certain parts of the Act of 1846, namely, so much as related to the constitution and establishment of the Provincial Assemblies and the General Assembly; it being left to the discretion of the Crown, upon the advice of the Privy Council, to direct that the Act

and pursuant Letters Patent and Instructions should be carried into effect before the expiration of that period. The operation of those portions of the Act, Letters Patent, and Instructions of 1840 which related to the Legislative Council was to be revived during the suspension; but the Governor-in-Chief was given authority to appoint additional members, either official or non-official, to the Council, subject to the right of disallowance of the Crown. Moreover, he might, subject to the same limitation, establish a Legislative Council in each Province by means of an Ordinance which should state the manner of appointment, or election, or appointment and election, of the members, and the powers to be exercised by it.

4. Establishment of Provincial Councils.

Public opinion did not cease to abuse the Governor in the most emphatic terms for the suspension of the Charter of 1846, and to clamour for a representative government in place of the autocracy of the Colonial Office. Constitutional Associations had been formed throughout the Colony to express and emphasise the determination of the colonists, and the efforts of the Governor to postpone the grant of a constitution were received with annoyance and contempt. In 1848 he convened his Legislative Council in Wellington, and passed the Provincial Councils Ordinance (IX. No. 1), which provided, as authorised by the Imperial Statute of 1848, that each province should have a legislature consisting of the regular Provincial Executive and of certain additional persons to be appointed by the Governor or Lieutenant-Governor. This, he reported, was intended as a step towards the introduction of representative institutions when the period of suspension should have expired. In the same year a Council of New Munster was

formed under this ordinance. But the colonists were not to be diverted or appeased. The new Council which sat for one session only in 1849, was heartily ridiculed, as was also a curious General Council of 1851, which consisted of the old colonial Council in combination with that of New Munster. On January 1st, 1848, Grey had assumed office as "Governor-in-Chief over the Islands of New Zealand," as "Governor of the Province of New Ulster" and as "Governor of the Province of New Munster." On the 3rd of the same month, the Governor-in-Chief appointed Major-General Pitt, Commander of the Forces, to be Lieutenant-Governor of New Ulster;* and on the 28th, Eyre, the Australian explorer, who had been appointed by the Crown to the Lieutenant-Governorship of New Munster, assumed, at Wellington, the administration of that Province. The Governor-in-Chief and Legislative Council sitting at Auckland continued to legislate for the whole Colony on such subjects as the Act of 1846 allowed. The Legislative Council for New Ulster was practically the same as that for New Zealand.

In each Province the Lieutenant-Governor was assisted by the Colonial Secretary, the Colonial Treasurer, the Attorney-General, and the chief military officer, who, with himself, formed the Executive Council. In New Ulster it was the same as for New Zealand with the addition of Major-General G. D. Pitt, who was succeeded in 1851, by Lieut.-Colonel Bolton. In New Munster Domett was Colonial Secretary, Daniel Wakefield Attorney-General, H. W. Petre Treasurer, and Lieut.-Colonel McCleverty principal military officer. This form of government, however, caused much dissatisfaction among the residents of New Munster,

*Succeeded on his death in 1851 by Lieut.-Col. R. H. Wynyard.

who were composed chiefly of the immigrants of the New Zealand Company, and who were the most ardent agitators for representative Government. No. 6 of Session XI., 1851, repealed IX. No. 1. and provided for Provincial Legislative Councils with two-thirds of their members elected on a fairly broad franchise. This new constitution was proclaimed in 1852, and the New Ulster elections were held, but further proceedings were stayed by the news of the Imperial Act of that year.* In transmitting to the Crown the Ordinance for creating Provincial Legislative Councils, Grey had outlined the constitution which he recommended as the most suitable to establish at the end of the suspension of the Act of 1846.

5. Proposed Extension of British Sovereignty in the Pacific.

When Grey had re-established order in New Zealand, he turned his attention to the other Island groups of the South Pacific, and wrought unceasingly in the endeavour to establish an island federation under the British flag. He induced the chiefs of Tonga, Fiji, New Caledonia, Tahiti, and the Loyalty Islands to consent to the establishment of British sovereignty in their territories, and the institution of customs duties identical with those of New Zealand, the proceeds from which would defray the expenses of a simple form of Government. But his enthusiasm found no echo in the Colonial Office, and with the exception of one group, which was tardily admitted within the Colony of New Zealand, long after he had ceased to have any official connection with it, these fertile lands were left to be annexed to France and Germany.

*See below p. 261.

CHAPTER XV.

EARLY LAND SYSTEM OF NEW ZEALAND.

1. Pre-British Land Claims.

The proclamation of Governor Gipps of the 14th of January, 1840, and that of the Lieutenant-Governor of the 30th, issued in accordance with the royal Instructions, had announced that no land title would be acknowledged as valid unless authorised through, or confirmed by, a grant from the Crown. These proclamations had virtually stopped the traffic in native lands within New Zealand; but Hobson reported in February, 1840, that extensive mischief had been done before their promulgation, and that, in some cases, the disaffected whites had perverted their contents into a means of exasperating the Maoris against the Government.

The land purchases affected by the proclamations were ranged in three classes: (1) Those made by the early residents who had purchased when there was no immediate prospect of the establishment of a settled form of Government, and who in some cases had paid a price that could not be considered unreasonably low, taking into account the many serious risks then attendant upon life in this remotest outpost of civilisation. (2) Purchases made from the year 1836, the majority of which had been contracted by individual speculators drawn from Sydney and other Australian centres by the rumour of British annexation and the hope of enjoying the large increment of value that would follow upon the institution of orderly government and the consequent increased flow of emigration. (3) The purchases of the New Zealand

Company and of the French Company, differentiated from the other two species by their political importance.

Hobson expected considerable difficulty, both in establishing a satisfactory method of adjudicating upon the claims and in executing the recommendations of the Commissioners. He anticipated that the Maoris would resist the enforcement of all awards that might prove unfavourable to them. The sources of difficulty were manifold. In the first place, it frequently happened that there were several European claimants to one piece of land, one of them having made his agreement with the chief of the tribe, another with some individual member, another with the *hapu* of the tribe, and yet another, perhaps, with the whole tribe. Seriously conflicting claims were specially numerous in regard to lands to which the native title had been effected by conquest, some of them having been purchased from the reputed conquerors, others from the vanquished; and this difficulty was increased by the suggestions of Europeans, consumed with land hunger, who prompted the Maoris to raise on this basis claims that might never have been entertained upon their own initiative. Then again, large tracts of land had been sold for sums that seemed fraudulently low when compared with the prices that prevailed immediately upon the news that British sovereignty would be definitely asserted. "This exasperates the natives," said Hobson, "and impresses on their minds that formerly they were in every case over-reached and cheated, whilst in fact, the old purchases were quite as just as those of a more modern date; the former being without the hope of British interference, whilst the latter were effected with the certain knowledge that Her Majesty's Government would extend to this

country the benefits of civil institutions and legal protection."* Finally, in many cases, the Maoris were not informed of the real effect of the bargain: they thought they were merely granting occupancy and not ownership, or that they were disposing of a crop growing on the land which they did not immediately require, or were admitting the purchasers as members of their tribe, with only common rights to the tribal lands. A Maori would sell only his share of the tribal right, whilst the European purchaser understood that he was purchasing the absolute ownership of the lands.

In February, 1840, five chiefs from the South Island being in Sydney, Governor Gipps explained to them the purport of a document similar to the Treaty of Waitangi, which he required them to sign, at the same time expressly declaring, in the presence of persons who claimed to have purchased land in their Island, that only such purchasers as might be approved of by the Crown would be ultimately confirmed in their possession. Although the chiefs promised to attend on a certain day to sign the agreement, they did not appear; but one of the Englishmen with whom they were staying intimated to the Governor that they had been advised to sign no treaty which did not contain full security for the possession by the purchasers of all lands acquired from the natives.

* J. S. Polack in his evidence before the Select Committee of 1838 said that the Maoris had full knowledge of the value of their land, and that they appreciated the necessity of acquiring valuable consideration in exchange for it. "They would say," he reports, "'Now remember, you are going to get our land. It descended to us from our forefathers. Do not think to give us a mere trifle. Give us that which we should have. See that stream, so let your payment be. It goes in various creeks and so refreshes all the land; so must your payment refresh all concerned.' Then again they would say: 'The things you give us are nothing like the value of the land. That lasts for ever but what will become of our blankets? They will become sick or dead. What becomes of your tomahawks? They will be sick or dead. Glass and iron are brittle. You are going to steal our land from us; your payment must be good to us. There is this tree. If one branch falls there will come another. It will remain to your children, but what will become of our children when these things are worn out?'"

The advice had been given them by Wentworth, who, in conjunction with some other persons, subsequently purchased from these chiefs for a small consideration all the unsold portions of the Middle Island, amounting to some twenty million acres.

2. Land Claims Act of 1840.

In May, Gipps introduced into the Legislative Council of New South Wales a Bill to empower the Governor of New South Wales to appoint Commissioners with certain powers to examine and report on claims to grants of land in New Zealand. The utmost efforts of the Sydney land-claimants were made to oppose it. Among the most active of these was Busby, the late Resident, who claimed 50,000 acres and the site of a township at the Bay of Islands, and Wentworth, claimant to the greater portion of the Middle Island. Between the first and the second reading of the Bill counsel was heard on behalf of the petitioners, and Busby and Wentworth, among others, addressed the Council. According to American law, for example, the right of preemption over the soil is exclusive to the Government, and Busby referred to the case of Batman and other original Port Phillip settlers who had obtained a large grant of land from the aborigines in 1835; but he contended that this case differed from that of the New Zealand land-claimants, inasmuch as the British Government, upon being informed of Batman's purchase, forthwith issued a proclamation declaring its illegality. In New Zealand no attempt whatever had been made by the Government to prevent British subjects acquiring territory there; up to 1840 the Home Government had admitted the sovereignty of the Maori chiefs and the independence of their nation, had acknowledged their national flag, had

approved their Declaration of Independence, and ordered it to be printed as a State paper. By the recent Treaty made at Waitangi the New Zealand chiefs had agreed to forgo the right to sell their land to anyone but the British Government, thereby giving the British Crown the right of pre-emption; but he asked, if the chiefs never had the right, why had they been required by the Treaty to relinquish that which they never possessed?

In a long and contentious speech Wentworth endeavoured to prove that the principle of the Bill was at variance with the principles of British law and the law of nations. He appealed to the law of nations as expounded by Vattel and to the precedent of New England.

Governor Gipps replied to the arguments of the deputation. He said, in the first place, that the law and practice of all the colonising powers of Europe had regarded the uncivilised aboriginal inhabitants of any country as having but a qualified dominion over it, and possessing only a right of occupation until they had established a settled form of government and subjugated the land to their own uses by cultivation; they were unable to grant any portion of it to individuals not of their own tribe, for the simple reason that they held no individual property in it. Secondly, if settlements were made by any civilising power, the right of pre-emption, that is, the right of extinguishing the native title, was exclusively the right of the Government of that Power, and could not be enjoyed by individuals without the consent of that Government. According to American law, for example, no American subject could hold or acquire land from the Indians without the sanction and confirmation of the Government of the United States. Thirdly, neither any individuals, nor any bodies of

men, of any nation could form colonies except with the consent and under the direction and control of their own Government; from any settlement which they might form without the consent of their Government, they could be ousted; a British colony, therefore, could not be founded without the consent of the Crown. In the fourth place, he had to consider a suggestion made by the House of Commons Committee, which had in 1836 enquired into the state of the aborigines in British settlements: this suggestion was that, so far as the lands of the aborigines were not in territories over which the dominion of the Crown extended, the acquisition of any of them by British subjects from their present proprietors should be determined null and void. This prohibition, in the opinion of the Committee, might also be extended to territories immediately contiguous to the Queen's dominions, but there was no power to prevent transactions of the countries which were neither within the Queen's allegiance nor affected by any of those intimate relations growing out of neighbourhood. New Zealand, Gipps contended, though not immediately contiguous to New South Wales had relations with it growing out of neighbourhood, and clearly came within the recommendation of the Committee.

He referred to the case of the Port Phillip Association, of 1835, cited by Busby, which established a settlement at Port Phillip on lands bought from the natives, but outside the limits of the Government of New South Wales. The Governor of that Colony had thereupon issued a proclamation declaring all such purchases to be invalid. The Association had been advised that its grants from the natives were not valid, and that the British Government could expel it from the settlement; for the Crown has full power

to prevent such settlements being made by British subjects. The more recent case of the New Zealand Company also pointed in the same direction. The Secretary of State for the Colonies had asked the Directors of the Company in 1839 whether they were parties to an agreement with persons forming an expedition for the establishment of a settlement and an independent government at Port Nicholson. When the Company took the opinion of its counsel on the matter, it was found that the proceedings in question were illegal, and they ordered them to be stayed. As to the recognition of the independence of the Maoris, the Governor pointed out that the Declaration of Independence had been made only by a few tribes in the Bay of Islands, and that the recommendation of a distinguishing flag is no concession or granting of immunities. Furthermore, the South and Stewart Islands had been annexed in virtue of the right of discovery.

Gipps also stated that the object of the Bill might be effected by a tax on land, and that, if the Bill were rejected, he would immediately propose such an expedient.

The Bill passed on the 4th August. Its effect was to render absolutely null and void all titles to lands in New Zealand except those allowed by the Crown. The Governor was authorised to refer land claims to Commissioners appointed by himself, who should examine and report upon them, and who should be guided in their decision by considerations of real justice and good conscience. No claim to a site, suitable for a town, a village, defence works, or for reserve or any public purpose, was to be recommended for confirmation by the Commissioners, but compensation in the shape of other lands might be awarded to those who established good claims to such

sites. In no case was a grant to exceed 2,560 acres (four square miles), except by the special permission of the Governor-in-Council; and grants recommended by the Commissioners might be vetoed by the Governor.

3. Attitude of the Crown.

Meanwhile, Lord John Russell, who had succeeded Lord Normanby, notified, in July, 1840, the Government's approval of the Treaty of Waitangi, the measures adopted by Gipps, and the manner in which they had been executed by Hobson. On the 16th November, a Royal Charter constituted New Zealand a separate colony. It was provided therein that nothing should affect the rights of the Maoris to the actual occupation or enjoyment, in their own persons or in the persons of their descendants, of any lands then actually occupied or enjoyed by them, and this provision was repeated in the subsequent Instructions to the first Governor. In referring to the Instructions in January, 1841, the Secretary of State wrote that "Her Majesty, in the Royal Instructions under the sign manual has distinctly established the general principle that the territorial rights of the natives as owners of the soil must be recognised and respected."

Gipps's Act had been disallowed by the Home Government upon its determination to make New Zealand a separate colony. The general provisions of the Act had been approved of by the Crown; but the separation of New Zealand from New South Wales would render the interposition of the Governor of New South Wales obsolete. Moreover, new arrangements had been made with the New Zealand Company which would forbid the application of the Act in its original form to their lands, and it was proposed to commit the investigation of their claims to a single

Commissioner, appointed by the Crown, and not to three joint Commissioners. Lord Russell recommended the passage of a new law by the local legislature, based on the New South Wales Act; but, in the meantime, as difficulties might arise in obtaining the necessary enactment, Hobson was authorised to postpone the notification of the disallowance of the Act, if he should be of the opinion that its disallowance would, on the whole, be injurious to the public interest. In that case, he was to report to the Secretary of State the grounds of his opinion, and until he received further instructions, the New South Wales Act was to continue in force in New Zealand, so far as it might be capable of execution, although, of course, subject to any amendments which might, in the interval, have been made by himself with the advice of the Legislative Council of New Zealand.

On the 9th June, 1841, however, before these Instructions had reached New Zealand, the Legislative Council had passed the Land Claims Ordinance to repeal within New Zealand the New South Wales Act, to terminate any Commission issued under the same, and to authorise the Governor of New Zealand to appoint Commissioners with certain powers to examine and report on claims to grants of land, and to declare all other titles except those allowed by the Crown null and void. The terms of the Ordinance were similar to those of Gipps's Act.

Under this Ordinance two Commissioners were appointed—Godfrey and Richmond—to act with Spain, the Chief Commissioner appointed in England. By the 1st October 800 claims had been sent in.

There were urgent reasons why the claims should be settled at an early date: the delay involved a continuous loss of capital to the settlers, and would

restrain immigrants from buying land at £1 per acre from the Crown as long as there was a probability of obtaining it on cheaper terms from private owners.

4. Aliens' Claims.

According to the existing English law, no alien could own land within the British dominions. Those aliens, who had purchased lands from the Maoris before the proclamation of British sovereignty, were therefore anxious to know in what light the authorities would view their claims. On being consulted by Lord John Russell, Lord Palmerston, Foreign Secretary, expressed his opinion that, "as in the case of a conquered colony, it would not be just to apply retrospectively to aliens, who had become landowners before the Islands formed part of the dominions of the British Crown, the law which prevents aliens from acquiring landed property within those dominions." In March, 1841, Lord John Russell instructed Hobson generally to acknowledge undisputed claims of aliens who had acquired lands from the chiefs prior to his proclamation respecting land titles, but to deal with doubtful claims in the same way as he proposed to dispose of the claims of British subjects.

5. Number and Extent of Claims.

The number of claims submitted to the consideration of the Land Commissioners was 1037. Including the New Zealand Company's purchases of 1839 and 1840, the claims covered 45,976,000 acres, of which 8,000 acres had been purchased from 1815 to 1824; 1,008,000 from 1825 to 1829; 600,000 from 1830 to 1834; 120,000 from 1835 to 1836; 240,000 from 1837 to 1838; 12,000,000 in 1839, exclusive of the New Zealand Company's purchases; and another 12,000,000 in 1840. The New Zealand Company's purchases

amounted to 20,000,000. In October, 1842, the Commissioners reported that 104 claims had been determined, comprising 48,328 acres, awarded at rates varying from 5s. to 20s. an acre, and at the general average of 6s. 3d. per acre. By the 31st May, 1843, they had reported on 554 claims; 304 were then in course of investigation, and were to be decided by the end of November; and the remaining 179 would be reported on during the ensuing summer.

We cannot here deal in detail with the many principles involved in the more important claims, such as those of the Manukau and Waitemata Land Company. Many of the claimants were either missionaries or their relatives. The missionaries' speculation in land had been a subject of enquiry by the Parliamentary Committees of 1836 and 1838, when it had been alleged in evidence that they were opposed to Great Britain assuming the sovereignty of the country. It was even suggested that they favoured the establishment of a Native Government under missionary control, because it offered them rich opportunities of acquiring and building up estates of vast extent and choice selection. Though it was proved that some of the missionaries had been unable to withstand the pangs of land hunger, and had appropriated areas of unreasonable extent, the general charge of land-grabbing was not proven.

6. Crown Land Sales.

A Committee of the House of Commons in 1836 had recommended that arrangements concerning the sale of Crown lands in the colonies should be entrusted to a Central Land Board in London with subordinate Boards in the different colonies, and that the proceeds of the colonial land sales should form

an Emigration Fund to provide the colonists with free labour.

In accordance with this recommendation, a Royal Commission of three was appointed, in 1840, as the Colonial Land and Emigration Commissioners, in order (1) to collect and diffuse information respecting the colonies; (2) to effect sales of Crown lands in the colonies; (3) to assist emigrants to proceed thither; and (4) to render periodical accounts of the land funds. The instructions issued to the Commission laid down the rule that the "Crown lands in the colonies are held in trust, not merely for the existing colonists, but for the people of the British Empire collectively"; but that local claims of a public nature were to be the first charge on the land revenue, and that a considerable part of the fund allocated for the use of the empire collectively should be expended in assisting emigration. The Governors were to continue to make the grants of Crown lands, but the Commissioners were to exercise equal power with them in contracting for the sale of the lands. The Commissioners were also directed to make enquiries as to the best system of alienation to adopt—whether to sell the lands at a fixed price, with priority for claims according to date, or to sell them at auction at an upset price.

Hobson's Instructions of 1840 had directed him to sell Crown lands in New Zealand at a uniform price per acre, to be fixed from time to time by the Home Government. The authority of the Commissioners to contract for the sale of land within the Colony was thereby limited to the issue of certificates by them to persons who had actually paid money to the London Agent for New Zealand for the purchase of land within the Colony.

The first sale of Crown lands in New Zealand took place at Auckland on April 19th, 1841, when 129 town allotments, with an upset price of 12s. 6d. per perch, or £100 per acre, and containing in all 41 acres were sold at the average rate of £597 per acre. The second sale—of suburban allotments and small farms—was held on September 1st. The Governor was subjected to severe criticism for not submitting more allotments to public competition. The original cost of the land to the Government had been trifling, and it was maintained that the quantity to be redistributed to the public was immaterial, provided it realised more than the upset price, which was understood to be its fair value, and to represent as well the Government's expectation of the proceeds of the sale. The greater number of town allotments were purchased on speculation, and only forty-eight by persons intending to occupy them. The *bona fide* settlers who had been waiting many months for land to cultivate complained that the system of offering land in small lots was peculiarly unjust to them. Moreover, the arrangement of the allotments was such as to encourage purchases by land-jobbers for subdivision and re-sale. Within a fortnight from the second Government sale there were no fewer than ten towns and villages advertised for sale, all on one route, within two miles of Auckland, while minute subdivision was also made of many of the original town allotments. The many narrow and winding streets that still mar the proportions of that city originated in these proceedings. The Survey Department had erred seriously not only by failing to provide lands suitable for small purchasers, but by omitting to prescribe regulations prohibiting the construction of narrow streets.

7. Land Legislation.

A first-class title was secured to the original grantee of land in New Zealand by his Crown grant; but, in order that subsequent changes of title should be rendered secure, it was necessary to establish a complete system of transfer. The ninth Ordinance provided for the registration of deeds and instruments generally affecting real property; whilst the tenth facilitated the transfer of real property and simplified the law relating to it.

The comparatively easy terms upon which the New Zealand Company, in accordance with the arrangement entered into with Lord John Russell's Government, obtained grants of land, operated to prejudice the success of Crown land sales in the north. The Governor, according to his Instructions, could not sell Crown land at less than £1 per acre, and it was not likely that intending colonists would purchase land at that rate when there was a probability of their being able to obtain it at a lower price in the New Zealand Company's settlements. Moreover, except by special recommendation of the Land Commissioners and the Executive Council, the Governor was obliged to limit his grant to any one claimant to 2,560 acres.

Hobson therefore introduced into the Council the Land Claims Ordinance (II., No. 14), which passed its final stage on the 25th February, 1842, and was immediately put into force. It repealed so much of the Land Claims Ordinance of the first session as was inconsistent with the arrangement made between Lord John Russell and the New Zealand Company, and declared all lands within the Colony that had been validly sold by the natives to be vested in the Crown as part of its demesne lands. It then extended the principle of Lord John Russell's agreement to

grants of land from the Crown, whether to natural-born subjects or to aliens, that is to say, each person recommended by the Land Commissioners for a grant was to receive four times as many acres as he should be found to have expended pounds sterling for the purposes specified in the agreement, and it was provided that, whenever goods had been given to the natives in barter for land, the value of these goods should be estimated at three times their selling price in Sydney at the time of effecting the contract. Moreover, if it were found that any part of the land to be granted to the New Zealand Company under Lord Russell's agreement had been validly sold by the natives to any other claimant, the Company was to compensate the latter by granting him land according to a rate to be determined by the Commissioners.

The Ordinance, however, was disallowed by Lord Stanley (19th December, 1842), on the ground that it had been founded on a misapprehension of the intentions of the Government, and that it was subversive of the principle of a limitation of grants to a maximum of 2,560 acres, and of valuation of the land to be granted according to a rate varying inversely as the time since it had been purchased. The disallowance was not notified in the Government "Gazette" till September 6th, 1843, and the Ordinance was therefore in force and acted upon in the Colony from the 25th February, 1842, down to that date.

It had been severely criticised by the New Zealand Company, which strongly objected to the clause basing the calculation of the value of the goods given by purchasers in exchange for their land at three times their selling price in Sydney.

In the meantime the Imperial Parliament had enacted its first measure dealing with the sale of land

in the Australasian Colonies. Its scope included New South Wales, Van Diemen's Land, South Australia, Western Australia, and New Zealand, and it was passed with the object of establishing a uniform system of sale within these colonies. Its most important provision was that with certain exceptions there should be no alienation of Crown land otherwise than by sale at public auction in blocks not exceeding one square mile. The lowest upset price at which land was to be offered was £1 per acre; but the Governor of a Colony was authorised to increase its price at any time, and to any degree he might think fit, subject to the sanction of the Home Government. The net revenue from the sales was to be devoted to the public uses of the Colony, one-half to be spent in assisting immigration from the United Kingdom, fifteen per cent. of the remainder to be applied for the benefit of the Maoris, and a certain proportion of the residue to roads and bridges.

Owing in part to the impecuniosity of the local Government, which could not afford to exercise its pre-emptive right by buying native lands of suitable situation and quality, in part to the frequent changes in the policy of the Home Government towards the New Zealand Company, and in part to the continuous Maori outbreaks in one part of the country or another till 1848, the Act had not effected any improvement in New Zealand affairs by 1846, when the Colony was exempted from its operation.

The disastrous state of the land question is forcibly shown by the statistics available at the end of 1849. Up to that time nearly 274,000 acres had been granted by the Crown in consideration of nearly £52,000. For survey and native land purchase, £33,000 had been expended, and a further £97,000 had been distributed

to claimants who had purchased under Fitzroy's proclamations, to be mentioned subsequently. At the same time the Colony owed the Home Government £14,000 for emigration expenses, so that the land transactions of the first ten years had resulted in a net loss of nearly £100,000.

The first Government immigrants from England arrived at Auckland in October, 1842. During that year the Land and Emigration Commissioners despatched three ships with 779 emigrants.

8. Maori Land Troubles.

Disregard by the colonists of the Maori right to land was a fruitful source of quarrel. The Wairau "affair" may be briefly cited as a striking but typical case. Colonel Wakefield had in 1839 bought certain claims to the Wairau district from Mrs. Blenkinsopp, the widow of a whaler; and, when the Nelson immigrants found that the land assigned to them was too confined for the purposes of such settlement as they had planned, some of them passed eastward into the valley of the Wairau, and began to explore that region to determine its suitability for settlement. As soon as he was informed of these proceedings, Te Rauparaha, the chief of the tribe claiming the district by right of conquest, crossed over to Nelson and informed the Agent of the New Zealand Company that the surveyors found in the Wairau would be treated as trespassers upon his land. He had not sold the district to the New Zealand Company, and had no present intention of selling it. Captain Wakefield explained to Te Rauparaha that the Company based its claim on the purchase made by the principal Agent, and informed him that the exploration and survey must continue. Te Rauparaha then asked the Agent to refer the claim to the decision

of the Land Commissioner who had been appointed to enquire into the Company's claims. The Company, however, relying upon Lord John Russell's agreement, refused to recognise that the Commissioner had any jurisdiction over its claims, and proceeded with the survey.

In April, 1843, the natives pulled up the surveyors' rods, and on May 6th destroyed some of their huts, after carefully removing the personal belongings of the surveyors. Early in June another hut was burned. As these huts had been built from materials taken from the land, the natives claimed that they had a right to destroy them. On the 12th June information was laid against Te Rauparaha and his son-in-law Rangihaeata; and a warrant was issued, by a bench of justices which included Captain Wakefield, for the apprehension of the chiefs on a charge of arson. A party of forty-nine settlers, thirty-five of them armed, proceeded to execute the warrant. Te Rauparaha declined to surrender himself, and earnestly besought the Europeans to defer action until Commissioner Spain had decided as to the ownership of the land. In the ensuing parley a shot was accidentally fired by one of the settlers, whereupon the parties engaged in combat. Whilst the Maoris lost only four of their number, twenty-two settlers were killed, nine of them, including Captain Wakefield and the Magistrate, being murdered after having surrendered themselves to the natives.

In consequence of this incident, Shortland, who was then administering the Government, issued, on July 12th, a proclamation requesting all land claimants, whose claims were denied or disputed, to refrain from exercising acts of ownership or from otherwise broaching the question of title until a Land Commissioner had heard and determined the claim.

This proclamation effected the stoppage of the Company's surveys, and was an indirect cause of the temporary cessation of their operations within the Colony.

9. Fitzroy's Land Policy.

There was no money in the public treasury with which to purchase land from the natives, who were consequently dissatisfied with the embargo laid upon the sale of their lands to others than the Crown. The northern colonists still laboured under the disadvantage of having to pay more for their land than those who had immigrated under the auspices of the New Zealand Company. In March, Fitzroy so far yielded to the united entreaties of Maoris and settlers as to issue a proclamation allowing settlers to buy land from the natives on paying 10s. an acre commission to the Government. Before leaving England Fitzroy had asked permission to waive the Crown right of pre-emption; but he had been directed to make enquiries on his arrival in the Colony, to report any suggestions that he might then have to make on the subject, and to await the decision of the Imperial Government.

His proclamation, therefore, was in excess of his instructions, but it eventually received a qualified approval from the Secretary of State, although the Maoris and prospective purchasers objected to the rate as a serious impediment to legitimate transactions, and although the Maoris went further and argued that the proclamation contravened the provisions of the Treaty of Waitangi, which had guaranteed them freedom of sale at any price they might think fit, subject only to the pre-emptive right of the Crown.* On the 10th October the Governor, unable

*Only some forty-seven purchases, however, were made under it, and the relief afforded was quite insufficient to satisfy the public demand.

to withstand the pressure brought to bear upon him, issued another proclamation by which the payment into the Public Treasury on the waiver of the Crown right of pre-emption was reduced from 10s. to 1d. per acre. Under this proclamation nearly fifty times as much land was bought as had been purchased under the preceding one. But it was a clear evasion of the Australian Land Sales Act of 1842, was of course promptly disallowed, and supplied one of the causes immediately leading to Fitzroy's recall.

10. Grey's Policy.

Grey was instructed by the Secretary of State to revoke both proclamations, and, after subjecting all claims under them to the strictest scrutiny consistent with good faith, to bring them to a close at an early period. In June, 1846, he therefore publicly notified that he would not "entertain or grant any application for waiving the Crown's right of pre-emption under Fitzroy's notice." The number of claims preferred under the proclamations was 148—47 under the earlier one, and 101 under that of October; the whole extent of land claimed was somewhat less than 100,000 acres. An ordinance of the 18th November authorised the payment of compensation in Colonial Debentures to be made to claimants under the October proclamation.*

It was in this June also that Grey wrote his famous "blood and treasure" despatch, in which he denounced the claims founded upon the penny an acre proclamation as not based on "substantial

*In 1847 the two judges of the Supreme Court pronounced against the validity of Fitzroy's penny an acre proclamation, declaring that a purchaser under it was simply a purchaser from the natives without the authority or confirmation from the Crown, and that the Governor had not authority to make an effective waiver opposed to the Royal Instruction and to the Act of Parliament in force when the certificate of waiver had been issued.

justice to the aborigines or to the large majority of British settlers.'' ''Her Majesty's Government,'' he went on to say in the passage from which the despatch derives its appellation, ''may also rest satisfied that these individuals cannot be put into possession of these tracts of land without a large expenditure of British blood and money.'' He pointed out that the persons interested in the land claims formed a very powerful party, and included several members of the Church Missionary Society, various public officers, and persons connected with the public Press. So direct a charge naturally evoked an outcry from the Church Missionary Society.

11. Maori Rights under the Treaty of Waitangi.

The New Zealand Company induced the House of Commons to appoint, on April 30th, 1844, a Select Committee of fifteen members to enquire into ''the state of the colony of New Zealand, and into the proceedings of the New Zealand Company.'' Lord Howick, who, as Earl Grey, subsequently became Secretary of State for the Colonies, was Chairman. To this Committee were referred two petitions, one from owners of land in New Zealand and other persons interested in the welfare of the Colony, the other from inhabitants of New Plymouth. While the former complained of the Governor's inefficiency and the unreasonable conditions which they were expected to satisfy before obtaining confirmatory Crown grants of their land, the latter asserted that absentee ownership of the greater part of the land in their settlement was the cause of the existing depression in the most fertile of the New Zealand plantations.

The Committee's Report was strongly in favour of the Company, which, however, it reprimanded, in the

first of its nineteen resolutions, for "highly irregular and improper" conduct in having commenced operations in defiance of the Government. The Treaty of Waitangi was characterised as "a part of a series of injudicious proceedings" that had originated long before its contraction. The acknowledgment by the local authorities of a right of property on the part of the natives in all their wild lands after British sovereignty had been assumed, was declared not to be essential to the true construction of the Treaty, and to be an error that had produced very serious consequences. In the opinion of the Committee, the Company was entitled to be put in possession of the amount of land awarded to it under Lord John Russell's agreement, "without reference to the validity or otherwise of its supposed purchases from the natives, all claims derived from which have been surrendered." The Company's selections should be limited to lands vested in the Crown. Steps ought to be taken forthwith for establishing the exclusive title of the Crown to all lands not actually occupied by the natives, or held under grants from the Crown, and they should then be considered as vested in the Crown "for the purpose of being employed in the manner most conducive to the welfare of the inhabitants, whether natives or Europeans." It was recommended that a land tax, not exceeding twopence an acre, should be imposed on all appropriated lands not held by natives; but that this should not be levied on the whole estate of the Company so long as it sold not less than one-twentyfifth of the land granted to it annually, and expended a fixed proportion of the proceeds on emigration. A certain proportion of land should be reserved for native uses, but lands so set apart should not be included in calculating the amount of the Company's grants. Legal titles

should without delay be granted to actual occupants "unless under special circumstances of abuse." The prohibition imposed on the purchase of lands from the natives by others than the Crown should be strictly enforced in the case of land purchased by natives, who, by special sanction of the Protector of Aborigines, might re-sell it to private individuals. The principle followed by the Company in establishing reserves for the ultimate benefit of the natives received the warm commendation of the Committee, which characterised it as "sound and judicious, tending to the benefit of all classes."

Though the House did not adopt the resolutions, the Report had considerable influence on the course of affairs in the Colony.

In his despatch to the Governor the Secretary of State expressed the opinion that the Report, carrying with it the authority of a Committee of the House of Commons, might add to the difficulties of his position, chiefly by the principles which it laid down,—principles which, he feared, if translated into practice, would lead to most unhappy consequences. As to the land rights of the native inhabitants, it had been the practice of the British Government to distinguish between "classes of aboriginals widely differing from each other." Up to 1839 England had recognised the chiefs of New Zealand as the heads of an independent community, and the Secretary of State had in that year acknowledged New Zealand as a sovereign and independent State, and had disclaimed on the part of the Queen "for herself and her subjects, every pretension to seize on the Islands or to govern them as part of the dominion of Great Britain, unless the free and intelligent consent of the natives, expressed according to their established usages, should be first obtained." Acting upon this principle the British

Government had then directed their Consular Agent to accept from the Chiefs the grant of sovereignty on certain conditions. The Committee admitted that, although the policy hitherto pursued had, in their view, been erroneous, they saw great difficulty in changing it, and they were not prepared to recommend that the Governor should be peremptorily ordered to assert the rights of the Crown as they believed them to exist. "All they advise is," wrote Lord Stanley, "that he should have clearly explained to him what those rights are and the principles on which they rest, and should be directed to adopt such measures as he may consider best calculated to meet the difficulties of the case, and to establish the title of the Crown to all unoccupied land as soon as this can safely be accomplished." In the Secretary's opinion, to restrict the native territorial rights to those lands actually occupied for cultivation appeared wholly irreconcilable "with the large words of the Treaty of Waitangi," and with the directions of the Marquis of Normanby to Captain Hobson to obtain "by fair and equal contract the cession to the Crown of such waste lands as might be progressively required for the occupation of settlers."* Nor was it consistent with the practice of the tribes, who after cultivating and exhausting a given spot for a series of years, were accustomed to desert it for another within the limits of their recognised territory. Lord Stanley therefore refrained from directing the Governor forthwith to establish the title of the Crown to all unoccupied land except with the qualification, borrowed from the Report, "as soon as this can be safely accomplished."

He denied that the Company had any right to obtain Crown grants without reference to the validity

*See above, pp. 88-9.

of its supposed purchase from the natives. The application of a tax to native lands would require the greatest caution, and he left the Governor unlimited discretion in this matter, though he pointed out that, if the tax could be peacefully imposed and collected, it suggested an easy mode of obtaining a large amount of valuable land in commutation or redemption of the tax upon the remainder.

The Report of the Committee and the tone of several of the speeches made in the House of Commons during the session of Parliament in 1845 created serious apprehension in the minds of the Maoris, who were thoroughly conversant with the discussions. It was fortunate that in his Instructions to the new Governor, the Secretary of State directed him "honourably and scrupulously" to fulfil the conditions of the Treaty of Waitangi—a direction which Grey obeyed when, soon after his assumption of office, he publicly stated to certain influential chiefs the intention of the Government "most punctually and scrupulously to fulfil the terms and promises of the Treaty which was signed at Waitangi on the arrival of Governor Hobson."

It was not till after Earl Grey (Lord Howick) had assumed control of Colonial affairs that an endeavour was made to give effect to the recommendations of the Committee and the demands of the New Zealand Company. By 9 and 10 Vict. Cap. 104, all the provisions made by the Act of 1842 with regard to Crown lands in New Zealand were repealed. There was thenceforth, to quote the words of the Secretary of State,* "a complete absence of any statutory provisions on the subject." The Queen was free to make whatever rules she might see fit to formulate with reference to waste lands in the Colony. The

*Earl Grey.

Charter issued in virtue of the Constitution Act of 1846 authorised the Governor to alienate such lands, and the accompanying Instructions directed him how to exercise that power.

The Instructions were explained in a lengthy despatch. The Secretary of State entirely dissented from the principle that the aboriginal inhabitants of any country are the proprietors of "every part of its soil, of which they have been accustomed to make any use, or to which they have been accustomed to assert any title." As long as their patches of potato ground were not appropriated, he would regard as a vain and unfounded scruple that which would acknowledge their right to property in any land unsubdued to the uses of man. It was only as tribes that the Maoris were supposed to possess a right of property, and, granting their title as such to have been good and valid, it was obviously a right which the tribes enjoyed as independent communities—"an attribute of sovereignty which, with the sovereignty, naturally and necessarily was transferred to the British Crown." But while these were the principles upon which, in his opinion, the colonisation of New Zealand should have been commenced, past transactions rendered a strict application of them impracticable, though the Governor was to regard them as the foundation of the policy he was to pursue.

Chapter XIII. of the Instructions directed the Governor to establish land registries for the record of titles to settled and unsettled land in each Province, and no native title was to be recognised unless the claim should have been registered by the Protector of the Aborigines, or some officer appointed to act for that purpose. All lands that were not so claimed or provisionally registered within a certain limited time, were to be vested in the Crown as demesne

lands. After the period appointed for the registration had closed, a Land Court was to be held in each district for investigating and determining the accuracy and validity of the registrations; an appeal lying from it to the Supreme Court of the Province, whose judgment was to be final. Section 9 provided that no claim should be admitted in the Land Courts, on behalf of the natives, to any lands, unless it was established that, either by some act of the Executive Government, or by the adjudication of some Court of competent jurisdiction, the right of the natives to the land had been acknowledged and ascertained, or that the claimants, or their ancestors, or those from whom they had derived the title, had actually had the occupation of the lands so claimed and had been accustomed to use and enjoy them either as places of abode, or for tillage, or for the growth of crops, or for the depasturing of cattle, or otherwise for the convenience and sustentation of life, by means of labour expended upon them. As for unregistered lands, they were to be confiscated without appeal.

The opposition evoked by the impolicy and injustice of these Instructions has already been referred to.* It was amply justified by its success. During the debate in the Commons on the passage of the Bill for suspending the Constitution Act, Mr. Labouchere (the Under-Secretary) declared on behalf of the Government that the Treaty should be "scrupulously and largely interpreted," and that "there was no intention on the part of the Colonial Office to interfere with or take any course upon the question of waste lands in New Zealand inconsistent with the rights guaranteed to natives under the Treaty of Waitangi."

Through his credit with the Imperial Government and his personal influence with the Maori chiefs, Grey

*See Chap. XIV., 2-3.

was able to buy more native lands than his predecessors. The Wairau territory was obtained in 1847; the Waitohi lands in 1848; over half-a-million acres in the Wairarapa in 1853; and from 1847 the extinction of Maori titles (except in the reserves) in the remainder of the South Island (some 30 million acres) was gradually effected in return for small cash payments, together with promises of "more valuable recompense in schools, in hospitals for their sick, and in constant solicitude for their welfare and protection,"—promises which the Government of New Zealand only partially fulfilled.

In March, 1853, Grey, having then abundance of Crown land at his disposal, and wishing to provide cheap land for labourers, who were unable to buy it in the Company's settlements where the price varied from £1 10s. to £3 per acre, proclaimed that thenceforth the price throughout the Colony should be reduced to 10s. per acre. One of the chief effects of this step, and a possibility that Grey must have overlooked, was the creation, by capitalists, of many large land holdings, which are only now being broken up.

Chapter XVI.

THE NEW ZEALAND COMPANY, 1840-50.

1. Its Early Colonies.

In this chapter we can touch only lightly a few of the points at which the history of the Company has influenced our system of government. We have already* noted the circumstances of its origin, the foundation of its first settlement, and the main features of its policy of colonisation.

Its attempt to appropriate the Chatham Islands in 1840-1 was an indication of the attitude it generally assumed in disputing territorial rights with the Crown. Its colonists had been given by Gipps a "permissory occupation of 110,000 acres around Port Nicholson, on condition of their confining themselves to that limit." Gipps had also promised that he would recommend the Home Government to award them a free grant to that extent, in return for the expense the Company had incurred in bringing immigrants into the Colony.

But the settlers did not fulfil the condition; for they almost immediately spread themselves to Wanganui, a distance of ninety miles, in direct opposition to a notice published both by Gipps and Hobson.

Meanwhile at Home the Company had been advancing in favour. On the 9th July, 1840, a Committee of the House of Commons had been appointed to "enquire into statements contained in the Petition of the Merchants, Bankers, and Shipowners of London presented on the 22nd May, 1840, respecting the colonisation of New Zealand." Edward Gibbon

*See Chap. VI., 3-7.

Wakefield was the principal witness, and his testimony was the best instrument for effectively presenting the Company's case before Parliament. The Report of the Committee set out certain principles which, in its opinion, should form the basis of the law as to the rights of property in New Zealand, and of the future Government of the Colony. The execution of these principles, would, it advised, be materially facilitated if the acquiescence of the New Zealand Company were obtained. The Company's native reserve scheme was favourably commented upon, and the Government was recommended to adopt a similar plan, which should prove "most beneficial" to the natives.

The Committee regretted that the British Government, from 1769 downwards, had lost sight of the principle "which was firmly acted upon by this country and by all other European powers with regard to their North American possessions, and had refused to recognise any titles to land founded on purchases made by private persons from savages. This principle has been adopted by the United States, and it has constantly guided their government in its dealings with the various Indian tribes inhabiting the North American continent, and it has been solemnly declared by the Supreme Court of Judicature in the United States to be a principle of International Law." The right of the discovering and occupying civilised nation to the land of the savage aboriginals is a right "qualified only by the moral obligation of acting with justice to the aborigines."

The Committee distinguished between land claimants who had shown the genuine colonising spirit by cultivating their purchases, and those who had given no such pledge of their intention to become permanent

residents. To such of the former as were in existence at the opening of the Land Commission, it would issue confirmatory grants; to the latter, it would give only the pre-emptive right of purchase from the Crown for ten years at not less than twenty shillings an acre. This was the amount of the rate recommended to be fixed as the minimum "uniform price of Crown lands." And the Committee went so far as to recommend that the total proceeds from Crown land sales should be applied to defraying the expenses of emigration to the Colony.

Colonising parties should either be repaid the moneys they had expended or be granted lands up to the value of their expenses at the rate of not less than the minimum uniform price, with freedom as to choice of site.

After the presentation of the Report, in August, negotiations proceeded between the Company and the Government, terminating in the offer, in November, of a charter of incorporation, on condition that the Company should waive all claims to land in New Zealand grounded on purchase from the natives, receiving in return from the Crown a free grant of four times as many acres as it had expended pounds sterling in colonisation. The offer was accepted and the charter was issued on the 12th February, 1841.

The corporation, thenceforth to be known as the New Zealand Company, was therein declared to be established for the purposes of "purchasing and acquiring, settling, improving, cultivating, letting, selling, granting, alienating, mortgaging, charging, or otherwise dealing with and making a profit of lands, tenements, and hereditaments" in New Zealand and its dependencies; of laying out settlements and towns; of working "all mines, pits, and quarries"; "of conveying or contracting for the conveyance of

emigrants" thither; "of exporting the produce of the Colony and its seas and of importing such articles as may be required for the furtherance" of the previously mentioned purposes; and of advancing money on the security of land and other property situated in the Colony. But it was provided that the Company should not carry on the business of banking, nor engage in any commercial operations in the United Kingdom or in the British Colonial Possessions for the purpose of making profit other than that from the operations specifically set out in the charter. The Company might execute, erect, contract for, and subscribe towards such public works and buildings, and also establish and maintain such public institutions for the improvement of the Colony and the comfort and well-being of its emigrants as might be proposed, undertaken, or sanctioned by the Crown.

It will be seen that this instrument differed in several important respects from the Royal Charters issued to the regulated and the joint-stock companies in the earlier periods of English colonisation. It conferred on the grantee no monopoly of trade with the colony proposed to be established. As it did not invest the Company with administrative functions of a State character, it afforded scant opportunity for creating complications with foreign powers, such as had led to several petty wars in India and America, entered upon and carried out with little heed to the niceties of international courtesy. And since there was already an established form of British Government in the sphere of the Company's operations, the Charter implied no license to harass the natives with impunity.

The Company's settlements were made at Petone and Te Aro (Wellington) 1840; Wanganui, 1841; New Plymouth, 1840, through the Plymouth Company,

merged in 1841 into the New Zealand Company; and at Nelson in 1841.

2. The Land Disputes.

In all these settlements the operations of the Company brought it into conflict with the Maoris, the Government, and its own colonists. In September, 1841, Governor Hobson waived the pre-emptive right of the Crown, in favour of the Company, over certain lands at Wellington, Porirua, the Hutt, Manawatu, Wanganui, and Taranaki. He explained to the Secretary of State that this action was the only available means of restoring confidence to the occupiers of land who had purchased from the New Zealand Company under the implied assurance that its title was clear and undisputed. He promised the Company to grant it such lands as it could prove to have validly purchased from the native owners. Subsequently he promised that any defect in Colonel Wakefield's engagements might be corrected by supplementary payments, so that the arrangements made between the Home Government and the Company might be fulfilled, and the Company's settlers should not be exposed to disappointment. But it was not till Fitzroy's first visit to Wellington, in January, 1844, that Wakefield finally promised to provide the funds to make a fair compensation to the natives entitled to receive it, and to abandon his claim to their *pas*, their burying places, and their grounds actually in cultivation.

Meanwhile some of the settlers, unable to occupy the land which they had bought in good faith before leaving England, demanded compensation from the Company for expenses incurred by them in endeavouring to obtain possession. The Directors considered it to be the duty, not of the Company, but of the

Government to protect the settlers, and to compel the natives to respect the law. In cases where the latter thought themselves aggrieved, they should seek redress from the "constituted authorities" and not by "acts of violence and rapine."

Spain, the Commissioner appointed by the Imperial Government to hear and determine the land claims of the New Zealand Company, arrived in the Colony on Christmas Eve, 1841. He opened his first Court at Wellington on the 16th May following, and did not conclude his duties till 1846, when new arrangements were made by the Imperial Government for the administration of the Colony's lands. The Company resisted his proceedings from the outset, and practically demanded a Crown grant from the Government, whether the native title were extinct or not. Spain soon discovered the many circumstances* that invalidated the purchases made by the Company's Agent.

The Company strenuously contended that Lord John Russell's agreement with it exempted its titles from investigation. Worsted in argument on this point by Lord Stanley, it impugned the validity of the Treaty of Waitangi. "We have always had very serious doubts," wrote Somes, "whether the Treaty of Waitangi, made with naked savages by a Consul invested with no plenipotentiary powers, could be treated by lawyers as anything but a praiseworthy device for amusing and pacifying savages for the moment." At the same time he candidly confessed that the Company objected to the Land Commissioner's Court because it felt no "security for being able to establish the validity" of its contracts with the natives, according to the views on which the Commissioner was acting. "What we object to," he

*Of the classes mentioned in Chapter I. and Chapter XV., p. 207.

said, "is that we should be required to prove that in every instance every native with whom our Agent contracted understood the full force and meaning of the contract which he made, and that the tribe with which he dealt had a right to convey according to the New Zealand law of real property." Unsuccessful in this, the Company asked that the Treaty should be declared to affect only the North Island.

The Court in its awards at the various settlements greatly modified the terms of the Company's bargains with the Maoris.

In May, 1845, the Company proposed that New Zealand should be divided into two distinct colonies. It was suggested the northern portion of the North Island should be subject to the provisions of the Treaty of Waitangi, and be governed as a Crown Colony; but that the remainder of the islands, including the Company's settlements in the North Island, and the whole of the South Island and Stewart Island, should be formed into a proprietary colony named Victoria, under the administration of the Company, which held that all the powers of government should be delegated to those entrusted with the business of colonisation. The land in Victoria was to be granted by charter to the Company for the purpose of colonisation, with certain permanent reserves for the benefit of the natives. The proposal was rejected by the Government, which expressed its determination to adhere faithfully to the Treaty in all its relations with the natives of the South Island.

In July, 1845, the Directors thought they had discovered that the Government of New Zealand had "from the beginning rested on no legal foundation," and, in particular, that the Governor and Council had no right to impose taxes and duties on the colonists. According to the high legal opinion they had obtained,

the statute 3 and 4 Vict. Cap. 62 did not confer upon the Government of New Zealand that authority to impose taxes which the Imperial Parliament alone could grant. It was admitted that New Zealand, at the time of the passing of the Act, was a dependency of New South Wales, and was capable of being erected into a separate colony, and of receiving such a form of Government as the Act gave authority to the Crown to grant. But it was contended that the power to make laws and ordinances required for the "peace, order, and good government" of the Colony did not necessarily include a power to pass laws imposing taxes. In the commissions granted to the Governors of the American and West Indian colonies a similar power was given, but no principle of the common law was violated by the legislative bodies of such colonies imposing taxes, inasmuch as they were composed of the Governor, Council, and elected representatives of the freeholders. "The Crown has no power to impose taxes, and of course could not grant any such power to its nominees, the Legislative Council." Moreover, Acts of Parliament, "imposing burdens, or taking away or varying the rights of parties are to be construed strictly and not by implication"; and if it were the intention of the Imperial Parliament to give by this Act to the Crown a power with which the constitution had not entrusted it, it would have used expressions clearly indicating that intention; and in the absence of such expressions the presumption was that no such intention existed.

These reasons were submitted for the opinions of the Attorney-General, the Solicitor-General, and Sir Thomas Wilde, who had been consulted by Lord John Russell when the Charter for the Government of New Zealand had been issued. They maintained, that although the Legislative Council had been created by

the Queen's charter, the authority to impose taxes was derived from the statute in question. At the time of its enactment, New Zealand was a dependency of New South Wales, and as such subject to the legislative authority of a Council nominated by the Crown under the authority of 9 Geo. IV. Cap. 83, a statute passed to replace 4 Geo. IV. Cap. 9, which expired at the end of 1829. This latter statute had authorised the creation by the Crown of a Council "to make laws and ordinances for the peace, welfare, and good government of the Colony" of New South Wales, and had provided that no tax should be imposed by the Council upon the vessels trading with the Colony or its dependencies, nor upon goods exported or imported, nor any other tax, except only such as should be necessary for local purposes. It was, therefore, maintained that this restrictive clause operated "as a legislative exposition" that by the previous words a general power of taxation had been conferred. The statute of 1828 gave the Council the same power as had been conferred upon it by the previous enactment, restricting it to taxation for local purposes, but omitting the restraint in respect of taxation upon exports and imports. At the time 3 and 4 Vict., Cap. 62, was passed, New Zealand was subject to the legislative authority of this Council, which was in no sense a representative body. The object of the statute was to enable the Crown to erect into an independent colony any of the dependencies of New South Wales, and to appoint a Legislative Council of the same character as that which existed in New South Wales, and for the same purposes. For these reasons the Crown law officers held that "the power to make laws and ordinances for the peace, order, and good government of the Colony of New Zealand conferred upon

the Council the power of taxation for local purposes.'' They were further of opinion that ''the power to impose taxes has always been deemed to be conferred by, and comprised within, the same words as are used in the 3 and 4 Vict., Cap. 62, or words of similar import, and that such power has been generally exercised without being questioned''; and further that ''such words are usual, apt, and proper words to convey the power.''

3. The Last Phase.

In 1846, after the appointment of the Russell Ministry, the Company received a loan of £100,000 from the Imperial Government; and in 1847 an Act was passed enlarging and defining the Company's privileges. The Government agreed to give up to the Company the exclusive disposal of all Crown lands and the exercise of the Crown's right of pre-emption over native lands in the southern district of New Zealand. During the three years commencing from the 6th April, the Government was to provide the Company with a loan of £136,000. A Crown Commissioner, paid by the Company was to attend all its meetings. Neither the Crown nor the Company was to sell lands for any sum less than 20s. an acre, nor to expend less than 10s. an acre of the proceeds of land sales in carrying out emigrants. Provision was made for the dissolution of the Company should it be unable to continue operations at the end of three years.

This Act was vigorously condemned by Gibbon Wakefield, who, in a letter written in April, 1849, to the Wellington colonists, predicted that the Company would not survive 1850, and that its disappearance would be the best thing for New Zealand. It undoubtedly marked a vital change, a departure from

the high ideals the Company had pursued in the earlier period of its existence. "New Zealand," said Wakefield some years afterwards, when speaking in the Colonial Assembly, "was founded by men with great souls and little pockets, and fell into the hands of men with great pockets and little souls." "My incapacity" (he has also recorded) "changed the whole character of the direction, which then fell into the hands of a few persons in whose minds sound principles of colonisation and colonial government were as nothing as compared with pounds, shillings, and pence. They sold the honour of the Company, and the interests of the Colony for money, to come through a Parliamentary obligation, upon New Zealand to recompense the Company for its losses." We can easily understand these sentiments on the part of the ardent originator and courageous and high-minded director of the organisation to which he had devoted so much of his life and fortune, and even without his illness the compromise effected by the Board of Directors with the Government would doubtless have caused him to abandon, as he did, all active share in the proceedings of the Company. But the real work of that body had been done, and although its final period of decay was more sordid than its birth and defiant youth, it would be idle to regret the policy which ensured its extinction, and unfair to blame severely those business men who entered into the compact. The arrangement had one striking merit: it facilitated the achievement of Wakefield's dearest project—the colonisation of Canterbury—as well as that of Otago.

As early as 1842 the formation of a colony in the South Island had been broached to the Company by a Scotchman named Rennie. With the proverbial caution of his nation, he made it an essential condi-

tion that no colonists should be sent out until the Company had obtained a clear title to the land on which it proposed to plant them, and until the site had been thoroughly surveyed and considerable preparation, in the way of buildings and cultivations, had been made for their reception. The disputes with the Government had prevented the Company from adopting and elaborating the scheme; but in May, 1845, there was formed the "Association of Lay Members of the Free Kirk of Scotland," whose chief object was to forward the establishment of a Presbyterian colony in New Zealand. In August, 1845, the Crown right of pre-emption was waived in favour of the Company over an area of 400,000 acres around Otago Harbour. The Company had, in July, 1844, contracted with the native owners for the purchase of this district for £2,400 and a promise to set apart reserves for the use of the latter. A Crown grant of the 400,000 acres was issued to the Company on the 13th April, 1840; and the survey of the site of settlement was completed in April, 1847. The first ballot for the land was held on the 10th November, and the first body of colonists left Scotland in December. They arrived at the settlement in March, 1848. Governor Grey had already stationed a magistrate there, with a sergeant, corporal, and four privates. Two years later a Chief Justice was appointed at a salary of £800 a year; but, after three sittings of the Supreme Court had been held without a single charge having been laid, the Court was closed, and did not re-open till 1858. The settlement was soon torn by agitation for representative institutions and for a modification of the land regulations. The latter was effected when the price of land was allowed to be paid in instalments—10s. per acre at the date of purchase, and in three equal instalments

at the end of each succeeding year. Early in 1852 the Association petitioned for a charter, which the Home Government declined to grant, as the Constitution Act of that year had made the necessary provisions for the administration of local affairs throughout the Colony of New Zealand.*

As far back as 1843 Wakefield had conceived the idea of a church colony to be founded in strict accordance with his principles of colonisation. In the latter part of 1847, while undergoing medical treatment at Malvern, he met John Robert Godley, a man of great ability, who had already made his mark as a writer on colonisation, and in whom Wakefield found a kindred spirit. It was then that the project assumed a definite shape, and seized with compelling strength upon Wakefield's imagination.

In May, 1848, Lord Lyttelton informed the Government of the formation of the Canterbury Association and of the negotiations into which it had entered with the New Zealand Company for acquiring a million acres of land and obtaining an advance of funds for its preliminary operations.

He subsequently asked for a charter of incorporation, so as to avoid the evils of divided responsibility involved in the assistance it had been necessary to obtain, both from the New Zealand Company and from the Society for the Propagation of the Gospel. He also referred to the question of government for the colonists, and asked that the Canterbury settlement should be erected into a distinct Province under the terms of the New Zealand Government Act of 1846. Earl Grey replied, stating that no objection would be made to the issue of a charter of incorpora-

*The Constitution Act provided that the Crown might make regulations by charter as to the disposal of lands in Otago, and that no Act of the General Assembly of New Zealand should relate to those lands except with the consent of the Otago Association and the New Zealand Company.

tion, and that the Governor of New Zealand would be asked to report whether the district selected by the Association's Agent would be capable of erection into a distinct Province. He also expressed a hope that the Agent might fix upon a district which should unite such capability with other favourable conditions. The site was ultimately selected at Port Cooper, and was approved in 1849. On November the 13th of that year, the Association was granted its charter, making it a body corporate for founding a settlement in New Zealand, and empowering it to purchase, hold, and alienate lands there.

In its prospectus the Association had stated its intention to form a settlement to be entirely composed of members of the Anglican Church, accompanied by an adequate supply of clergy with all the appliances requisite for carrying out the discipline and ordinances of the Church, and with full provision for extending them in proportion to the increase of population. By preserving unity of religious creed, it hoped to avoid the difficulties which surrounded the subject of education, and it anticipated that it would be able to provide amply for that object.

The colonists would sail from England as far as possible an organised society, just as the Greek colonies of old sailed from their parent cities. Among other distinctive features of the plan were the preliminary survey of the territory to be occupied by the settlement; the method of free selection of land by every purchaser of a land-order in whatever part of the survey territory he might wish; the preparation of roads and other conveniences before the arrival of the first body of colonists; the provision of religious and educational endowments; the selection of the labouring class of immigrant from members of the Church of England and on the recommendation

of Church clergymen; and the pasturage system, according to which the pasture of such lands as might, from time to time, remain unsold within the limits of the settlement, was to be distributed.

The agreement between the Association and the New Zealand Company was made on December 1st, 1849. One-sixth of the land fund was to be applied to surveys and other miscellaneous expenses of the Association; two-sixths to immigration; two-sixths to ecclesiastical and educational purposes; and one-sixth, or 10s. per acre, to the New Zealand Company. Persons in the Colony who might be approved by a Local Committee appointed by the Association, were to be permitted to purchase land in the settlement on the same terms as those on which it was sold in England.

The first of the Canterbury settlers left England in September, 1850, and arrived in the Colony in the following December. By this project (in which Wakefield's ideas for the first time found adequate expression) the infant colony gained perhaps the most remarkable band of emigrants that ever sailed from England, resembling—as Wakefield put it—"both in heart and mind the nobler spirits of Elizabeth's time," while the old world was afforded an opportunity of witnessing one of the most interesting and instructive experiments in colonisation. The Governor had appointed Godley, who had preceded the settlers, as Resident Magistrate in the settlement. The affairs of the Colony were administered by a Board of twelve representatives, elected by the settlers and called the Council of Colonists. In August, 1850, an Act (13 and 14 Vict., Cap. 70) had been passed empowering the Association to dispose of its lands in New Zealand generally according to the terms of the arrangement made by it with the

New Zealand Company, which had been dissolved in July.

But the Association lost its charter in 1852, in consequence of its inability to pay the proportion of the Land Fund agreed upon. When the Constitution Act had been brought into operation in the Colony, and Canterbury made a separate Province, the colonists obtained full control over their affairs.*

The New Zealand Company had long thrown aside its original high character, and become a commercial institution, animated by the hope of monetary profit. When this proved to be but visionary, the speedy dissolution of the Company was recognised as inevitable. The agreement between the Government and the Company in 1847, was to terminate on July 4th, 1850, and on that day the Company resolved to surrender its charters, and to inform the Government that the surrender was a course forced on the shareholders by a "hard and cruel necessity," and to ask it to abstain, both in the interests of the colonists, and as an act of justice to the Company, from availing itself of the full powers vested in it by the law in respect to the corporation.

The Company's debt to the Government totalled £236,000; while to its shareholders it owed £268,370 15s. 0d., including £200,000 paid-up capital. It claimed to own 1,097,166 $\frac{5}{16}$ acres of land in the Colony then undisposed of; and the debt to the shareholders was secured on the proceeds from the future sale of these lands. An Act of 1851 (14 and 15 Vict., Cap. 86) substituted administration by the Crown for that of the Company in respect of its lands. Nothing in this Act was to interfere with the rights of the Company in respect of the debt of £268,370 15s. 0d.,†

*The Constitution Act authorised the Canterbury Association to transfer its powers to the Provincial Council of Canterbury.

†Calculated on 1,073,483 acres of land at 5s. per acre.

and its interest at 3½ per cent., which by 10 and 11 Vict., Cap. 112, had been charged upon the proceeds of all future sales of the demesne lands of the Crown in New Zealand.* The Constitution Act of June 1852 (15 and 16 Vict., Cap. 72) further provided that one-fourth of the sum derived from the sale of the waste lands of the Crown should be paid to the Company until the debt should be discharged, but that the Company might, by resolution passed by the majority at a meeting of the Court of Proprietors, release these lands from payment of any part or the whole of the sum. In 1857 the New Zealand Company's Claims Act (20 and 21 Vict., Cap. 52) made provision whereby the debt was ultimately discharged, and the affairs of the Company terminated. The Colony had paid off some £102,703, and the Company had expressed its willingness to accept, in full satisfaction of its claims, a sum less than the unpaid residue. The Act therefore provided that if the Company were paid the sum of £200,000 on or before April 5th, 1858 (including the amount already paid) all its claims to the proceeds of Crown land sales in New Zealand should thereupon cease. The requisite sum was paid out of a loan authorised by an Act passed on the same day as the Claims Act (20 and 21 Vict., Cap. 51). In opposition to the wishes of the colonists in the northern districts, who considered that the Company's land payments should be made only by the districts in which it had formed settlements, the sum was thus made part of the general debt of the Colony.

4. General Survey of the Company's Operations.

During the eleven years of the Company's existence (May, 1839—July, 1850) it had despatched 95 vessels

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*See page 243.

to the Colony, carrying in all 11,680 emigrants; and it had sold 270,073 acres of land to private individuals. The most active period of its operations was the first, extending from May, 1839, to January, 1843, during which time it had been allowed very largely to shape its own policy. Fifty-seven ships with 8,600 emigrants had been despatched from Great Britain, and 844,619 acres of land had been granted to private purchasers. In the succeeding period, January, 1843-November, 1847, when the Company was subjected to closer supervision, and more frequent interference by the Government, the corresponding figures fell to 1 ship, 656 passengers, and 6,389 acres. From November, 1847, onwards its activity revived. In May of that year the final arrangements had been made for the establishment of the Otago Colony, on the principle of "social unity based on identity of religious sentiment." To this settlement 1,375 persons had been sent out by the Company between 1848 and 1850, and 17,750 acres of land had been disposed of. In June, 1849, negotiations were completed for the acquisition of the Nanto-Bordelaise Company's land rights for £5,769—a transaction which extinguished foreign ownership in New Zealand. In the same year an Imperial Act was passed to facilitate the execution of conveyances by or on behalf of the Company in New Zealand. The terms of land purchase had been revised in the direction of simplification and uniformity; and a system of pasturage had been devised and adopted. Since 1847 Governor Grey had had authority to determine all land troubles, and the Company, acting under the superintendence of an officer of the Colonial Government, had acquired a territory comprising 30,000,000 acres. The scheme for founding a Church colony had also been success-

fully initiated and preparations were in active progress for the despatch thither of the first body of emigrants. From November, 1847, to June, 1850, 2,424 persons emigrated to New Zealand in 18 ships chartered by the Company, which sold to private persons during the same period, 19,064 acres. These last figures do not include the immense areas reserved for the Otago and the Canterbury Associations.

The source of most of the adverse criticism directed against the Company lay, not in its policy, but in its administration. It is generally agreed that the Wakefields did not possess that high degree of executive ability which is one of the essential conditions of unqualified success in situations like that in which the Company's local agents were placed during the early forties. Gibbon Wakefield once endeavoured to enshrine the whole history of the Company in the epigram already quoted—"The Company was founded by men with great souls and little pockets, and fell into the hands of men with great pockets and little souls." But this altogether ignores the blunder that proved most prolific in troubles—the sale of land to emigrants before any arrangement for purchase had been made with its owners, and the transference of those emigrants to a part of the country where they had to suffer a protracted period of idleness, with no native food products available to tide them over their difficulty.

It has often been stated that the Wakefield system of colonisation failed in New Zealand; but such proceedings as we have just described were not part of Wakefield's theory, and to them the greater part of the failure, in so far as there was failure, may justly be ascribed. The shareholders' persistent opposition to the recognition of the Treaty of Waitangi is easily understood, but the directors should have made the

most of the rich opportunities still available, instead of frittering away energy upon vain quarrels with the authorities. The Company's local agents should have known the temper of the Maoris better than to allow their principals to believe, as they did with Lord Howick, that "if native rights to the ownership of land had been admitted only when arising from occupation, there would have been no difficulty in giving at once to the settlers secure and quiet possession of the land they required." It is difficult to believe that anyone acquainted with the Maoris could honestly expect that anything less than a fierce war of conquest would result from such a conditional admission. At the same time it must be conceded that Shortland's irritating bureaucratic spirit, and Fitzroy's pro-missionary leanings, undoubtedly militated against the development of the better side of the Company's local officers.

The sale of lands at a uniform price did not prove an unmixed blessing; but the abuses to which it ultimately led were not necessarily a direct consequence of the Wakefield system, which contemplated a "sufficient" as well as a "uniform" price of land. In Canterbury land was selling at the uniform price of £2 per acre, with no restrictions as to area or to compulsory occupation, when its market value was considerably above that sum. The result was that large areas were monopolised by rich capitalists, and that closer settlement has since been ultimately achieved only at great public expense in the form of moneys voted for the re-acquisition of these estates by the Government.

But when allowance has been made for these and other subsidiary ill results, there still remains a substantial balance of good, wrought directly by the Company. Our account of the proceedings during

the period 1836-9 should have made it sufficiently clear that it was the Company, and the Association from which it developed, that secured New Zealand for the British Crown. But for its prompt action in despatching Captain Wakefield's expedition, New Zealand would most probably have become a French penal settlement, resembling that of New Caledonia. The Company was impelled to this undertaking not alone by the desire of commercial profit, but also by its appreciation of the importance of these Islands, whose unrivalled capacity for effective colonisation it proclaimed unceasingly to the British public. Having secured its footing in this desirable field, the Company made every effort to remove the stigma that had become attached to England as a colonising power, and to arouse public enthusiasm in the work of planting, over-sea, new communities that should grow to be one in spirit with the Mother Nation, as they were one in race, language, and religion. This aim it had in some considerable degree achieved before it ceased its active operations. It was owing largely to its exertions that colonisation was no longer proscribed by the ruling classes in England, but came to be regarded rather as a duty and "as a means of family provision"—a mode of regarding it which, if in some degree utilitarian, yet augured well for its success in the future.

Some of the Company's services were above all price. The Dominion cannot be too grateful for the rigid selection practised in regard to its emigrants. The Company's colonists comprised representatives of all grades of society, and only the best from each grade were accepted. Not only did men of eminence in State, church, and commerce, give the influence of their names and good-will to the Com-

pany's schemes, but some of them took an active share within the Colony in carrying them into practice; whilst nearly all of them offered up some members of their family on the altar of colonisation. From the outset the New Zealand colonists manifested certain valuable qualities not generally exhibited by the pioneers in other parts of the Empire, though the select character of the colonisation did not enjoy full opportunity of impressing its stamp on the development of the local constitution till after the establishment of representative government. To the Company also is largely due the success of the opposition offered to the Home Government's two attempts to establish penal settlements within New Zealand.

One of the chief factors in the rapid progress of New Zealand has been the even distribution of the towns. In each of the Australian colonies there is one great city into which a large proportion of the whole population is gathered. Sydney and Melbourne contain over one-third of the population of New South Wales and Victoria respectively; whilst Adelaide contains very nearly one-half of the people in South Australia. In New Zealand there is not so great a disproportion as this between the rural and the city populations. There are four cities which do not differ materially in the numbers of their inhabitants. Wellington, Dunedin and Christchurch were founded by the Company, which also established Wanganui, New Plymouth, and Nelson. These separate settlements of the Company gradually developed into distinct provincial settlements, animated by a healthy spirit of rivalry, which proceeded in some degree from differences in the inhabitants' general characteristics. In Auckland the early seat of government, the people have always been remarkable as the most cosmopolitan

and least conventional of the city populations. There is also a larger Irish element there than in the three other chief cities. Wellington and Christchurch are distinctly English in character—the latter especially so; New Plymouth is much influenced by the Nonconformist spirit; and Dunedin is largely Scottish.

If there had been no Company, the systematic settlement and political development of the South Island would have been retarded for some years, even though the Home Government had annexed the country. It was largely because of the comparatively early settlement by colonists of the best stamp of this portion of the Colony, where the native population was sparse, that representative institutions and, almost immediately afterwards, responsible government, were firmly established. The census of 1911 showed that 70 per cent. of the population of New Zealand was then resident in districts originally colonised by the Company and its offshoots, though, of course, the population of the Colony was fiftyfold what it was at the time when the Company surrendered its Charters.

CHAPTER XVII.

THE MOVEMENT TOWARDS CONSTITUTIONAL GOVERNMENT.

1. The Introduction of Responsible Government into the Colonies.

When New Zealand was about to enter on its career as a British colony, Wakefield and Durham were inaugurating a new and splendid period in British colonial policy, a period corresponding broadly with the first fifty years of Victoria's reign, and merging in the eighties with the Queen's Jubilee, the first Colonial Conference, and the publication of Seeley's "Expansion of England," into the grander era of imperialism and federation.

Wakefield would colonise, not with one special class, but so that the colony should be an epitome of the society of the Mother Country; slavery and penal labour should be made unnecessary by the immigration of free labourers, the expenses of which should be paid by the sale of the Crown lands at "a uniform and sufficient price." In such a colony there must be the free political institutions of the Old Country, and so we are prepared for Durham's famous Report on Canada in 1839.* The leading principle of this Report—"the Magna Carta of the Colonies"—is that the union of the Empire will be effected and maintained, first, by the institution of self-government or the cabinet system in the colonies situated as Canada then was, a measure designed to establish identity of interest between governors and governed, and, secondly, by the retention of the control of the

*See above, Chapter VIII, page 130.

Imperial Parliament over (*a*) the form of constitution for the colonies, (*b*) foreign relations and diplomacy, (*c*) trade between the colonies and the Mother Country, and (*d*) disposal of the colonial public lands. Durham did not mention (*e*) military and naval affairs and (*f*) native affairs, though there is no reason for doubting that these in his opinion should be reserved for the Home authorities. His main recommendations as to Canada were embodied in the Union Act of 1840, which united the two provinces into a single colony under a governor-general, a nominated legislative council and a popularly elected assembly. Various tentative efforts at responsible government were made, but it was not firmly established till 1847-8 by Lord Elgin who, instructed by Earl Grey, chose his executive council from the party commanding the majority of the legislature, refrained from vetoing bills that did not prejudice the relations with the Mother Country, stood aside from party politics, and generally acted on the advice of his ministers. Gradually, in this way, the Crown, chiefly by instruction to its colonial governors, extended the system to other colonies as they became equal to the responsibility.

2. Agitation in New Zealand.

When the Canterbury settlers arrived they found the Colony in a state of zealous agitation for self-government. If anything the new-comers exceeded the older colonists in vigour and determination. They came prepared for battle; for both Wakefield and Godley had been fighting in the same cause at Home; and they therefore threw the whole of their weight into the struggle which had been raging since 1846. Godley, himself, in a letter which he addressed

to Gladstone at the close of 1849, warned that statesman earnestly of the danger of resisting the colonial demands, and sounded a clear note of protest against the indifference to the fate of their colonies which for many years was yet to dominate the larger number of Englishmen.

"You are," he wrote, "far from estimating as highly as I do the danger which threatens our colonial Empire, and the necessity of meeting it promptly by measures of thorough reform. If you did, I feel sure (from my faith in your patriotism and public spirit), that, waiving all consideration of a personal and party nature, you would stand forth as the active champion of those searching remedies, by which alone the disease which is consuming our greatness can now be cured. . . . . A year ago I thought, as perhaps you think now, that though a system so absurd in theory, and so unsuccessful in practice, as that by which our colonies are ruled, must break down sooner or later, still it might last indefinitely, for ten years to come, or perhaps for twenty; and that our efforts might safely be directed to a gradual amelioration of it. I am now convinced that I was wrong: the real danger is, not that the despotism of the Colonial Office will last ten or twenty years—nor that the colonists will be oppressed by it for an indefinite time to come—but that it may last just long enough to break up the British Empire; a consummation which, at the present rate of progress, will not, perhaps, take a great deal more than ten or twenty months. . . . Whereas the alternative has hitherto appeared to lie between local self-government and the centralism of Downing Street, now it is between local self-government and national independence. Many causes have

contributed to this change in the aspect of the question; but the chief of them are these—first, the increased strength of the Colonies, or rather (perhaps) their increased consciousness of strength; and secondly, the growth in England of a political school holding the doctrine that the colonies ought to be abandoned. During the next year or two, in all probability it will be decided whether the British Empire is to endure and to grow, as it has hitherto grown, for an indefinite time to come, or whether it is to shrink, by a rapid process of disintegration, into the dimensions of two small islands."

3. Grey and Constitutional Government.

This was vigorous and trenchant enough, and similar views were expressed upon every possible occasion by the promoters of the Canterbury settlement. But it is hard to say what effect they would have had upon the Home Government or how long New Zealand would have had to wait, if Grey himself had not changed his views and facilitated the introduction of representative institutions. Whatever Earl Grey, or Wakefield, or Adderley, or Pakington contributed to the form and substance of the Constitution Act, the Governor's influence was paramount. Whether or not his suspension of the charter of 1846 was perfectly frank and ingenuous, whether or not he felt that the dangers to which he had alluded were now less serious and capable of being met, whether or not he realised the futility of trying to repress the popular feeling, it is clear that towards the end of the period of suspension his policy became more liberal and popular. Between 1848 and 1851 he wrote many long and interesting despatches upon the subject of a representative government, and ultimately suggested the passing of a new Act drawn

upon more liberal lines than that of 1846. Lord John Russell was then in office, with Earl Grey as Colonial Secretary, and implicit reliance was placed by the latter upon Sir George Grey's judgment and advice. He has placed it on record that if the pressure of other business in the House of Commons had not rendered it impossible, he would have brought down a Bill to embody Grey's suggestions in the session of 1851,* and at the opening of Parliament in 1852 the subject was among those recommended to the attention of Parliament in the Queen's Speech.

4. The Constitution Act.

Then followed almost immediately Lord John Russell's defeat on his Militia Bill, and Lord Derby came into office with Disraeli as leader of the House of Commons. The change of Ministry, however, effected no change in policy so far as New Zealand was concerned. The new Colonial Secretary, Sir John Pakington, found in his department the heads of a Bill already prepared by his predecessor, and, as he afterwards wrote, when forwarding the Constitution Act to Sir George Grey, "Her Majesty's Government did not hesitate to adopt the general outlines of the measure thus originated, which appeared to them calculated to fulfil the expectations of the people of New Zealand, and to confer on them constitutional rights in a form the most adapted to their peculiar circumstances." The new Bill, though modelled closely upon that of Earl Grey, effected some important modifications. It was drawn with the direct assistance of Gibbon Wakefield, and it was doubtless to his suggestions that

*Grey's "Letters," page 157.

some of these were due. On the Bill being introduced into Parliament a vigorous attack upon the proposed Provincial Councils very nearly stopped its passage. Numerous amendments were proposed and progress was so seriously blocked that at times it seemed as if the Government would abandon the measure. Fortunately the friends of the Bill were able to break down the opposition on this point. Gladstone, though criticising the measure in part, warmly supported it as a whole, and exerted his private influence to "stiffen up" the Government, while Wakefield petitioned the House to "pass the Bill in question for the sake of its merits, and without regard to its obvious defects, because there is not time for amendment by present legislation here, whilst the whole measure is open to future amendment by legislation in the colony, subject to the approval of Crown and Parliament."* These counsels prevailed, and the Bill became law on the 30th June, 1852, under the title of "An Act to grant a Representative Constitution to the Colony of New Zealand."

By it provision was made (ss. 32 to 72) for a General Assembly for the Colony, and (ss. 2 to 31) for a subordinate legislature for each of the six provinces into which the country was divided. The General Assembly was to consist of a House of not more than twenty Legislative Councillors, nominated by the Crown and holding office for life, and a Lower House of thirty-seven representatives elected for a period of five years. The right to vote was conferred upon every man owning land to the value of £50, or leasing a house of the annual value of £10, or being the occupier of a tenement of the value

*Garnett, "Life of Wakefield," pages 330-1.

of £10 in a town, or £5 if situated in the country. The same qualification served for a candidate for election. No provision was made for voting by ballot. "It was not thought expedient," said the Attorney-General, Mr. Swainson, writing a few years later, "for the sake of a few weak and worthless characters to introduce into New Zealand the doubtful principle of the secret vote."

The powers of the General Assembly were contained in sections 53, 61, and 68 which read as follows:—

"53. It shall be competent to the said General Assembly (except and subject as hereinafter mentioned) to make laws for the peace, order, and good government of New Zealand, provided that no such laws be repugnant to the law of England; and the laws so to be made by the said General Assembly shall control and supersede any laws or ordinances in anywise repugnant thereto which may have been made or ordained prior thereto by any Provincial Council; and any law or ordinance made or ordained by any Provincial Council in pursuance of the authority hereby conferred upon it, and on any subject whereon under such authority as aforesaid it is entitled to legislate, shall so far as the same is repugnant to or inconsistent with any Act passed by the General Assembly be null and void."

"61. It shall not be lawful for the said General Assembly to levy any duty upon articles imported for the supply of Her Majesty's land or sea forces or to levy any duty impose any prohibition or restrain or grant any exemptions bounty draw-back or other privilege upon the importation or exportation of any articles or to impose any duties or charges upon shipping contrary to or at variance with any treaty or treaties concluded by Her Majesty with any foreign power."

"68. It shall be lawful for the said General Assembly by any Act or Acts to alter from time to time any provisions of this Act, and any laws for the time being in force concerning the election of members of the said House of Representatives, and the qualification of electors and members; Provided that every Bill for any such purpose shall be reserved for the signification of Her Majesty's pleasure thereon, and a copy of such Bill shall be laid before both Houses of Parliament for the space of thirty days at the least before Her Majesty's pleasure thereon shall be signified."

Sec. 56 provided that the Governor might assent to, or refuse his assent to, any Acts, or might reserve the same for signification of Her Majesty's pleasure thereon, while under section 58 the Crown might by Order in Council disallow any Act within two years after receipt of same. The Crown's right of pre-emption over native lands was reserved,* and it was also provided that Her Majesty might cause to be maintained the laws, customs and usages of the aboriginal inhabitants so far as they were not repugnant to the general principles of humanity.†

The boundaries of the Colony were declared to be 33° South latitude and 50° South latitude, 162° East longitude and 173° West longitude.‡

The Provincial Councils (ss. 2 to 31) were designed to carry out in each province the work of subordinate legislation and administration and thus to minimise the work of the General Assembly. Though the machinery devised was faulty, the principle was a sound one, and well suited to the circumstances of the young Colony. The centres of population were distinct and isolated, and the difficulties of transit and communication great. Grey had strongly insisted in his despatches upon the necessity for local legislatures, and Wakefield's petition, already quoted, had emphasised the same point in answer to the criticisms of Sir William Molesworth and Mr. Lowe. "Evil happens," he wrote, "when the area of the Colony is so large, and its means of communication so deficient, that the seat of Government is what London has been as the seat of Government for many remote dependencies. In such cases the benefits of government—the means of getting done things

*S. 73. †S.71.
‡These boundaries excluded the Auckland Islands, which had been included in Grey's commission.

without number which are greatly needed and which Government alone can do—are confined to the seat of Government and its immediate neighbourhood. The rest of the country is neglected, and stagnates almost without government."

At the head of each province was placed a Superintendent elected by the people for four years. He was assisted by a Provincial Legislative Council chosen by the same electors and for a similar term. The legislation of the Council and Superintendent was subject to a right of veto by the Governor, who might also disallow, within three months, the election of a Superintendent, or might dissolve the Council. Such a dissolution had the further effect of removing the Superintendent. It was also provided—doubtless with some idea of preventing deadlocks—that on the address of a majority of the members of the Council the Crown might remove a Superintendent from office.

Certain subjects which it is unnecessary to enumerate here, were reserved as matters to be exclusively dealt with by the General Assembly.

Such was the Constitution, the grant of which freed New Zealand from the domination of the Colonial Office, and which is still the fundamental charter under which she is governed to-day. Undoubtedly mistakes were made in its framing, amendments were too hastily made in the course of its passage through Parliament, and it has since been materially modified by the Colonial legislature, acting under the authority of Imperial statutes. But it marked a great and beneficial change in the status and government of the country, and gave to New Zealand the boon of self-government and increased opportunity for self-development. It was the outcome of a sturdy national movement in the

Colony, and although its adoption by the British Parliament was, perhaps, helped in the case of some by a lurking contempt for empire, or even by that definite hope of separation which was soon to prevail so strongly in England, we may yet agree that it was a wise and liberal measure, and that it was "framed in the broadest spirit of the Durham Report."

5. Colonial Government since 1840.

It will be convenient to conclude here the rapid sketch of the development of British colonial government begun in Chapter VIII. and continued in the first section of this chapter.

Once recognised, the principle of responsible government spread rapidly. New South Wales began to exercise the privilege in May, 1856; Victoria in November; Tasmania in December; South Australia in 1857; and Queensland in 1860. By this time five American and six Australasian colonies were "self-governing." Cape Colony came into the favoured circle in 1872; Natal and West Australia in 1890; and the Transvaal and the Orange River Colony in 1906 and 1907 respectively.

Control was relaxed in many other ways, and sometimes in directions not contemplated by Durham. During the fifties and sixties the right to dispose of Crown lands in the colonies was transferred to the local governments. The commercial restrictions were gradually removed; the navigation laws were amended in 1825, and abolished in 1849; during the fifties free trade was established between the colonies in accordance with instructions from Earl Grey; but the rapidly-growing feeling that the colonies would inevitably and soon become free States, "the communicators of freedom to others"

led to the grant of a degree of liberty that would not have gained Durham's approval, for, in 1858, Canada was allowed to frame a tariff with protective duties upon imports from Home, and from that time we may date the complete fiscal independence of the greater colonies. Control of the native races came later; we got it in New Zealand in 1864, but as late as 1906 the British Government attempted to supervise the conduct of native affairs in Natal. With greater freedom came heavier obligations, and the Commons' resolution that the colonies ought to provide the cost of their own land defences was followed by the gradual withdrawal of Imperial troops from colonial stations, 1862-70; but the colonies were still guarded by the navy, which effectually prevented any attempt of foreign States to interfere with the working out, by themselves, of their destiny. The judicial connection with England was also narrowed down to the limited right of the Judicial Committee of the Privy Council to hear appeals from the colonial courts. The Crown, on the advice of the British Cabinet, long continued to exercise freely its right of vetoing or disallowing colonial bills and acts; but the disallowance has, since 1899, been practised only in the case of acts in conflict with the interests of the whole Empire. The last remark suggests the reason for the reservation of control of the foreign relations of a colony to the Crown; but the exercise of control has been tempered, since 1867, by the convention that in the making of treaties the colonies specially concerned shall be represented in the negotiations, and Canada has, by her own ministers, conducted commercial negotiations with France, Germany, and the United States. All this is a notable example of the flexibility of the British constitution, of the ease with which, through the

establishment of unwritten conventions, it adapts itself to changing circumstances; for many of the rights now enjoyed by the responsible colonies are exercised in the face of statutes unrepealed, some of them, such as the Colonial Laws Validity Act of 1865, of comparatively late date.

The extension within the Empire of the federal system of Government has, undoubtedly, hastened the process of colonial liberty. Federations, such as Canada and Australia, approach to equality with the United Kingdom, and their governmental structure is such as to create something like a national opinion, and to provide it with an effective mouthpiece. When four colonies in Canada united in 1867 to form the great Dominion, they were given a Constitution that placed the balance of power in the central government, mainly because it was felt by many in England that federation was the prelude to independence, and that the proximity of the United States necessitated a government that could, at need, act swiftly and surely. The constitution of Australia (1900) preserves a much higher degree of power to the several States, whilst the South African Constitution (1910) is a union rather than a federation. These aggregations are an essential part of the movement towards the federation of the Empire, which may be said to date from 1887, though Adam Smith, as early as 1776, outlined a scheme for union that does not differ vitally from some of those in favour to-day. It is impossible to say at what point, or if anywhere, in the future, consummation awaits the federalists' hopes; but the chain of events during the last quarter of a century—the Conferences of 1887, 1897, 1903, 1907, 1909, and 1911; the closer

shipping, postal, and telegraph connection; the preferential tariffs of all the Dominions; the rapidly-growing power of Germany and Japan—supports the opinion that some form of closer union, whether Imperial Federation or Britannic Alliance, is inevitable, though an examination of the plans that have been proposed shows that the difficulties to be overcome are still very great. One thing would seem certain; if the Empire is to persist, its present looseness of structure, and, perhaps, some of its elasticity, must be sacrificed to coherence, and the power of rapid common action in the face of common danger.

Chapter XVIII.

ESTABLISHMENT OF RESPONSIBLE GOVERNMENT.

1. Wakefield in Politics.

The passing of the Constitution Act was formally notified in the Colony on the 17th January, 1853, and the news was received with profound and universal satisfaction.

Sir George Grey did not proceed to bring a Parliament into existence at once, but began by merely setting up the provincial machinery provided by the new Act. The boundaries of the six provinces were defined, electoral districts were proclaimed, and dates appointed for the election of the Superintendent and Council for each province. Then, having seen these provincial institutions in working order, the Governor sailed for England, leaving to his deputy—Colonel Robert Henry Wynyard—the task of giving effect to the more important provisions of the Constitution Act. The Acting-Governor—the Officer Administering the Government, to use his official style—lost no time, and the first election for seats in a representative parliament followed very shortly after Grey's departure.

The most noteworthy feature of the elections was the candidature of Edward Gibbon Wakefield, who had landed in New Zealand on 2nd February, 1853. Upon his arrival he was warmly welcomed by the people of Wellington, who presented him with an address of thanks for his efforts in the cause of self-government. The change of scene and climate worked a temporary improvement in his health, and

with renewed spirit and hope he threw himself ardently into the battle, finding for his political ambition and energies an opportunity which had been closed to him in England by his youthful escapade.

"I am going to throw myself upon the people," he wrote enthusiastically to Lord Lytton. "I get on famously with the unwashed, and like them," was his statement to Rintoul, in a letter which contains a valuable picture of the condition of the people, and the circumstances of the Colony. In fulfilment of his plan he came forward as a candidate for Hutt, and was elected to the first Parliament of New Zealand, beyond doubt the ablest man in an assembly numbering many men of quite exceptional ability.

The first session opened on the Queen's Birthday, 24th May, 1854, and it is pleasant to speculate with what emotion Wakefield must have taken his place in a parliament for which he had fought so gallantly, in a colony which, he, above all men, had founded and preserved to the British Crown. Though we have no record from his pen, we may feel quite sure that as he entered the humble wooden building where the representatives of the people met for the first time, he must have realised to the full what he in his own splendid words has termed "the utmost happiness which God vouchsafes to man on earth—the realisation of his own idea." Within a few months the dreams he cherished for himself were to be rudely shattered. Broken in health, and burdened with the bitter enmity of many, he was soon to leave the tiny stage and sink into a dull and painful obscurity. But the memory of his feelings as he looked round upon that first gathering of members must have remained with him, a bright and happy possession.

2. The Problem Stated.

The Chief Justice administered the oath to the members, the Speaker of the Legislative Council read the commission by which he was appointed, and then the proclamation calling the General Assembly together. The Lower House adjourned until the next day, when a Speaker was elected. Some discussion then took place in regard to opening the proceedings of the House with prayer, and before calling in anyone to officiate, the House was careful to affirm that no preeminence should be deemed to be accorded to the Church to which any person summoned to offer up prayer might belong. No business was done this day beyond the appointment of a Standing Orders Committee.

On the 27th May the General Assembly was formally opened by the Acting-Governor who read a long and able address dealing, for the most part, with the General and Provincial Legislatures, and concluding with an eloquent appeal to the Assembly "to confirm by your prudence and moderation the fitness of our countrymen for representative self-government and free institutions; to preserve and to advance in the scale of civilisation the native inhabitants of these Islands; to develop the resources of a country rich in all the elements of future national greatness; to be the pioneers for its colonisation by the Anglo-Saxon race, to lay the foundation of its religious, political, and social institutions, to give laws to the present and to influence the character of a future generation."

"Entering then, as we are about to do," he continued, "on the discharge of important and responsible duties, believing that our example and that the character of our proceedings will be influential in after times, and on those who shall

succeed us, and seeing in this Assembly the germ of what will one day be the great council of a great nation, I cannot conclude my address on opening the first session of the General Assembly of these Islands without the expression of an earnest prayer that the Divine Blessing may direct and prosper all our consultations, and that all things may be so ordered and settled upon the best and surest foundation that peace and happiness, truth and justice, religion and piety, may be established among us for all generations."

The occasion was auspicious, and the popular imagination was gratified, but the clearest sighted of the new members perceived a substantial defect, either in the Act itself or in the Governor's method of working the new Constitution. And the struggle that followed very aptly throws into prominence a fundamental principle of the working English Constitution, and might have formed a neat text for the luminous commentary which Bagehot was to write a few years later upon the relation between Legislature and Executive under the English parliamentary system. The stage was a small one, and, as usual in the politics of New Zealand, there were not wanting elements of comedy, even of farce; none the less the contest was profoundly interesting and instructive, and the issue was vital to the liberty and general well-being of the Colony. It was a new fight upon the great question which England had fought out between 1688 and 1800. Looking at the matter more deeply, we may even say that the little comedy played out in New Zealand between May and August of 1854 contained most of the elements of the tragedy played by the Stuarts and the Parliament of England, the crowning scene of which was the glorious Revolution of 1688.

The lurking menace lay in the simple fact that although Parliament was representative, the government was not that of a responsible ministry. The Constitution Act made no provision with regard to the Executive Council. When it was passed, the Governor's Ministers were the Colonial Secretary, the Colonial Treasurer, and the Attorney-General. These were officials appointed by the Colonial Office and holding their positions upon the tacit assumption that so long as they behaved themselves properly their employment would continue; and in the absence of any provisions in the Constitution Act for any change, the Acting-Governor conceived it to be his duty to leave them undisturbed. There was thus lacking the essential feature, "the efficient secret" of the English ministerial system—"the close union, the nearly complete fusion of the executive and legislative powers." The House of Representatives, in fact, found itself in the position occupied by Parliament shortly after the Revolution of 1688, when a method had not yet been evolved by which the Commons could effectively exercise the powers that had been reasserted and vindicated by them in that signal movement. The Ministers of the Crown were independent of a parliamentary majority; they were chosen by the Crown without regard to the opinions of the House; they were responsible to none but the Crown; they might act in direct conflict with the predominant sentiment of the House; they might be quite unrepresented in that body. The result was a complete severance of the executive from the legislative authority, with a certain risk of conflict between the two. Parliament had no control over expenditure. Ministers had no control over policy. Even the heroic remedy of refusing supplies to an obnoxious Ministry was denied, because, through some oversight

in the framing of the Act, the financial control of Parliament was limited to future revenues levied by virtue of any Act of the General Assembly, and the old sources of revenue remained untouched. It was thus clear that any conflict or disagreement between Parliament and the Executive might easily result in a very serious deadlock. Instead of the Ministry resigning when it could no longer command a majority in the House, there was every prospect of a protracted and harassing struggle.

3. Wakefield's Resolution.

To Wakefield in particular the danger was real, and with characteristic promptitude and energy he came forward as champion of the parliamentary cause. Immediately after the Governor's speech we find him giving notice of motion "that among the objects which this House desires to see accomplished without delay, both as an essential means whereby the general Government may exercise a due control over the Provincial Governments, and as a no less indispensable means of obtaining for the General Government the confidence and attachment of the people, the most important is the establishment of ministerial responsibility in the conduct of legislative and executive proceedings by the Governor. The address-in-reply was moved by Fitzgerald in a polished speech, in the course of which he touched upon the question of ministerial responsibility, and expressed the opinion—undoubtedly correct—that to introduce the principle did not require a new law, but a simple act on the part of the supreme executive power.

On the 2nd June the House, in Committee, proceeded to consider Wakefield's motion, which he introduced in a speech of singular lucidity and power. Commencing with the statement that he

might not improperly begin by reciting in a few words the ABC of the British system of government he proceeded to give an admirable broad review of the origin and growth of the ministerial system. He summed up the matter in the statement which, though containing an element of exaggeration, is essentially true and illuminating, that Charles I. lost his crown and his life because he was unwilling to make Bedford, Saye and Sele, Pym, and Hampden his cabinet ministers, and that rebellion and civil war became the last resource of the people bent upon obtaining somehow a share and influence in the work of government. Then followed a brief notice of the system in the other British Colonies, and the speaker concluded by affirming that any arrangement would be a sham unless it distinctly provided that the Ministers, in the House and out of it, should retire from office whenever it should be fully established that they did not possess the confidence of the representative body. Justice demanded that a retiring allowance should be provided for the former Ministers of the Colonial Office, but due provision could easily be made for this.

For three days Wakefield was followed by speakers who supported his view—very often with more enthusiasm than knowledge, and ministerial responsibility became the watchword of an excited and determined House. The single amendment which was proposed—to refer the matter to a select committee—was supported by only two members, and Wakefield's motion was carried at the close of the debate by twenty-nine votes to one. It was followed immediately by an address to the Acting-Governor, praying him to take it into "his early and serious consideration."

Colonel Wynyard replied that he would do so, with a desire, so far as he could, to give effect to the views of the House, but he found himself faced with the difficulty that no provision had been made authorising him to supersede the Ministers of the Crown, and he was not prepared to take the responsibility of dismissing them. There was a good deal to be said for his view of the matter. He was merely the Officer Administering the Government in the absence of the Governor, and it was a serious step to remove the councillors who had till that time been quite naturally regarded as permanent officials. Further, the Attorney-General's legal opinion was that the Acting-Governor had no power to do so. A compromise of a temporary nature was therefore tried, doubtless with Wakefield's approval. It was arranged that the Ministers should continue in office "until they could with propriety retire," and that in the meantime Fitzgerald, Sewell, and Weld, all members of the House of Representatives, should be added to the Council without portfolios. Very shortly afterwards Bartley was added from the Upper House. The arrangement was explained to the Legislative Council on the 15th June by the Attorney-General, Swainson, who in the course of his speech quoted his own formal opinion to the effect that the Acting-Governor could not dismiss the Ministers then holding office, but might appoint others to act with them.

Wakefield wrote exulting over what he termed "neither more nor less than a revolution." "The mutilated Constitution" he said, "has been healed and brought into vigorous action by the friendly concert of Pro-Governor Wynyard and the House of Representatives."

He moved in the House an address of thanks, which was carried unanimously, and in the course of

his speech stated that the principle at stake had been admitted, that more had been conceded than he had anticipated, and that "if this step had not been taken, the country would have been thrown into a state of convulsion." Wakefield refused office for himself, but characteristically worked as unofficial adviser to the Acting-Governor, over whom he seems to have acquired a very great ascendancy.

4. Deadlock and Prorogation.

A few weeks showed the satisfaction thus expressed to be premature. For various reasons, many of them obscure, but doubtless personal, the compromise proved insufficient to secure harmony, and the members of the Lower House soon ceased to follow Wakefield in his acceptance of the arrangement as an adequate temporary expedient.

On 1st July Fitzgerald introduced an Executive Government Bill, in which provision was made for pensions to the old Ministers of the Crown. During the debate it was clear that the new Councillors were most anxious for the old ones to be displaced, but although these last—the Attorney-General, the Colonial Secretary and the Colonial Treasurer—offered to resign if requested to do so by the Officer Administering the Government, that gentleman, acting under Wakefield's advice, declined to take the step so indicated. He very clearly explained his position in a message to the House, the words of which we may safely assume were the words of Wakefield. "I have sanctioned," he said, "the link between the Assembly and the Government by the introduction of four members into the Executive Council; but I am not prepared to disturb the officers appointed by the Crown, or in any way to establish a new form of

government in the Colony of New Zealand without reference Home.''

For a month the wrangle continued, and scarcely any business was done in the House. Then, on 2nd August, the representative Ministers resigned, and their resignations were accepted by the Governor. In answer to his message announcing this acceptance, the Lower House threw down the gage of battle by passing a resolution affirming once more the principle of ministerial responsibility. From this time onward Wakefield was mercilessly assailed in the House, which appears to have regarded him as an apostate from the popular cause. Nor was this view modified when, as soon happened, it became apparent that Wakefield had established himself as confidential adviser to Colonel Wynyard, and had been consulted by the latter upon the formation of a new Ministry. Eager as members were for the dismissal of the permanent ministers, they became still more eager for the dismissal of the unofficial one, and gravely prayed the Governor to consult his Executive Councillors, and not his irresponsible adviser. To this His Excellency courteously replied that his Councillors concurred in all his actions. It must be confessed that Wakefield's methods were calculated to alarm and inflame the House. Just as in England he had displayed a perfect genius for inspiring and working important figureheads, so here he stood confessed as the power behind the Acting-Governor, and rather gloried in emphasising the unpalatable reality. Upon one occasion a message from the Queen's representative was being read, and it was found that a page of the document was missing, whereupon Wakefield promptly pulled a draft from his pocket and proceeded to supply the missing part. We need not wonder that such conduct on his part produced the most intense irritation and mistrust.

After the failure of Wynyard's compromise the agitation for a responsible Ministry was continued with redoubled force and acrimony. The House refused to listen to any other business until that matter was properly disposed of, and government was absolutely at a standstill. In this difficult position Wynyard remained equally firm, reiterating that he considered himself powerless to act—"that he believed himself absolutely precluded by the royal instructions from establishing ministerial responsibility in a complete form." On 7th August an elaborate message to the Legislative Council again explained the difficulty. It was accompanied by the Attorney-General's legal opinion, and suggested that an Act to make the required change should be passed at once, but reserved for the signification of Her Majesty's pleasure. Still the Lower House remained obdurate and pressed for the dismissal of the obnoxious Ministers.

Matters came to a crisis on the 17th August, when two messages were received from the Acting-Governor. In the first he referred to the difficulty between himself and Parliament, and stated that he would take steps to get the authority required to establish responsible government. He added that, to give him an opportunity of adding to his permanent advisers a number of representative persons, it was his intention to prorogue the House for a short period. When this was read, it was instantly obvious that the second message contained the notice of prorogation, and the House was in no mood to be baulked of further discussion and protest. It at once went into committee further to consider its favourite topic. It was then pointed out that a Governor's message was entitled to precedence over all other business, and that therefore the second message should be read

without delay. Again the majority objected to be coerced, and a motion was promptly forthcoming for the suspension of the Standing Orders. In the fierce debate that followed, a split in the camp became evident, for a compact minority declined to go as far as the more vigorous supporters of ministerial responsibility, and took Wakefield's view that the Acting-Governor had done all that he could in the circumstances. Suddenly this body made a concerted move towards the door so as to leave the House without a quorum. With military promptitude the Sergeant-at-Arms turned the key, while Sewell jumped over the rail into the strangers' gallery and locked the exit there. With equal promptitude, and amid great uproar, the dissentients clambered over the railing and stood within the gallery—technically outside the House. The Chairman very properly declined to take a vote unless the doors were opened; the division bell rang, and as soon as a way was thus provided, the dissenting members left the House. The motion, supported by twenty votes to one, was ruled out by the Chair. Foiled in this direction, Sewell—in unconscious imitation of Sir John Eliot in the strangely similar tumult in the English Commons in 1628—proposed a series of resolutions asserting the right of Parliament to control expenditure, protesting against prorogation or dissolution without supplies being asked for and granted, and recommending the presentation of two addresses—one to Her Majesty to establish responsible government, the other to the Officer Administering the Government, praying Wakefield should be removed from his unofficial position of adviser. In presenting these to the House, Sewell remarked that they might have been made more complete by the addition of one

praying for the removal of the Acting-Governor himself. A short but fierce debate ensued, in the course of which a savage and unworthy attack was made upon Wakefield.

Suddenly a second sensational incident occurred. Mackay, the member for Nelson, walked into the House with his hat on, and went to his seat to get his umbrella. Amid loud cries of "Order" the Chairman called upon him to remove his hat. Politely raising the offending covering, Mackay replaced it on his head, and proceeded to pull some printed sheets from his pocket, remarking as he did so, that he meant no disrespect, but that he had obtained outside a copy of the "Gazette" containing the notice of prorogation. Instantly the papers were snatched from his hand and crumpled up, whereupon he threw another on the table and called on those present to read it. Completely overcome by his feelings, Sewell seized Mackay by the collar and proceeded to belabour him in the ribs. In an instant the House, like a pack of school boys, broke through all bonds of restraint, and a howling mob bore down upon the respectable but unwelcome member for Nelson. Hustled and reviled for some moments Mackay succeeded in breaking from his assailants, and took his stand in the middle of the floor. Here for a moment he defied them with flourishings of his opportune umbrella; then he coolly climbed over the gallery railing and left the chamber.

The House proceeded to report. The Speaker took the Chair. Mackay was declared guilty of contempt, a reply to the Governor's message was adopted, and the second message announcing the prorogation was then read. So ended the first session of the first Parliament of New Zealand. After sitting for two and a half months it had accomplished no act of

legislation save one—a measure authorising the sale of liquor within the precincts of the House for the use of honourable members. This had been put through all its readings at once on the 3rd July, to accomplish which result a unanimous House had suspended the Standing Orders.

5. The Solution.

The prorogation lasted for a fortnight. Wakefield wrote in the meantime to Swainson suggesting conciliation and that the prorogation should not be continued by reason of the scene that had occurred. During the recess Colonel Wynyard called to his Council Messrs. Forsaith, Travers, Macandrew, and Jerningham Wakefield, while Gibbon Wakefield retired from his position as unofficial adviser. Having then (as Mr. Swainson put it) "ascertained through various channels that if allowed to meet again the House would proceed with the business of legislation and vote the necessary supplies," the Acting-Governor permitted Parliament to reassemble.

The session began on 13th August, and the Governor's speech explained that he had appointed a mixed Executive as a temporary expedient pending the passing of an Act—to be reserved for Her Majesty's assent—which should make provision for complete ministerial responsibility. The House thankfully acknowledged the Governor's desire to introduce the necessary change, but declined to accept a mixed Executive, and prayed His Excellency to work only with the old ministers in the meantime and to put through such legislation as was urgently needed. Three days after the opening of the session the representative ministers resigned, and the Parliament proceeded rapidly with the ordinary work of

law making. It was prorogued on the 16th September.

During the recess Colonel Wynyard was advised from Home that no legislation was needed to introduce responsible government, and he was authorised to accept a responsible Ministry upon condition that adequate provision was made for the old Ministers of the Crown. Shortly after this. Sir George Grey was replaced by Sir Thomas Gore Browne, who summoned the third session of the first Parliament for the 8th August, 1855, for the purpose of granting supplies. The session ended on the 15th September, and a general election for a new Parliament followed. The second Parliament assembled in April, 1856. An Act for the grant of pensions to the old Ministers was passed, and on the 10th May the Governor sent for Sewell to form the first responsible Ministry in New Zealand.* After a few days he resigned, and was succeeded by Fox, who in turn had to give place to Stafford after having held office for only thirteen days. With the appointment of Stafford a condition of equilibrium was achieved; Parliament entered seriously upon its proper functions and the most exciting chapter in the purely political history of New Zealand was closed.

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*For a list of the Ministries in New Zealand, see Appendix A.

Chapter XIX.

THE PERIOD OF THE PROVINCES.

1. General Review.

The years from 1856 to 1876 are of great interest in the general history of New Zealand. They form a period of vigorous expansion and growth of material prosperity. Population increased with great rapidity; much of the land was settled and improved, while the discovery of rich goldfields both in the north and in the south gave a powerful impulse to the progress of the young colony. They are also the years which embrace the inglorious native wars, waged with brief intermissions from 1860, when hostilities broke out in Taranaki, to 1871, when the pursuit of the desperate Te Kooti was finally abandoned. Happily it does not lie within the limits of this undertaking to tell the story of these miserable conflicts, begotten of a misunderstanding, conspicuous on both sides by acts of great personal gallantry, and on the part of the Maoris, outnumbered five to one, by an able and stubborn defence against an inept management, and a ponderous system of attack. The Queen's sovereignty prevailed; a wise clemency in time healed the wounds and softened the bitterness of the conquered, and though in later years small threatening clouds appeared from time to time, peace between *Pakeha* and Maori has never since been seriously imperilled.

From an imperial standpoint, too, the period is noteworthy for the anti-colonial sentiment which prevailed in England, and the growth in the Colony of quite a strong feeling in favour of separation. In

1869 Governor Bowen reported to the Home Government that there was an avowed desire on the part of many to ask for the protection of the United States, and about the same time Froude was writing passionately, but almost fruitlessly, against the cold indifference or the covert hostility manifested by Englishmen towards the colonies.

"Let the Canadian Dominion," he cried in 1870, "let Australia, the Cape, and New Zealand be occupied by subjects of the British Crown, be consolidated by a common cord of patriotism, equal members, all of them, of a splendid Empire, and alike interested in its grandeur, and the fortunes of England may still be in their infancy, and a second era of glory and power be dawning upon us, to which our past history may be but the faint and insignificant prelude."

His words fell for the most part upon deaf ears. The doctrines of the Manchester school held powerful sway in England, and the Empire went far upon the road towards that state, suggested by Wakefield five and twenty years before, but only to be repudiated by him for a brighter prospect—that state in which the Colonies "powerful as the parent state or more so, should through mismanagement have become independent states, more likely to be its enemies than its hearty friends."

From the purely constitutional point of view, however, only two great changes are to be noted in the twenty years now under review. First, the provincial system was destroyed; secondly, with the advent of peace, and the consequent withdrawal from the Governor of the only matter in respect to which he exercised a personal and paramount influence, the virtual emancipation of the Colony was completed, and the Governor became a symbol rather than a force in domestic government.

2. Development of Parliament.

A few slight constitutional changes were effected, which may be passed over with the barest mention.

In 1857 an Act (20 and 21 Vict., C. 53) was passed giving the General Assembly power to alter, suspend, or repeal the provisions of the Constitution Act, with the exception of certain fundamental sections.*

In 1860 the membership of the House of Representatives was fixed at 53, a number increased to 57 in 1862,† to 70 in 1865, to 72 in 1867, and 74 in 1870.

In 1860 the franchise was conferred upon the holders of miners' rights.‡

In 1870 the Qualification of Electors Act provided that an elector should not be entitled to exercise more than one vote in any one electorate.

In 1864 the seat of government was removed from Auckland to Wellington, and although this gave great offence to the North, and caused an attempt to have the Auckland Province declared a separate colony—Sir Frederick Whitaker moved to this end in the Legislative Council—the wisdom of the change was generally recognised, and cannot now be seriously questioned.

The Native Rights Act 1865 declared that all persons of the native race, whether born before or since New Zealand became a dependency of Great Britain, should be deemed to be natural born subjects, and be under the jurisdiction of the Courts of Law.

In 1876 the Maori Representation Act gave to the Maoris the right to elect four representatives to Parliament. Before this Act they had had no separate representation, although they might be qualified to

*A further slight amendment was made in 1868 (31 & 32 Vict. C. 92).
†Mr. Julius Vogel was first elected to the Parliament of 1863.
‡Further legislation on this point followed in 1862 and 1863.

vote with the white electors. It has been suggested, and probably with truth, by competent authorities that an earlier grant to the Maoris of direct representation would have averted the King movement, which resulted in the acceptance by Te Wherowhero of the Maori kingship on the 14th July, 1857. In setting up a King the natives were actuated in part by a desire to prevent intertribal contests, but also in part by a feeling of hostility towards the *Pakeha*, and the movement was destined to have an important bearing on the hostilities which broke out in the sixties.

In 1867 Sir George Grey was abruptly and discourteously dismissed by the Duke of Buckingham, in consequence of his refusal to withdraw a vigorous despatch in which he severely criticised the actions of General Cameron and Earl de Grey.* He retired into private life, and took up his residence on Kawau Island, whence seven years later he was to emerge with startling effect as a representative of the people during the fight over the provincial question.

Lastly we may notice that in 1869 the ballot was adopted for elections to the House of Representatives. A Bill to this end had been thrown out in the previous year by the Council, where there were many sturdy conservatives, who held tenaciously to the old fashioned view expressed by Swainson in words which may with some interest be recalled at the present day:—

"Should the time," he wrote, "ever arrive when any considerable portion of the settlers shall become so dependent in circumstances and so poor in spirit as to be open to venal influences in the exercise of a great public trust, it may then be time to consider,

*See Collier, *Life of Sir George Grey*, pp. 159-60, and Henderson, *Sir George Grey*, pp. 232-3.

not whether they shall be screened and encouraged in the betrayal of that trust by the secrecy of the ballot; but whether, consistently with the welfare of society, and consistently with sound principle, they are fit to be trusted with any share whatever in the government of their fellow men.''

3. The Provincial System at Work.

Leaving these less important matters we turn now to consider the topic which aroused the deepest political interest—the question of the provincial system of government. As has already been explained, this system was framed by Grey, and heartily endorsed by Wakefield, both of whom clearly and rightly insisted that the circumstances of the Colony at the time of the Constitution Act demanded a very large measure of local self-government. In the nature of things, however, the Provincial Assemblies could not outlast the temporary necessities which called them into being. The matter was touched upon in the Governor's speech to the first Parliament under the Constitution Act, and when once the all-absorbing question of ministerial responsibility had ceased to agitate the public mind, and Parliament had settled down to sober work, we find members at once ranging themselves upon the side of Centralism or the side of Provincialism, and making their views upon this question the test of party adherence. The line of party cleavage remained the same for many years to come.

The provincial system was a wise measure of temporary policy, but it was certain to become an anachronism and a burden when the Colony grew, and local isolation was broken down. As the years went by its defects became accentuated, its utility

decreased, and it increasingly prejudiced the unification of the Colony and a comprehensive national policy. The foundations of the system were thus gradually weakened, and when finally its maintenance was found to be a barrier against the policy of the general government, the downfall of the provinces was speedily assured.

Opposition was in some degree fostered by the ostentation of the provincial assemblies; one Superintendent was scrupulously referred to as "His Excellency"; the Councils were mimic Parliaments, which copied from the Mother of Parliaments her state, her forms, her order of procedure; and the existence of these petty Houses within the bounds of a Colony with the population of a small city, was soon felt by many persons to be unnecessary and absurd. Further than this, the system produced inequalities, and encouraged local jealousies. Chief among the functions of the provincial councils was that of administering the waste, or unoccupied, lands in the respective provinces. Some could always find endowments for education and other public purposes, or moneys for roads and bridges; others were cramped by insufficient revenues, and hampered by circumstances which prevented settlement and thus rendered their lands of little real value. The provinces, although all subordinate to the central government, were in many ways like separate states, unequal, jealous, selfish, and grasping. The South was rich: the North was poor. The South had broad acres, ready and apt for immediate settlement. Much of the North was owned by Maoris, settlement was confronted there with greater difficulties, and the native wars from 1860 both hampered occupation and aroused the antagonism of the South. It was, therefore, only

natural that as the central government grew in stability, and means of transit and intercourse improved, many should turn against the provincial system and aim at the centralisation of all the important functions of state.

Down to 1873 there were, in all, twelve ministries. The attention of Parliament was largely occupied by financial matters and administration, and later by the problem of the Maori wars, and it was round such topics as these that party warfare raged. But the provincial question was always present, and in no small degree effected a party cleavage.

The first important public attack upon the system was made by Stafford in 1868, when, as leader of the government, he replied to an assault launched by Fox against the Ministry.

"I shall now," he said, "urge our friends to take every opportunity of pointing out how miserably insufficient the present political system is to meet the wants of the people, and of demonstrating how, whatever little efficiency it once possessed, has as a rule died out. The honourable member always forgets that there is a large portion of the Colony which does not belong to the large centres of population. He has never got beyond the time when New Zealand consisted of six small fishing villages, as was the case when the Constitution Act was passed in 1852. He speaks as if these six little villages still represented the people of New Zealand. He also ignores the fact that provincial government in New Zealand is, for the most part, reduced to a pretty central power, and that the most despotic government ever seen in the country is what might be styled the rump of a provincial government. The provincial system has been tried and found wanting, and cannot long survive."

This was the expression of opinion definitely

formed, and obviously shared by many besides the speaker.

4. The Struggle for Abolition.

The final stage of the struggle may be dated from 1870. By that time the flame of war had almost died, and McLean was busily engaged in his great work of building up friendship and confidence between the white man and the conquered Maori. Freed from the engrossing and harassing task of war, Parliament was in a position to turn its attention to other topics, and almost at once a conflict was precipitated between Centralists and Provincialists. Fox was Premier, with Julius Vogel as Colonial Treasurer, and the latter gave the first indication of his policy upon the subject of public works by proposing to borrow ten million pounds for the construction of railways by the State. The time was favourable to the acceptance of a policy of borrowing. The period of severe depression was over, prosperity was dawning upon the Colony, and the prospect of opening up the country by an extensive system of railways attracted the minds of men upon both sides of the House. On the other hand, Vogel's scheme possessed one feature which aroused the most vigorous hostility. He proposed that the expenditure should be recouped by the disposal of a public estate to be created out of the lands through which the railways would pass. When it is remembered that the provinces had hitherto retained the control and disposal of their lands, it will be seen that this was an attack upon the provinces in a most vital part, and the Provincialists, while accepting the simple and pleasing suggestion to borrow, forgot their mutual animosities in a common danger, and combined to defeat the very salutary proposal for recoupment. The point is important because it indicates the certain

tendency of the old provincial system to conflict with the central government upon matters of broad and general policy, and also because it marks a change in Vogel's attitude towards the provinces. He left almost immediately for England to arrange the loan for public works, and from the time of his return, in August of the following year, until he took the final steps for the complete abolition of the provinces, we find in his public utterances indications of a growing mistrust of the old system, and an increasing desire to narrow its functions and its influence.

"I confess myself," he said in 1872, "to have frequently wavered in opinion, appalled by the difficulty, on the one hand, of preventing the provinces from destroying the necessary power of colonial action, and on the other of preventing the centralising tendency from destroying the usefulness of local governing bodies, without supplying or being able to supply their place. The policy I am about to elaborate I describe as the result of a search after equilibrium—or as nearly a state of equilibrium as is possible amidst the many varying circumstances and contending interests with which we have to deal. Broadly we want the Colony to take charge of colonial works. Broadly also we class main railways and immigration as amongst colonial works; other works necessary for the settlement of the country we class amongst the 'local.'"

Here we have the old provincial minister, whose mind has been deeply impressed by the parochial rejection of a sensible and business-like piece of policy.

Later still, upon a no-confidence motion proposed by Stafford in November, he indulged in stronger condemnation.

The motion was carried, Fox resigned, and Stafford took office which he succeeded in holding for a month.

Then, Fox declining, Vogel was sent for and formed a ministry under the nominal leadership of G. M. Waterhouse, he himself taking the portfolio of Colonial Treasurer. With numerous changes in personnel* but scarcely any in continuity of policy, this Ministry lasted until 1877. The end of the provinces was rapidly approaching. The policy of borrowing was continued, the tide of material prosperity rose higher and higher, and further conflict with the provincial system was inevitable. The final collision came in 1874, when Vogel introduced a State Forests Bill to conserve existing forests, and to make provision for afforestation. The debate on this measure was long and keen, and the whole opposition came from the ranks of the Provincialists.

"That word 'Province,'" said Stafford, "has been thrown in the ears of honourable members as if a province were some little god almighty, with inherent virtues in itself for the advantage of the people of the country. If we heard less of the provinces, and more of the people of New Zealand, our legislation would be more beneficial."

5. Abolition of the Provinces.

Vogel's mind was now made up, and on the 13th August he moved in Parliament:

"That this House is of opinion that, taking the circumstances of the Colony into consideration, the Provincial form of government in the North Island should be abolished; that in the measure giving effect to the same there should also be included a provision declaring Wellington to be the seat of government of the Colony, and for continuing the localisation of the

*Vogel became Premier in March 1873, after a short tenure by Fox during the former's absence in Australia. Pollen followed in July, 1875, Vogel and Atkinson in succession in 1876.

land revenue in accordance with what is known as the Compact of 1856. That during the recess the government should consider how best to give effect to the above resolution."

In speaking to his motion he frankly admitted that his views on the provincial question had previously fluctuated and that "the action the government are now taking has been precipitated by the course which has been adopted by some honourable members with respect to the State Forests Bill—by the fact which came to light during the discussion on that Bill, that there was an opposition to the carrying out of that great measure, which opposition was based solely, as far as I could understand, upon provincial grounds, and mainly upon the ground that it might interfere with the disposal of the land of the provinces for provincial purposes."

The debate was conducted at great length and with remarkable ability and energy. That Vogel's attack was swift and unexpected was shown by one sensational incident which marked the occasion. Mr. G. M. O'Rorke, then Minister of Justice, rose in his place, and after eloquently condemning his leader's action, then and there declared his intention of resigning from a ministry with whose policy he could not agree. "I should never," he remarked in the course of a dignified speech, "have occupied this seat had I known that the honourable gentleman at the head of the government had in his copious armoury this treacherous dagger to stab the provinces, which I thought he and I were sworn to maintain." At the close of his speech he left the Ministerial benches and crossed to the other side of the House. In the evening his resignation was announced, and Mr. O'Rorke explained that he had intimated in Cabinet that he would resign if the

resolutions were brought forward. To this the Prime Minister gave a flat contradiction, and complained that Mr. O'Rorke should not have spoken as he did, but should have first resigned and then have stated his reasons without delivering an attack upon the government.

The resolutions were finally carried on the 24th August, 1874. The gage was thus down, and the Provincialists rallied all their forces: They found an unexpected champion in Sir George Grey, who came out of his retirement, was elected Superintendent of the Auckland Province, and, a little later, member for Auckland West. He at once became the acknowledged leader of the party, and threw the whole weight of his ability and prestige into the fight. It was, however, a lost cause. In the new Parliament of 1875 Major Atkinson, leader of the Lower House, introduced a Bill for the abolition of the provinces, and the fiercest opposition was powerless to stay its passage.

Atkinson had clearly the best of the discussion, and made his strongest arguments in laying down the principle that the power which raises the taxes should be the spending power directly responsible to the people upon whom those taxes are levied, and in attacking a system under which "nine sturdy mendicants" perpetually assailed the government for monetary aid. Grey was able to reply only by questioning the legality of the measure, and by advancing the argument that under the provincial system public money was expended under a more direct and minute scrutiny than would be possible under a system of centralised government. The rest of his speech consisted of eloquent but unconvincing generalities.

The second reading was carried in the House by 52 to 17, the third by 40 to 21, and the measure was finally passed on the 12th October, 1875, to become law on the day immediately following the close of the first session of the next Parliament.

The Act made provision for a separate account of the land fund arising within each district and this was charged with interest and sinking fund in respect of the various provincial loans, and with the cost of administering the waste lands. Subject to these charges the land was set aside for the construction and maintenance of public works, and for the endowment of road boards and municipalities, while provision was also made for the further assistance of local bodies out of the Consolidated Fund of the Colony.*

The interval advisedly placed between the passing of the Act and its coming into operation gave an opportunity for a final and desperate attempt on the part of the Provincialists to save the provinces. Vogel came back with a majority from the poll in 1876, and took over the reins from the nominal Premier, Dr. Pollen. Resigning on the 1st September he was succeeded by Major Atkinson. On the 19th of that month Macandrew unsuccessfully moved a resolution praying the Governor to take steps so that the provisions of the Abolition Act might be suspended as to the province of Otago. In October, Grey cabled to the Secretary of State for the Colonies that disturbances were imminent if the measure of the last session were permitted to come into force; counter threats of coercion by British men-of-war were freely bandied in the House. Grey also continued to press, with the utmost pertinacity, the question of the illegality of the Act, while in correspondence which was printed and laid before

*See also Interpretation Act, 1908, No. 1.

the House he indulged in fierce, unmeasured, and bitter attack upon the Governor. As a practical measure he urged that a sum of £5,000 should be provided for the expenses of determining the legal position.

The struggle, however, was vain. Atkinson's majority was strong and compact; neither threats nor eloquence could shake its solidity, and Parliament was prorogued on 31st October without any alteration having been made in the Abolition Act, which thus took effect from November 1st. 1876.

6. Note on the Abolition of the Provincial Governments.

(By J. W. McIlraith, LL.B., Litt.D.)

The main factors in the formation of the provincial system of government were—

(*a*) The circumstances of the original settlement,

(*b*) The physical configuration (with consequent lack of communication) of the country.

Some districts were settled by people from a particular country, and some by people of a particular religion. Canterbury was intended originally as a Church of England settlement; and Otago a Presbyterian colony, drawn almost exclusively from Scotland. These settlements made special provision for their own religious organisations.

The settlements were widely separated, and as each settlement was formed some system of local government had to be devised. Thus Provincialism naturally preceded Centralism. But evils inseparable from Provincialism soon manifested themselves. Provincial pride often degenerated into provincial jealousy and spite. And among other evils:—

(1) The spirit of protectionism arose—one province seeking to exclude absolutely the cattle and meat of another.

(2) Vexatious quarantine regulations caused ships from one province to be detained in the ports of another, merely to hamper the trade of the former.

(3) Fencing Acts differed in their requirements, thus causing trouble with boundary fences on inter-provincial boundary lines.

(4) Different regulations for coping with pests and diseases made the eradication of such diseases as scab in sheep an impossibility.

(5) Each province had control of its police and prison system, hence:—
  (*a*) Efficient inspection of gaols impossible.
  (*b*) Non-co-operation of the police of one province with those of another.
  (*c*) Unnecessary expenditure on the police force of the colony.

(6) Education was in the hands of the provincial assemblies, and hence the richer provinces (*e.g.*, Canterbury and Otago) founded excellent systems, while less fortunate districts were educationally starved. Auckland even proposed a capitation tax for education purposes.

(7) Proceeds from the sale of provincial lands were retained by the individual provinces. Canterbury and Otago, with an abundance of readily cultivable land and no native difficulty, had an overflowing revenue; whereas districts like Auckland had to rely on taxation for the support of gaols, schools, hospitals, and public works. This led to:—
  (*a*) Reckless expenditure in the richer provinces.
  (*b*) A clamour by the poorer provinces for the pooling of the land revenues.

(8) The Maori wars devastated the North Island and hindered settlement, hence—
  (*a*) A demand by the North Island that the South Island should share more directly in the cost of the war;
  (*b*) A feeling in the southern provinces that they ought to be exempt from the burden of the war; and this led to,
  (*c*) A demand for the separation of New Zealand into two colonies with Cook Strait as the common boundary.

(9) Each province had its own survey staff, which worked independently of the survey staffs in the other provinces. Hence arose error. By 1875 all confidence in the accuracy of provincial surveys had vanished.

(10) Intra-provincial forces were also accelerating the disintegration of provincial governments:—
  (*a*) Some provincial governments (*e.g.*, Canterbury and Otago) were charged with expending an altogether undue proportion of their revenue in their capital cities on the erection of ornate and often unnecessary public buildings while the outlying districts in the same provinces were starved.

(*b*) The goldfields, especially in Otago, were shamefully neglected, though they contributed very largely to the provincial revenues.
(*c*) Crown lands were sold and then railways were constructed through them. The buyer reaped the benefit of the enhanced values at the expense of the State.
(*d*) Some provinces, scenting abolition from afar, disposed of their Crown lands in feverish haste and squandered the proceeds recklessly.
(*e*) Provincial credit stood so low in the London market that even rich provinces like Otago had sometimes to pay 8 per cent. for their loans.
(*f*) Some of the provincial governments had delegated so many of their functions to subordinate bodies (*e.g.*, harbour, education, hospital, and road boards) that they retained but the shadow of their former importance.
(*g*) Improved communication brought every part of the colony into close touch.

(11) In the General Assembly legislative and administrative difficulties arose:—
(*a*) Members of provincial assemblies were allowed to sit in the General Assembly, and this led to—
(1) Log-rolling; formation of provincial groups to promote provincial interests.
(2) Coalition of provincial groups to protect common interests of those provinces.
(3) Organised provincial raids on the Central Treasury with consequent:
(*a*) Destruction of ministerial responsibility for expenditure.
(*b*) Decay of the national spirit.
(*c*) Accentuation of provincial jealousies.
(*d*) Degradation of parliamentary life.
(*b*) Members of the Central parliament were very prone to view legislation from the provincial standpoint; hence good general acts were almost impossible.
(*c*) Many of the ablest minds were employed in relatively unimportant official positions in the provinces.
(*d*) The Central government found it at times impossible to raise a loan for special purposes without first promising the provinces a per capita dole out of it. Thus the loan had to be much greater than was really necessary.

CHAPTER XX.

THE CONTINUOUS MINISTRIES.

1. 1872-91: Conservative.

Turning from specific measures, we find the most interesting constitutional feature of the period since 1876 in the development of the continuous ministry—"a name given," says Mr. W. P. Reeves, "to a shifting combination, or rather series of combinations among public men, by which the Cabinet was from time to time modified, without being completely changed at any one moment." One such ministry, with brief interludes from 1877 to 1879, and from 1884 to 1887, when Grey and Stout respectively held office, occupied the period from 1872 till 1891, while another occupied the Government benches from 1891 until 1912. The leaders of the first were, at different times, Vogel, Atkinson, Hall, and Whitaker; of the second Ballance, Seddon, and Ward. It would be beyond the scope of our undertaking to consider the ministries in detail or to discuss the political achievements with which they were associated. It is sufficient to refer generally to the facts which explain their development and which point to a probable recurrence of the phenomenon in the future.

From 1872 to 1875 the vital question of New Zealand politics was the abolition of the provincial system of government, and when in the latter year the Provincialists were decisively beaten, few topics of first-rate importance remained. The government, too, was just entering upon the famous policy of borrowing for public works. Finance and administration thus became the matters of greatest moment, and after a comparatively short tenure of office the

party in power succeeded in strongly entrenching its position. The possession of the Treasury benches gave it a great advantage over those in opposition, and a change of government became increasingly difficult. This advantage, inevitable in any country where the functions of government are mainly administrative, and where few questions of national policy, and none of foreign policy, are being agitated, was increased by the fact that the government borrowed largely and embarked upon many great public works. The nine provinces had lost their local government, but the "nine sturdy mendicants" remained. In any new and expanding country the power of the purse is enormous, although it be exercised with the utmost fairness and impartiality. Every pound of public money spent, even upon obvious and inevitable works, increases the hold of the ministry, and a very moderate dexterity in the doling out of grants enables a party once firmly established, constantly to strengthen its hold upon the country. It must also be remembered that in a new country the distinction or cleavage between Liberals and Conservatives, though nominally retained, is much slighter than that between parties in England. Political opportunism, too, is more conspicuous, and a strong opposition often succeeds in forcing its views upon ministers and their supporters, gaining a victory upon principle without turning the government out. It was thus that in 1879 Grey forced his adversaries to take the first step towards manhood suffrage by granting a vote to persons having only residential, and not property, qualifications; it was thus that in 1889 the Atkinson Ministry acquiesced in the proposal to abolish plural voting. It was thus that, time and again, Seddon routed a determined attack made upon him and triumphantly turned to

his advantage the measures advocated by his opponents. The remarkably close approximation of the two parties is clearly shown by the action of four Auckland members in 1879. On 8th October a resolution was passed "that the government as at present constituted does not possess the confidence of this House," and the Governor sent for Hall to form a ministry in place of that led by Grey. It was, however, clear that the state of parties was so even that little could be expected in the way of legislation. Most of the members, it is true, were in favour of liberal reforms, but all were pledged either to support or to oppose Grey, and it looked as though another appeal to the country would be the inevitable outcome of the deadlock which existed. In these circumstances four of the Auckland members (Wood, Swanson, Hurst, and Colbeck), who were pledged supporters of Sir George Grey, determined upon a bold course. They arranged among themselves that, provided Hall would undertake to pass the measures which the four members were pledged to support, and would place an Auckland member, not being one of themselves, in the ministry, they would vote with him on a no-confidence motion and by that means secure for him a working majority. The arrangement was duly carried out, and, though the four members were unmercifully attacked and vilified, it seems plain that they were actuated by the best of motives and that their action involved no real change of principle, but only one of party allegiance. Party politics had become little more than a struggle between the Ins and the Outs. In the end, of course, the possession of great administrative power brings about destruction. Security breeds carelessness, perhaps corruption: length of office inspires mistrust, discontent, and envy. An office, too, which is only executive seldom

survives a period of industrial and commercial depression. So it proved in New Zealand.

2. 1891-1912: Liberal.

The downfall of the Conservative party in 1891 was brought about by bad times, by the inevitable reaction against a long administration, and by the rising of a strong tide of democratic feeling, a strong movement in favour of radical legislative changes. The Liberal party was returned with a majority and Ballance formed a ministry in succession to that of Atkinson. With Ballance began the second continuous ministry, destined to hold office without intermission for no fewer than twenty years, during fifteen of which Seddon occupied the position of Prime Minister. His long ascendancy was due in part to his remarkable amalgamation of the Liberal and Labour parties, in part to the great prosperity, springing from many causes, which the colony enjoyed for many years; in part to his legislative programme, which fascinated the radicals without unduly alarming the cautious liberals; and in part to the powerful personality of the man himself. But even the staunchest follower must recognise that Seddon's triumph illustrates as well the truth of the contention that the secret of long office in New Zealand is the administrative control of the country. Every year saw millions borrowed and spent, and even had he been superhumanly free from the opportunism of the politician, such an expenditure must inevitably have consolidated large sections of electors in his favour. Few people, indeed, realise how small a period of Seddon's domination is covered by his great legislative achievements. Coming into power in 1893 he proceeded at once to carry an ambitious programme into execution. 1894 saw the passing of a Factories

Act, the Government Advances to Settlers Act, the Lands for Settlement Act, the Shops and Shop Assistants Act and the establishment of the system of Conciliation and Arbitration for the settlement of industrial disputes. The following year held the Female Law Practitioners Act and a permissive Act providing for rating on unimproved values. In 1898 the system of Old Age Pensions was introduced, but no other important measure. In 1899 the State embarked on the business of Accident Insurance, but from that time on, if we omit non-party reforms, the legislative energy of Parliament began to flag. In 1900 the only noticeable measure was the adoption of the English Workers' Compensation for Accidents Act. Since then the only important legislative departures have been the State Fire Insurance Act of 1903, certain provisions for State erection of Workers' Dwellings (1905) and in 1907 a Monopoly Prevention Act.

Upon the death of Seddon, Sir Joseph Ward succeeded to a secure command, and for a time bade fair to hold on indefinitely. The legislative springs, however, showed no signs of renewed activity. Few measures of policy were before the country, and the one great controversial topic—land settlement—was not regarded as a strict party question. The old union between Liberalism and Labour showed signs of dissolution, and Labour was not strong enough to force the pace. Administration thus became once more the chief question of practical politics, and it was upon this issue that the elections were frankly fought in 1908 and 1911. The result of the latter showed that the long attack of the opposition had been effective, and that the people were desirous of a change of government.

Once more the situation is confused, but unless a strong and active radical party arises—strong in numbers and bent upon large measures of policy—it seems likely that administration will before long become again the chief political topic, and that so long as times are buoyant and borrowed money continues to flow in, any ministry which succeeds in holding office for a session will long retain its place and power.

PART II.

CHAPTER XXI.

TERRITORY.

1. General Principles.

A British Colony or Dominion cannot of itself alter its boundaries. This rule is closely connected with the principle that the laws of a colonial legislature have no validity beyond the limits of the Colony.* A Colony can legislate for its territory only as its limits are defined by the Crown or Imperial Act. The boundaries of New Zealand, as was the case with all the colonies, were first prescribed by exercise of the prerogative; the first Act of Parliament defining them was not passed till 1863 (26 and 27 Vict., C. 23). The Colonial Boundaries Act of 1895 (58 and 59 Vict., C. 34) was passed partly to remove doubts whether the Crown can change colonial boundaries that have been laid down or incorporated in an Act of Parliament. It enables the Crown, either by order-in-council or by letters patent, to alter the boundaries of any Colony, but provides that in the case of a self-governing Colony, its consent is necessary to effect the change.

2. Boundaries of New Zealand.

We have already noted the intention to include New Zealand in the scope of Phillip's commission (p. 40), and the letters patent of June 15th, 1839, (p. 87) followed by Hobson's proclamation of the 30th January, 1840. The Treaty of Waitangi names only the "territories" of the confederate and the separate and independent chiefs of New Zealand;

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*For discussion of this principle, see Chaps. XXIV., 8, and XXVIII. 2 (c).

there is no attempt to define their limits. For the Charter of November 16th, 1840 (see p. 149). That of April 4th, 1842, proclaimed on November 1st, enlarged the boundaries to 33° and 53° S., and 162° and 173° E., and so added the Chatham Islands, Bounty Islands, Antipodes Islands, Auckland Islands, and Campbell Island to the Colony as well as certain extreme parts of the North Island and Stewart Island excluded by the instrument of 1840. These boundaries were given a statutory basis by the Act of 1863. By a proclamation of July 21st, 1887, the Governor, acting by authority of letters patent of January 18th, annexed the Kermadec Group as from August 1st. On June 10th, 1901, a similar proclamation, under authority of an order-in-council of May 13th issued in exercise of powers conferred on the Crown under the Colonial Boundaries Act of 1895, annexed, as from June 11th, the Cook Islands and seven Islands* outside the Cook Group. The New Zealand House of Representatives had in 1900 demanded their annexation. The existing boundaries of the Dominion are therefore defined by the three last-mentioned instruments, which can be varied only by the Crown or the Imperial Parliament with the consent of the Dominion.

NOTE.—Statutes dating from 1901, consolidated in 1908 No. 28, provide for a Federal Council and Island Councils, partly elective, to legislate for the whole group, except Niue, and each island respectively. The Governor's assent is necessary for their ordinances and the Governor in Council may apply New Zealand law to the Islands. There is a High Court with appeal to the Supreme Court and local island courts. The executive head is a Resident Commissioner. Since 1903 there has been a separate administration for Niue.

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*Niue, Palmerston, Penrhyn, Humphrey, Pierson, Danger, and Suwarrow.

CHAPTER XXII.

THE GOVERNOR.

1. Appointment, Style, and Salary.

The Governor is appointed by the Crown by letters patent under the Great Seal, on the advice of the Secretary of State for the Colonies, or some other appropriate Minister.* The Government of the Dominion is now, however, informally consulted before the appointment is made, though it has not the right to suggest who shall be the appointee; for the officer who is charged with conducting the foreign relations of the Crown, as affected by the colony, and with advising the Crown when any question of Imperial, as distinct from colonial, relations arises, must be selected by, and be responsible to the Crown alone. There have been cases in which colonies have objected to the proposed appointees and the appointments have not been proceeded with.

Since the withdrawal of the Imperial troops from this Dominion it has been customary to nominate by letters patent the Chief Justice of the Dominion as the officer to whom the administration may be delegated in the Governor's incapacity or absence. The Governor may also appoint a deputy who may act during his temporary absence, though he himself in such case is deemed to possess full power to perform all his functions.†

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*For the law relating to colonial governors see; *Todd, Parliamentary Government in the British Colonies; Keith, Responsible Government in the Dominions*, Vol. I., pp. 83... *Jenkyns, British Rule and Jurisdiction beyond the Seas*, Chap. VI.

†Dr. Keith thinks that this is open to objection, as a Governor would seem to have power only within the limits of his Dominion, and his assent to a Bill, for example, if given outside the limits, might be judged to be illegal. By 1912, No. 4 the deputy may exercise all the Governor's powers, statutory and otherwise.

The salary of the Governor is paid by the Dominion, and is not subject to annual appropriation, but is fixed by a permanent Act. It must not be reduced during his term of office, but may be subject to reduction only when a new Governor takes office. The salary is £5,000 a year, or half that paid by Canada, the Commonwealth, and the Union, with £2,000 allowances.

The Governor or the officer administrating, is officially entitled, within the Dominion, to the style of Excellency. As representative of the Sovereign, he receives certain salutes and marks of distinction from the naval and military forces and wears a special uniform. As Governor, he must accept no present from within the Dominion, without the permission of the Secretary of State for the Colonies, which is generally granted in the case of valedictory gifts. The Colonial Office also discountenances the development by a Governor of any business interests within his Dominion during his term of office.

2. Correspondence.

Any communication to the Home Government or the Crown from a resident in the Dominion must be forwarded through the Governor, who has no power to withhold any such communication, but must send it on with any necessary comment. Of course, if it refers to the internal affairs of the Dominion, the communication will be referred by the Home Government to the local Ministers. This would be done through the Governor, for the Governor is the only person in the Dominion with whom the Secretary of State corresponds officially; but an exception has lately been made in connection with the work of the Imperial Conference, the Secretary to the Conference having been authorised since 1907 to correspond

direct on minor matters with the colonial members of the Conference. After Sir George Grey retired from the office of Governor and entered New Zealand politics, he argued, but in vain, that he was entitled to address the Secretary of State directly, although he himself had bitterly complained of those Imperial military officers who had during the Maori wars ignored him as Governor by communicating direct with the Home Government.

The despatches that pass between the Secretary of State and the Governor are classified as public, confidential, and secret. Of the secret and the confidential despatches to the Governor some are intended to be submitted to his Ministers and must not be published without the permission of the Home Government previously obtained, and the others are personal to him, but may be disclosed to his Ministers at his discretion. Though many of the Governor's despatches Home are secret and many others are confidential, yet the Secretary of State has the power to publish such despatches; his right, however, is exercised only after consultation with the Governor, and it applies only to the despatches proper, and not to any confidential or secret communications of the local Ministers to the Governor. One of the acts leading to Sir George Grey's recall was his refusal in 1867 to receive a communication for the Secretary of State as confidential.

3. General Powers.

A Governor's powers are nowhere rigidly defined and limited. His office is nowadays constituted by permanent letters patent under the great seal and permanent instructions amplifying them, and each Governor is appointed by commission to the office as it is described in these instruments and subject to

any special instructions he may receive and to the rules for the general guidance of Governors laid down by the Colonial Office. But the letters patent do not always expressly state the nature and extent of his power in relation to a given subject. It is clear that a Governor is not a Viceroy. Like the King, a Viceroy can do no wrong in his official capacity; the Courts of law will not countenance any action against a Viceroy for any official act done by him. But it has been judicially decided that a Governor possesses no general sovereign power, but only whatever authority is derived from the powers expressly or impliedly entrusted to him by his Commission. The extent of his prerogative powers is conditioned by the fact that he must possess all the power needed to conduct the executive government of his Dominion. Usage shows that "the Governor possesses the whole executive authority of the colony so far as that authority is needful in a colony."* Any act done beyond these limits, even though performed in good faith in an emergency when the maintenance of the government is threatened, may bring him within the jurisdiction of the Courts unless he is protected by an act of indemnity.

Three views have been taken of the general character of the power of the Governor of a self-governing Dominion. Goldwin Smith and Todd represent two opposite and extreme opinions. The former says: "A Governor is now politically a cipher. He holds a petty Court, and bids champagne flow under his roof, receives civic addresses, and makes flattering replies; but he has lost all power, not only of initiation, but of salutary control." Todd holds

Keith, p. 116.

that the Governor has a large "reserve power." "A constitutional Governor," he writes, "is not merely the source and warrant of all executive authority within his jurisdiction; he is also the pledge and safeguard against all abuse of power by whomsoever it may be proposed or manifested, and to this end he is entrusted with the maintenance of certain rights, and the performance of certain duties which are essential to the welfare of the whole community. And, while he may not encroach upon the rights and privileges of other portions of the body politic, he is equally bound to preserve inviolate those which appertain to his own office; for they are a trust which he holds in the name, and on behalf, of the Crown for the benefit of the people." The third view is based upon a more careful analysis of the duties of a Governor.* He serves, in a Dominion, in a two-fold capacity, as chief Imperial officer or agent of the Crown and Home Government, and also as the nominal executive head of the local Government. As the former, he possesses and often exercises real power, independent of his local Ministers. As the latter, though generally following their advice, there are times when, like the Crown in England, he is justified in acting on his own initiative, and he has always many opportunties of exercising "salutary control." But these points will be developed and illustrated when we speak of the Governor's relations with his Ministry.

The Governor has a grant of general executive authority, but there are certain prerogatives he may not exercise. He may not coin money, nor grant royal charters of incorporation, nor confer honours of any kind, nor change the great seal of the Dominion. He may not exercise the power of

*See Keith and Jenkyns.

pardon, unless it is specially delegated to him; he may not declare war or peace; he may not make treaties without special delegation; he may not create legislative bodies, nor, unless specially authorised, courts of law; and it is very doubtful whether he may perform an act of State against aliens, *e.g.*, whether he may exclude them from the Dominion by virtue of the prerogative.

The fact that a Governor may not exercise certain royal prerogatives in the Dominion, does not mean that they are not exercisable at all here. It has been laid down that the Crown can exercise in the colonies all the prerogatives it enjoys in England, except those which have been excluded by legislation, either imperial or colonial.

4. Civil and Criminal Liability.

"The King can do no wrong," and therefore cannot be sued in the ordinary way in his own courts, though subjects who have suffered through the action of the Crown or its agents are not thereby without remedy. But this prerogative is not delegated to a Governor, despite Lord Mansfield's pronouncement in *Fabrigas v. Mostyn* in 1774 that "the Governor of a colony is in the nature of a viceroy, and therefore locally during his government no civil or criminal action will lie against him." A series of cases, the chief members of which are *Cameron v. Kyte* (1835), *Hill v. Bigge* (1841), *Phillips v. Eyre* (1867), the *Queen v. Eyre*, and *Musgrave v. Pulido* (1879), has shown that he is legally responsible for many of his acts. We must distinguish, first, between acts done in his official and those done in his private and unofficial capacity, and secondly between his civil and his criminal liability; and when considering his official acts we have to ascertain whether

they are within the limits of his authority or not. He may be sued, during his term of office, in the courts of the Dominion or in England for debts contracted in the Dominion or elsewhere, and generally he is liable to a civil action in those courts for acts done in his private capacity. The case of *Fabrigas v. Mostyn,* decided that he may be proceeded against in England for unauthorised acts done in his official capacity. He is also liable for any act which, though authorised by the Crown, is such as the Crown through its Ministers cannot legally do; for the orders of the Crown are no excuse for an illegal act. It was held in *Musgrave v. Pulido* that he may be sued even in the courts of his own colony for an official act.

But the Governor's civil liability is subject to an important qualification: he cannot be sued either in England or the Dominion for an official act properly authorised by the Crown, that is, for an "act of State"; but it is for the Courts of law, even those of the Dominion, to determine whether any act done by the Governor is within the limits of his authority, and therefore an act of State. If, therefore, a citizen is injured through a contract made by the Governor on behalf of the Crown, the only remedy is by petition of right, for it is impossible to succeed in any action against the Governor on a government contract. But the Governor has not the prerogative of the Crown, which enables it to order right to be done to the aggrieved subject, and so any petition of right originating in the Dominion must be sent Home for submission to the Secretary of State. He obtains the advice of the law officers of the Crown, according to which the King takes action. If the petition is thought reasonable, a fiat is issued, the writ is endorsed, "Let right be done in the Supreme

Court of the Dominion of New Zealand,'' and the petition is returned to the petitioner, who proceeds with his action in the local courts. The Colonial Conference of 1897 asked in vain that the grant or refusal of the fiat should be determined by the advice of the local Ministers; and, as Dr. Keith says, it is strange that no self-governing Dominion has modified the prerogative by appropriate legislation.

Wherever it is alleged that an officer or body charged with a certain duty fails in its performance, a writ of mandamus may be issued compelling its discharge; but a case against the Governor of South Australia in 1907, and a similar Victorian case in 1908 decided that a mandamus does not lie to a Governor to compel him to do an act in his capacity as Governor, for the same reasons that prevent a court of law from ordering the Crown to perform a constitutional duty.

The Governors Act of William III., extended by an Act of George III. and by the Offences Against the Person Act of 1861, emphasises the liability of a Governor to criminal proceedings in cases of misdemeanour, including breaches of official trust. Under these Acts, any Governor accused of oppression or of any other crime contrary to English law or to local law may be tried at King's Bench in England. In 1802 Wall, ex-Governor of Goree, was convicted and hanged under an Act of Henry VIII., for the murder of a soldier by excessive flogging in 1782; and in 1804 General Picton was tried for inflicting torture on a person in Trinidad, of which he was Governor; judgment had not been pronounced when he fell at Waterloo. Eyre, the famous Australian explorer, and sometime Lieutenant-Governor of New Munster, in New Zealand, figures prominently in two leading cases. As

Governor of Jamaica he had proclaimed martial law, and taken severe measures for the suppression of the negro rebellion of 1865. In *The Queen v. Eyre* the principle of trial in the Queen's Bench was upheld, though the grand jury threw out the bill against Eyre, and in *Phillips v. Eyre*, an action in the Queen's Bench for assault and imprisonment, it was held that the grievances complained of were covered by an act of indemnity passed by the Jamaica Legislature, and that such an Act, even though the Governor who was being tried was an essential party to its passage, freed him from liability in the Courts of England as well as in those of Jamaica.* But, because of the Imperial Acts mentioned on the preceding page, a colonial act of indemnity, though protecting the Governor (or other officer) civilly in England, has no effect criminally.

Whether the Governor can be tried on a criminal charge in the Courts of the Dominion is questionable; but as he possesses no general sovereign power, but only limited authority, he should be in no better position than, say, a Cabinet Minister in England, and therefore not immune from criminal prosecution.

Whenever a Governor discharges judicial functions legally appertaining to him, he enjoys the absolute immunity from action which is the privilege of a superior judge, against whom no action will lie for acts done, or words spoken, in the exercise of his official duties, even though his motives be malicious and his findings erroneous.

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*"No act can be treated in England as a wrong on the part of any defendant in whom it is not a wrong by the law of the country where it was done, whether that law did not regard him as a wrong-doer at the time, or whether he has since been enabled to justify it in that country by an enactment of indemnity."—Westlake, *Private International Law*, 4th edn., p. 259.

The responsibility of the Governor of a self-governing Dominion for his official acts seems at first sight a useless survival from the time when he constituted the actual executive government of a colony. But though, since the institution of self-government and of responsibility of Ministers to the local Parliaments, the actions of Governors are generally guided by the advice of their local Ministers, they are not always so determined. The Governor is the agent of the Imperial Government as well as the head of the constitutional Government of his Dominion, and as such he has real responsibilities to the Home authorities, enforceable, many of them, in the last resort in the law courts. The doctrine that the King can do no wrong cannot be applied to the Governor, until, as in England with the Crown, the responsibility for all his acts, including those coloured by Imperial considerations, is cast upon and accepted by the Ministry of the Dominion. But this can never be whilst New Zealand remains a colony. Such a change would mean either that the Dominion had attained to absolute independence, in external as well as internal affairs, or that it had become merged in a closer union or federation of the Empire in which the various Dominions shared in the responsibilities and duties of Imperial policy, which now fall chiefly on the United Kingdom. Until then a Governor must often act with his eyes upon other than purely local conditions, and with a keen sense of his responsibility to the Home Government. It is in deciding whether local considerations outweigh Imperial that a Governor's position becomes one of special difficulty, and we may imagine that in certain cases when he acts on the advice of his Ministers, as for example, in assenting to certain extreme measures for the preservation of law and order in times of

national crisis, his anxiety becomes extreme, for that advice may lead him to perform acts which may subject him to trial in England.

5. Dual Responsibility.

The chief distinguishing mark of the Governor's position in our Constitution is his dual responsibility; he is the head of the Government of a self-governing Dominion, and at the same time the agent of the Crown. In the former capacity he is responsible for his acts to the people of the Dominion, in the latter to the Crown, which will judge him according to the advice of the British Ministry. It follows that he ought to look for support from the British Government only whenever he acts in its interests or in accordance with the established usage of constitutional government. If he disobeys his instructions in matters affecting Imperial policy, or if he cannot work smoothly with his local Ministers in local affairs, the Home authorities will recall him, as they recalled Sir Charles Darling from Victoria in 1866. Governors have been censured also by resolutions of their own Parliaments, but in most cases the subjects of complaint have been domestic, and the actions of the Governors have been approved by the Secretary of State on reference to him.

The functions of a Governor of a self-governing Dominion are often compared with those of a constitutional monarch; but the likeness is far from complete. The King of Great Britain and Ireland, who is the best example of a constitutional sovereign, is bound, if not in law yet by convention, to act in all matters upon the advice tendered him by his Ministers, provided there is no clear proof that they have lost the confidence of the Commons and the nation. Even when the King proposes to take a step

against ministerial advice, he must not proceed until he is assured that he can find another set of men who will take office and accept full responsibility for his action. Thus, in the Mother Country, the principle of ministerial responsibility to Parliament and nation has been developed to the full. But even in those colonies which are "self-governing" it is impossible to impose on Ministers the responsibility for all the Governor's actions, because the character of some of these must be determined by factors over which they have no control, but which he, surveying the circumstances that affect the problems of government as an Imperial officer as well as the head of the local government, must include in his outlook. He has to serve two masters, and on a given question their interests may be in opposition. It must not be thought that this distinction between his duty to the Crown and his duty to the Dominion corresponds exactly with the division between the external and the domestic affairs of the Dominion; for in conforming to some Imperial law or in conserving the general Imperial interest, the Governor may have to disregard his Ministers' will in some domestic question, and in such circumstances, it would clearly be harmful to good government to make them responsible for his acts.

6. Influence.

The power actually exercised by the Governor is therefore more intense than that of the Sovereign at Home; but his influence, as distinguished from his actual legal authority, is naturally neither as deep nor as wide as that of the Crown. It is, nevertheless, much greater than is supposed by those unfamiliar with the work of government, though it will vary according to the character of the individual Governor.

In his intercourse with his ministers, the Governor enjoys the same rights as the Sovereign, the right to their full confidence, to be informed and to be consulted by them in all important decisions, and the right to advise and warn; but these rights are exercised in the secrecy attendant upon the inner working of cabinet government. His influence grows with his term of office, and is the stronger because his position is set above party interests and he comes from a community which has greater interests and a wider outlook than a Dominion. This influence, like that of the Crown in the manner so clearly described by Bagehot,* may be extended to the general social life of the Dominion and the encouragement of the arts, science, and literature.

7. Relations with His Ministers.

But the most interesting and weighty part of a Governor's duties are those concerning his relations with his Ministers. As we have already seen,† Government of the colonies by Ministers responsible to the Colonial Parliaments was not established by statute. In New Zealand the Executive Council still rests on the letters patent that constitute the office of governor, and not on Imperial statute law, as in Canada, Australia, and South Africa, since their federation or union. Section V. of the letters patent provides for an Executive Council to consist of "such persons as may at any time be members of the Executive Council of New Zealand, in accordance with any law enacted by the legislature of the

*Bagehot, *The English Constitution*, II. and III. See also Low, *The Governance of England*, II., IX., XIV. and XV. Anson, *Law and Custom of the Constitution*, Vol. II., Part I. *Lowell, The Government of England*, Vol. I., Chap. I. and II. Lee, Article on Edward VII. in the *Second Supplement to the Dictionary of National Biography*.

†See above Chap. XVII., p. 257.

Dominion, and of such other persons as the Governor shall, from time to time, in Our name, and on Our behalf, but subject to any law as aforesaid, appoint." No law such as that mentioned in the clause has been passed by the Parliament of New Zealand, and consequently the appointment of the Executive Council is legally altogether in the hands of the Governor. But in accordance with well-established convention founded on the instructions issued when responsible government was instituted in the colony, the Governor appoints as his Executive Council those persons who are selected by the leader of the party having the majority in the House of Representatives to fill the various ministerial posts with him. Though it is the letters patent that constitute the Executive Council, it is the royal instructions that indicate the relations that shall exist between the Governor and the Council, and these instructions have been unmodified since 1892. According to law the administrative acts of government may be done in three ways. Some are to be performed by the Governor-in-Council, some by the Governor, after consultation with his Council, and some by the Ministers. By law and usage, whenever the "Governor-in-Council" acts, he must act according to the advice of his Council, but he still has considerable power, even in matters within the authority of the Governor-in-Council, for either he can refuse to act, and thus force his Ministers to give way or resign, or, a case nowadays of almost purely academic interest, he can swamp the Council with pliable members, since there is no legal limit to the number of the Council, and no obligation upon the Governor to select its members from within Parliament. And as legally it is the Governor who dismisses Ministers, he can, if need be, exercise very

real control, by threat of dismissal, over acts of the third class.

In practice the Governor can do little of the actual work of administration without assistance from his Ministers. Only in a few cases, such as the sealing of a grant, or the publication of an instrument, is it conceivable that his opposition to the wishes of his Ministers will result in positive administrative action of his own. Such a course may, or may not, bring about the resignation of the Ministry; that would depend on the importance of the point in dispute. The Whitaker-Fox Ministry resigned in 1864, when Sir George Grey pardoned Maori rebels on his own responsibility. If the Ministry does resign, the Governor must find other advisers who will accept full responsibility for his acts of local administration. But the ordinary form of rupture occurs when the Governor simply refuses to take certain action urged upon him by Ministers, and this happens most frequently when a Ministry with a weak following in Parliament asks for a dissolution and fresh election. The Constitution Act and the letters patent confer on the Governor the power to summon, prorogue, or dissolve the legislative body in New Zealand; and, in every Dominion the Governor, like the King in England, has a function of the highest importance to perform whenever a Ministry is losing the confidence of Parliament. In England such a Ministry may advise the Crown to dissolve the Commons in order that it may appeal to the electorate, and the weight of opinion among constitutional authorities is that circumstances should determine whether the King accepts the advice or not. If he does not, the Ministry resigns, and he sends for the leader of the party with the majority; but this new Prime Minister is responsible *ex post facto* for the step

taken. If, on occasion, the Crown sets aside the will of its advisers, this step is defensible only on the assumption that the Ministers' will no longer represents the national will, and it cannot be taken unless other Ministers are found ready to accept the responsibility of advising a different course of action from that recommended by the outgoing Ministers. When parties are ill-defined, or evenly balanced, or broken into shifting groups, the King's personal action comes conspicuously into play. Then upon him alone is the ultimate and high responsibility of choosing the nation's real ruler, or of deciding whether the question shall be remitted to the electors for decision.

It is in circumstances like these that we may justly compare the Governor with the King, for he is then called upon to act generally as head of the Dominion Government, and without any reference to Imperial considerations. Standing apart, and uninfluenced by party feelings, he takes a broad survey of the conditions, and judges whether there is sufficient ground for believing that the Ministry seeking the dissolution is more representative of the country than is the Parliament. If he considers that there is good reason to believe the Parliament out of touch with the people, he grants the dissolution. There are, of course, other factors to be taken into account. The duration of colonial Parliaments is short, and therefore there are frequent regular appeals to the people, and great inconvenience and expense are caused by extraordinary elections, whilst there may be grave difficulties through the Ministry not having been able to obtain supply to defray the expenses of government until after the crisis. But the main principle is clearly that it is the duty of the Governor to allow a dissolu-

tion whenever it is probable that Ministers are really in touch with the national will.

There are a great many precedents, spread evenly over the period of responsible government in the colonies, that illustrate this view of a Governor's duty, and Dr. Keith analyses the facts relating to more than a score of the more important cases. In 1872, in New Zealand, Governor Bowen refused a dissolution to the Stafford Ministry because there was no probability that an election would alter the disposition of parties. In 1877, when Lord Normanby was asked by Sir George Grey, then Premier, for a dissolution because the House had been elected under the auspices of the defeated Atkinson Government, and because there was every prospect of his success at the elections, the Governor declined, on the grounds that there was no indication of a change in public opinion, that there was no great question at issue, and that no provision had been made for grant of supplies. Grey, thereupon, argued that the Governor must dissolve on the advice of Ministers, both under the Constitution Act and by reference to usage, a view that Lord Normanby contested. On being appealed to, the Secretary of State approved the Governor's action. In 1879 a dissolution was granted by the new Governor, Sir Hercules Robinson, but only after an assurance from Grey that he would advise the early summons of the fresh Parliament. His Government was defeated at the elections, and gave way to the Hall Ministry.

At the first Colonial Conference, 1887, the New Zealand representatives were strongly of opinion that a dissolution should be granted upon advice, as a matter of course, and should not be left to the discretion of the Governor. Contrary views were expressed by the majority of the representatives, no

action was taken, and refusals of dissolution have not been infrequent since.*

It is an established principle "that a Ministry which has been defeated and is simply waiting to leave office, unless the country returns it to power, cannot be allowed to exercise the more important functions of government. If they tried to do so, it would be the duty of the Governor to restrain them, and, if need be, to dismiss them."† When he allowed Sir George Grey a dissolution in 1879, Sir Hercules Robinson insisted that the Ministry should discharge only routine duties before the elections. The cases in which the principle has been asserted arise chiefly out of the attempts of a defeated Ministry to appoint members to the Upper Legislative House. In 1877 Lord Normanby would not allow a Ministry, whilst a vote of censure was pending against it, to nominate a member to the Legislative Council. But in 1891 Lord Onslow, avowedly ignoring this local precedent, after negotiations that led to the modification of the

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*Mr. Reid in New South Wales, Mr. Kingston in South Australia, and Sir G. Turner in Victoria, were refused dissolutions. There have been three cases in the Commonwealth—those of the Labour Ministry in 1904, the Reid Ministry in 1905, and the Fisher Ministry in 1909. The difficulties of a Governor asked to decide for or against a dissolution have been conspicuous in several recent cases. In 1906 a dissolution was granted as a last resort to Mr. Price in South Australia; in 1907 the Governor of Queensland insisted on dissolving the House against its wish; in 1908 the Victorian Governor granted a dissolution to the Government after it had been defeated in the House, chiefly because a refusal could not be reasonably expected to find support in the constituencies; upon the West Australian Upper House rejecting a financial measure in 1907, the Government, with a large majority in the Lower House, sought a dissolution, but the Governor granted a prorogation only, after which the Upper House proved more reasonable; in Tasmania dissolutions were refused in 1904 and 1909; a Newfoundland case in the latter year illustrates the principle that it is the duty of the Governor to exhaust every possible chance of finding a Government before dissolving a House that has met just after a general election fought on party lines; Dr. Jameson's case in 1907 in Cape Colony shows the necessity of a dissolution when the two parties are so evenly balanced that no work can be done; and the two notorious cases in New South Wales in 1911 resemble both the last mentioned in certain important respects.

†Keith, Vol. I., p. 212.

Ministry's demands, appointed six members to the Council on the advice of the Atkinson Government given after its defeat in Parliament. He did so only after the assurance that the appointments were not made on party grounds, cited the practice in the United Kingdom, where it is usual for an outgoing Ministry to create peerages, and urged that "it was better to leave the punishment for the mistaken advice of Ministers in the hands of the people than to face the resignation of Ministers." The Secretary of State sanctioned the Governor's action, but disclaimed any intention to approve the advice of the Ministry. The leading case, however, is a Canadian one, that of Lord Aberdeen and Sir C. Tupper, 1896. Parliament expired on April 25th; the Tupper Ministry was defeated at the general elections on June 23rd; and supplies lapsed on June 30th. After the elections the defeated Ministry advised Lord Aberdeen to make certain appointments, including those of judges and senators, but he refused on the ground that "the full powers and authority which are unquestionably possessed by the Government should be exercised in such directions only as are demanded by the exigencies of the public interest, and so as to avoid all acts which may tend to embarrass the succeeding Administration."

The dismissal of a Minister or Ministry is an extreme measure, and the right has been rarely exercised.*

*In 1856, the Governor of New Brunswick forced the resignation of his Ministry; the Newfoundland Ministry was dismissed in 1861, and cases of dismissal occurred in 1878 in Quebec and the Cape of Good Hope, in 1891 in Quebec, and during 1898-1900, and again in 1903 in British Columbia. Two Canadian cases are remarkable for the Governor's refusal to dismiss. In 1849 there was a popular outcry by the Canadian Loyalists for the dismissal of the Ministry responsible for the passing of the Rebellion Losses Act, and again in 1873 a strong demand was made for the expulsion of the Macdonald Ministry, against which grave charges of political bribery had been brought.

The general rule that in local affairs the Governor must act on the advice of his Ministers, unless he is prepared to dismiss them or to cause them to resign by refusing to act on their advice, is subject to the condition that the contemplated action does not involve an infringement of the law. If, for example, the Governor does not secure a grant of supply before the dissolution of Parliament, there may come a time when the expenses of carrying on the Government can be met only by breaking the law, that is, by collecting taxes and paying salaries and other charges without the authority of Parliament.*

It is only in extreme emergencies that such steps should be taken, and the Governor will usually act only on the advice of his Ministers, who must be held ultimately responsible at law for the irregularities. The Public Revenues Act of 1910 minimises the necessity of thus breaking the law in New Zealand by sanctioning expenditure at current rates for the first quarter in each financial year.†

8. Martial Law

Several interesting questions arise when conditions necessitate the proclamation of martial law by the Governor. "Martial law" is an ambiguous term, even when we exclude the fact that it is often confused with "military law," that is, with the statutes, rules, and regulations to which the soldier as distinct from the ordinary citizen is subject, and by which

*As a result of a famous case in Victoria in 1865 Sir Charles Darling was recalled by the Crown, because he sanctioned the levying of duties on a mere resolution of the Lower House and the raising of a loan without full legislative authority.

†It appears that such irregular practices are not infrequent in the Australian States, where moneys have often been paid out, either with only the Governor's consent or on his mere warrant in anticipation of a grant by Parliament. Two of the most recent cases were provided by the Philp Government in Queensland in 1907-8 and the Bent Government in Victoria in 1908.

discipline is maintained in the army in peace as well as in war. In its proper sense "martial law" denotes either the right which every citizen enjoys, and indeed the duty imposed on everyone, by the common law to repel force by force, so as to restore peace and order in time of riot or war, or, secondly, the prerogative right of the Crown and military authorities to exercise jurisdiction in time of war over both civilians and soldiers in certain offences to the exclusion of the ordinary courts.

There is no doubt that the former class of martial law exists as a part of English law, but action under it in emergencies must not be in excess of the necessities of the case; otherwise those responsible are liable both civilly and criminally, even though they may be members of "courts-martial," which properly speaking, are not courts at all. Therefore those who act in discharge of these rights and duties generally attempt to safeguard themselves by securing the passage of acts of indemnity; and an act of indemnity of a colonial Parliament will bar civil, but not criminal, proceedings in England against a Governor who has acted in good faith, but in excess of the needs of the situation. The proclamation of martial law by a Governor when there is no state of riot or war is not illegal; for it is not the proclamation which institutes the martial law; but any action taken under the proclamation may be illegal. There can be no enforcement of martial law without war or other serious disturbance, and it rests with the ordinary law courts to decide whether there is war or not. Once the courts recognise a state of war, they have no jurisdiction over the military authorities, and cannot interfere with the execution of martial law.

A Governor, in proclaiming martial law, is not obliged to act on the advice of his Ministers, but in

a crisis it is improbable that a Governor's view of the position would be essentially different from that taken by a responsible Ministry urging its proclamation; and he may not find other Ministers to assume the responsibility. But the position is not without danger for him, because under the Statutes of 1699, 1802, and 1861, previously described,* he may be proceeded against in England on a criminal information for exceeding his powers, even though a colonial act of indemnity had been passed with the sole object of protecting him. In 1869 the New Zealand Ministry protested that the position of a Governor acting on the advice of his responsible Ministers in such a case is unsatisfactory and abnormal. Martial law was proclaimed during the Maori wars 1845-7 and 1862-70, and in 1867 the Crown would not allow a bill of indemnity passed the year before, because it was so widely worded as to cover all acts done in the suppression of the rebellion and not only those done in good faith.

9. As Imperial Officer.

Certain duties are placed upon the Governor by Imperial acts, as, for example, when he is commissioned to grant certificates of re-admission to British nationality. In discharging such duties he may act without the advice of his Ministers, but he generally finds their advice helpful, and if he disregards it the Ministry need not resign, for the responsibility is the Governor's only. A Governor has, in the second place, to obey instructions issued to him by the Crown. These instructions are presumably framed in the interests of the Empire as a whole, and bind him rigidly as to some executive acts of the ordinary kind, some relating to the prerogative of mercy, and,

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*See above, page 316.

in several colonies, but not New Zealand, as to reservation of bills relating to divorce, presents to himself, currency, differential duties, Imperial shipping treaties, etc. In obeying these instructions the Governor may find himself in opposition to his Ministry. If the Ministry's will does not prevail, it is not required by constitutional practice to resign, for "in all such cases the responsibility of the local Ministry to the local Parliament would naturally be limited. They would be responsible for the advice they gave, but could not strictly be accountable for their advice not having prevailed."* Thus the Ballance Government did not resign in 1892 when Lord Onslow, acting according to his interpretation of his instructions, would not accept its advice to appoint twelve members to the Legislative Council. In this case, the Secretary of State, when appealed to, made it clear that the matter was one of purely local importance, and that a Governor generally must accept Ministerial advice wherever the interests of the Imperial Government and the Empire as a whole are not concerned.

The Colonial Laws Validity Act, 1865, provides that a law of a colonial Parliament shall not be void merely because it is inconsistent with the Governor's Instructions.

From what has been said in this chapter it should be readily seen that the appointment of the Governor within the Dominion by Parliamentary or popular election, would involve a fundamental alteration of the constitutional position, amounting almost to revolution; for it would destroy that responsibility

*At the Cape, in 1878, Sir Bartle Frere dismissed a Ministry with whom he could not work smoothly in Imperial matters. In 1906 the Governor of Natal was placed in a difficult position by the receipt of instructions to suspend the execution of certain natives tried under martial law; and in 1907 the Governor of Newfoundland had to override his Ministry in the fisheries question by issuing an Order-in-Council under an Imperial Act of 1819. In none of these cases did the Ministry in question resign.

of the Governor to the Crown and the Imperial Government which is one of the few legal links binding the Empire. An elective Governor would be responsible altogether to his electors, but, as Dr. Keith is careful to point out, if the principle of full responsibility is enforced the present constitution of the Empire is injured at a vital point. In law and in practice there is only one body which speaks for the Empire as a whole, and that is the Government of the United Kingdom. "Disputes between the colonial and Imperial Governments are grave and serious things, but the unity of the Empire is more serious still. If there disappears a power which has the theoretic and practical right, subject to the duty of the fullest consultation, to conclude treaties and to legislate and so forth for the Empire at large, it will be harder to re-create it if the growth of the power of the Dominions causes them to ask for a Federal Government."*

*Page 297.

CHAPTER XXIII.

THE EXECUTIVE COUNCIL.

1. The Legal Position of the Council.

It will be apparent from the account of the constitutional struggle in 1854 that the Executive Council owes its existence entirely to the royal prerogative. The Governor, by virtue of his commission and without any legislative authority, is empowered to appoint his Ministers, in whom is vested the administration of the great departments of State. The paid Ministers are to be Executive Councillors. But while in theory his choice is unrestricted, there being no legal provision that the members of the Executive Council shall be members of Parliament, he is in reality controlled by the practical necessity of retaining the confidence of a majority in the House of Representatives. The Legislative Council, less democratic than the House and having a minor voice in money bills, plays no part in determining the Ministry. "Authority to appoint and remove from office an unlimited number of members of the Executive Council—'with reference to the exigencies of representative government'—is vested in the Governor of every colony wherein responsible government has been established, without the necessity for obtaining the concurrence of the Home Government, and it is understood that Councillors who have lost the confidence of the local legislature will tender their resignation to the Governor, or discontinue the practical exercise of their functions, in analogy with the usage prevailing in the United Kingdom. . . . Pursuant to well-established constitutional practice it is everywhere regarded as allowable to strengthen

the Executive Council, or Ministry, by the occasional introduction therein of non-official members, holding no portfolios or departmental office, but who serve as active members in council, and share equally in the responsibility of their colleagues in the Cabinet, provided only that they must possess a seat in Parliament."*

The existence of the honorary Ministers mentioned by Todd is due to the convenience of having in Parliament men who besides ordinarily conducting there a certain amount of government business, may be used as substitutes for absent or sick Ministers. There are in New Zealand no Parliamentary Secretaries and Under-Secretaries, and to a slight extent the institution of the honorary Minister satisfies the need of them.

Since 1876, the law provides that only one Minister shall be a member of the Legislative Council, though the opinion has often been expressed that this number is inadequate.

There have been at times some attempts to influence popular opinion in favour of an elective Executive Council, and in 1891 a Constitutional Reform Committee of the House of Representatives reported in favour of the election of the Ministers by members of the House by the system of proportional representation upon the assembling of Parliament after each general election;† but no action was taken.

By royal instructions, every meeting of the Executive Council must be presided over by the Governor, who is an essential part of the Council, and it is a well-established convention that he shall be informed beforehand of the resolutions in all but routine

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*Todd's *Parliamentary Govt. in the Brit. Cols.*, pp., 42-43.

†See *App. to Journals, House of Reps.* 1891, Vol. IV. I. 10. Also *N.Z. Parly, Debates*, 1911, pp. 360-87.

matters which his Ministers desire to be made at the meeting. Such a meeting is of course formal, and differs from a meeting of the Cabinet. In practice, as we have mentioned before, the Governor withholds his consent to the proposals of the Ministers generally on legal or imperial grounds, or, if on other grounds, only when he expects to be able to get other Ministers to advise him if his present Ministers resign on account of his refusal to accept their advice. But the Interpretation Act, 1908, No. 1, provides that the Governor need not be present at the meeting of the Executive Council and that the advice and consent of the Council may be signified to him in writing.

The standing Instructions to the Governor dated 18th November, 1907,* provide that the quorum of the Council shall be two, and that "in the execution of the powers and authorities vested in him the Governor shall be guided by the advice of the Executive Council; but if in any case he shall see sufficient cause to dissent from the opinion of the said Council he may act in the exercise of his said powers in opposition to the opinion of the Council, reporting the matter to Us without delay with the reasons for his so acting." Any member of the Council may require that there shall be recorded upon the minutes the grounds of any advice or opinion he may give upon the question.

The Governor's powers are in practice further limited by the fact that Parliament controls the expenditure of the country. The Civil List Act, 1908, provides salaries for not more than ten members, two of whom must be Maoris or half-castes, the officials named in the Act being the Prime Minister (£1,600 per annum), the Minister for Railways (£1,300), six

*"N.Z. Gazette," 1908, p. 1640. See Appendix B.

other members each holding one or more of the ministerial offices (£1,000 each), and two Maoris or half-castes not holding any ministerial office (£400 each). The Attorney-General may or may not be a member of the Council, and may or may not be the holder of a seat in either House. If he is not a member of the Executive, he receives such salary as may from time to time be appropriated by Parliament. No Minister receives more than one salary, no matter how many departments he controls.

In New Zealand a member of the Lower House, on receiving a ministerial appointment, has never been required, as in Great Britain, to vacate his seat and to seek re-election.

2. Cabinet Government.

The Cabinet is unknown to the law, as distinguished from the conventions, of our constitution. It may be regarded as the Executive Council in its informal character, but excluding the Governor. So understood, the Cabinet of ten falls into two parts, one consisting of those members who are regularly associated in the work of determining the policy of the Government, the other of those who are called only to the more formal meetings. The head of the Cabinet is the Prime Minister; he is selected by the Governor for the office because he is the leader of the party with the confidence of the majority in the House of Representatives, and he in turn chooses his colleagues and apportions their departments. The whole Cabinet is then legally appointed by the Governor as his Ministers and Executive Council.*

The relations of the Prime Minister to the rest of the Cabinet are guided by principles similar to those

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*See above, XXI., 7.

recognised in the British constitution,* and therefore need not be described here; but it is often remarked that in colonial Cabinets the Prime Minister does not generally exercise as rigid control over his colleagues as does the Prime Minister of the United Kingdom. This observation, however, applies to New Zealand with less force than to some other Dominions. The principles of Cabinet government in general are also very similar in the United Kingdom and in New Zealand.† "The Cabinet system in the Colonies," says Keith,‡ "is chiefly remarkable because of its close resemblance to the English model on which it is based. The conventions of the English constitution are followed in a manner which is almost embarrassing in its closeness of imitation, and the number of experiments which have been tried is very small, and they have been unimportant in actual result." Colonial Cabinets exhibit all the essential characteristics of the British Cabinet: political homogeneity, collective responsibility to the popular House, and the supremacy of the Prime Minister, who is chosen in accordance with the will of that body. In minor features, too, the resemblance is close. For example, it is now the general practice for ministers defeated at the polls to resign forthwith without waiting for the meeting of the new Parliament; the Atkinson Ministries so resigned in 1884 and in 1891, and the Stout Ministry in 1887. Of course the Governor need not force the resignation of Ministers in such circumstances; but he would probably insist on their meeting Parliament as early as possible and in the

*See especially Anson, Vol. II., Part I.

†For an exposition of Cabinet Government see especially:— Low, "*The Governance of England*"; Anson, "*The Law and Custom of the Constitution*"; Lowell, "*The Government of England.*"

‡Keith, "*Responsible Government in the Dominions*" Vol. 1., p. 301.

meantime performing only the necessary routine duties of their offices.

An example of the difference between British and colonial practice is afforded by the results of a ministerial defeat in Parliament; such a defeat is not always viewed in the same grave light in the colonies as in England.* The Grey Ministry, according to Lord Normanby, never enjoyed the confidence of the majority of the House of Representatives.

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*See *Appendix to Journals*, 1878, A. 1, p. 3.

Chapter XXIV.

PARLIAMENT*.

1. The Electorate.

In 1879, when Mr. (afterwards Sir) John Hall held office as Prime Minister, the first step was taken towards the adoption of the principle of "one man one vote" by the Qualification of Electors Act, which reduced the qualification for an elector from £50 to £25 (freehold) and, while abolishing the leaseholder's, householder's, lodger's and ratepayer's franchise, gave a vote to every male person above the age of 21 years who had resided within the colony for twelve months, and within the electoral district for which he claimed to vote for six months preceding his registration as an elector. It is interesting to note that during the debates on this measure Sir George Grey, then Leader of the Liberal Opposition, strongly denounced the retention of any property qualification at all. It must also be remembered that the Act did not in any way interfere with plural rights to vote. A person might still vote in several districts by virtue of his property, and might have a residential qualification in one district and a property qualification in one or more other districts. Both in committee and on the third reading in the Lower House an amendment was moved to the effect that no person should be entitled to have his name placed on more than one electoral roll. This was supported by Grey, Ballance, Seddon, and Reeves, among others,

*According to the Interpretation Act, 1908, No. 1, the term *General Assembly* denotes the Governor, Legislative Council, and the House of Representatives, and that of *Parliament* the two Houses.

but was defeated by a small majority. Ten years later (1889), the Atkinson Ministry being then in power, the final step towards one man one vote was taken by the enactment of section 4 of the Representation Act of that year, which provided that "from and after the passing of this Act no elector shall at any election of members of the House of Representatives vote in respect of more than one electorate, and any person voting in respect of more than one electorate shall be guilty of an offence under this section." This provision was moved in committee by Sir George Grey, and received the support of Ministers, while it passed the third reading in the Legislative Council with a majority of six votes.

By the Electoral Act of 1893 the right to vote was given to women equally with men. The qualification remained as before, save that three months' residence in the district was substituted for the former requirement of six months. The principle of allowing one vote only was maintained as it has been ever since. Three years later (1896) the property qualification was abolished, but not so as to affect existing rights, which might therefore be carried forward to new rolls. Thenceforward the residential qualification could alone be relied upon to secure registration; and at the present time the number of registrations in respect of property, carried forward from the period before 1896, is so small as to be negligible.

The qualifications in existence are therefore two,* possession of property and manhood or womanhood with a year's residence in New Zealand and three months in the electorate. Half-castes may register, but not Maoris, who may vote only at the election of Maori members.

*See the *Legislature Act*, 1908, No. 101, 35-8. Consult this and subsequent Amending Acts, 1910, 1911, 1913, for the subjects of this chapter.

The following persons are disqualified from voting:—Aliens, persons of unsound mind, persons convicted of certain offences, unless they have received a free pardon or have undergone their sentence or punishment.

2. Distribution of Seats.

Seats in the House of Representatives are distributed on a population basis, and the electoral districts are redistributed from time to time so as to adjust them to changes in the distribution of population. To do this work there are two permanent Representation Commissions, one for each island. In computing the population for electoral purposes twenty-eight per cent is to be added to the rural population as determined by the ordinary census.

In 1889, following upon an abortive attempt to introduce the Hare system, the experiment was tried of making only one electorate, with three members, of each of the four chief cities, but four years later a return was made to the single seat system, and the towns were again subdivided accordingly.

3. Elections.

The conduct of the parliamentary elections is governed by Division II, Parts II and III of the Legislature Act, 1908, and Amending Acts.*

In 1908 the principle of a second ballot was introduced, so as to ensure that a person should not be elected except upon an absolute majority of the persons voting. It was provided that if as the result of the first ballot it was found that no candidate had received an absolute majority of votes, a second ballot should take place between the leading and the second

*1911, No. 19; 1913, No. 36.

candidates, and that at the second ballot the candidate receiving the highest number of votes should be declared to be elected. The principle was applied to the general elections of 1908 and 1911; but the Act was repealed in 1913 by No. 36.

4. Number and Qualifications of Members.

The number of the House of Representatives has varied from time to time, and now stands at 80, including four Maori members.

Section 24 of the Legislature Act of 1908 provides that every male registered as an elector is qualified for election for any electoral district. But undischarged bankrupts, members of the Legislative Council, civil servants, and contractors interested in public contracts to the extent of more than £50 in any one financial year are expressly disqualified. The qualification of residence in the electorate is not required.

There is provision for resignation of a seat, and a seat may be vacated for one of a number of reasons.*

5. Summons, Meeting, and Duration of Parliament.

The law and practice relating to the summons, opening, prorogation, and dissolution of the New Zealand Parliament are similar to the provisions in respect of the Imperial Parliament, the royal prerogatives of summons, prorogation, and dissolution being, of course, exercised by the Governor.†

The maximum duration of Parliament was fixed at five years by section 4 of the Constitution Act, but in 1879 the Triennial Parliaments Act altered the period to three years, the limitation applying to the Parliament then in session. This provision is now

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*See 1908, No. 101, Sec. 30.
†See especially Anson, *Part I, Parliament*, Chap. IV, and Keith, *Responsible Government*, *I*, pp. 470-2.

embodied in the Legislature Act, 1908. Parliament may be dissolved any time within the three years at the discretion of the Governor acting with or against the advice of his ministers, in circumstances already described.*

6. Payment of Members.

The principle of payment of members was introduced in 1884 and has been consistently followed ever since. The amount of remuneration has varied from time to time, until it now stands at £200 and £300 per annum for members of the Council and Lower House respectively. This has been the rate since 1894.

7. Composition of the Legislative Council.

In 1891 the important step was taken of fixing seven years as the period of tenure of a seat in the Legislative Council. Hitherto the appointments had been made for life, subject of course to the Crown's right of dismissal. The Act making the change expressly preserved existing appointments.

Members are summoned by the Governor in the name of the Sovereign. The following persons cannot be summoned:—minors, women, undischarged bankrupts, certain offenders who have not been pardoned or undergone punishment, members of Parliament, contractors receiving over £50 of public money a year, and civil servants. Members who hold office for seven years may be re-appointed. A member may send his resignation of his seat to the Governor, and a seat may be vacated for one of several reasons.†

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*See above, Chap. XXII, pp. 323-3.
†1908, No. 101, Sec. 4.

8. Powers and Functions of Parliament.

The powers granted to the Legislative Council of the Crown Colony period are described in Chapter X., and those conferred on the General Assembly by the Constitution Act are set out on page 263. It is evident that these powers are not unlimited like those of the Imperial Parliament; but within the limits of its powers the Parliament of a self-governing Dominion is supreme — its powers are plenary and not merely delegatory,* and in making laws for "the peace, order, and good government" of the Dominion it may use any means it pleases.† The only cases in which it exercises delegated powers occur under such Acts as the Extradition Act, 1870, when it is the delegate of the Imperial Parliament.

But the limitations imposed on the powers of the Dominion Parliament are real and important.‡ In the first place, it has not the attribute of full sovereignty. It cannot legislate, for example, to change the status of the Dominion, or to abandon its work and abolish itself or abolish the office of Governor as at present constituted, or to treat as neutral in every respect an enemy of the United Kingdom when within the limits of the Dominion.

Secondly, the Dominion Parliament can legislate only for the Dominion itself,§ whilst the British Parliament can legislate for any part of the British possessions or British subjects wherever situated. It can deport or banish a person but cannot authorise his detention outside the limits of the Dominion.|| In 1894 it was laid down by the Privy Council¶ that the

*Regina v. Burah, 3 App. Cas. 889. Hodge v. The Queen, 9 App. Cas. 117.
†Riel v. The Queen, 10 App. Cas, 675; and see Keith, *Responsible Government*, I, 358-60.
‡See Keith, Vol. I, 361-440; Trotter, *Government of Greater Britain*, Chap. II. Dicey, *Law of the Constitution*, Chap. II. Sir John Findlay, *The Imperial Conference of 1911 from Within*, pp. 65-69 and 79-84.
§*Macleod v. Attorney-General of N.S.W.*, 1891, A.C. 455.
||*In re Gleich*, O.B. & F. (S.C.) 39; *App. Jnals.*, H.R., 1880, A. 6.
¶*Ashbury v. Ellis*, 1894, A.C. 339.

New Zealand Parliament may subject to its tribunals persons who are neither by themselves nor their agents resident in the Colony, in regard to actions on contracts made or to be performed in the Colony. In a recent case* the Chief Justice held that, under the Constitution Act, the legislation of the local Parliament has much more than the territorial scope here suggested, but his judgement has been adversely criticised,† though it is admitted that "the territorial limits of the jurisdiction of the Legislature of a Colony must be decreed to extend so far as necessary for the proper enforcement of the powers given." It is pointed out, for example, that "naval defences would be quite ineffectual if the vessels ceased to be under any law when they left the three mile limit."

A third restriction is imposed by the provision that no laws made by the Parliament of the Dominion shall be repugnant to the laws of England. The interpretation of this provision in Colonial Constitution Acts presented so many difficulties especially in South Australia, that the Imperial Parliament passed the Colonial Laws Validity Act, 1865,‡ to remove doubts as to the validity of Colonial laws. Sections 2 and 3 of that Act read:

"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

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******In re Award of Wellington Cooks' and Stewards' Union*, 26 N.Z.L.R., 394.

†See Keith, pp. 396-8.

‡28 and 29 Vict., Cap. 63.

England, unless the same shall be repugnant to the provisions of some such Act of Parliament, order, or regulation, as aforesaid.''

An Imperial Act may extend to New Zealand because it has been passed for New Zealand or for the Dominions generally. The local Parliament may therefore make law, though it be repugnant to the provisions of other Imperial Acts or to Imperial non-statutory law. It may also alter the general law of England adopted at the foundation of the Colony as being then applicable to the circumstances of the Colony.*

Finally, a Colonial Parliament is subject to certain restrictions on its power to alter the Constitution. A non-representative legislature like the old Legislative Council cannot change its constitution. There was no provision as to alteration in the Constitution Act, but 20 and 21 Vict. Cap. 53 gave the General Assembly power to vary the Constitution, with several important exceptions. It is a question whether the restrictions implied in the exceptions still exist, for section 5 of the Colonial Laws Validity Act, besides providing that Colonial Legislatures may establish and alter courts of law, declares ''every representative Legislature shall, in respect of the Colony under its jurisdiction, have, and be deemed at all times to have had, full powers to make laws respecting the Constitution, powers, and procedure of such Legislature: provided that such laws shall have been passed in such manner and form as may from time to time be required by any Act of Parliament, Letters Patent, Order in Council, or Colonial Law for the time being in force in the said Colony.'' This gives a general power of alteration subject to the observance of the proper prescribed forms and may supersede the Act

*See above, page 119.

of 1857, so that, for example, Parliament may, as was proposed in 1913, establish an elective Upper House without reference to the Imperial Parliament.

The interpretation of the limits of the powers of the Dominion Parliament rests of course with the judges of the Supreme Court and, on appeal, with the Privy Council.

In practice the legislative sovereignty of the Imperial Crown-in-Parliament over the British possessions is tempered by certain conventions, such as that it will not tax any possession, nor change the constitution of any possession without its consent, nor legislate on Imperial matters that closely affect a self-governing Dominion without first ascertaining its views on them.*

Within their limits the powers and functions of the Parliament of New Zealand allow of the ordinary classification into deliberative and legislative, including taxation.

The control of Parliament over revenue and expenditure is secured in various ways.† The Governor may not borrow except under the authority of an Act, and the power to borrow on Treasury Bills is limited by statute. There is a Controller and Auditor-General, who is appointed by the Governor and holds office during good behaviour, being removable only by the Governor on an address from both Houses. He may be suspended by the Governor-in-Council when Parliament is not sitting, but the suspension may not extend beyond the next session of Parliament. The Governor's warrant is required for all moneys issued out of the Public Account, and no issue may be made until the Controller and Auditor-General has certified

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*For a reference to the spheres in which the Imperial Parliament exercises its sovereign right within the Dominions, see Chapter XXVIII.

†Public Revenues Act, No. 43, 1910, amended 1912 and 1913.

that it is according to law. If the Auditor declines to pass an issue or credit requisition because it is not according to law, the Governor-in-Council decides after taking the opinion of the Attorney-General, and the objection and opinion are laid before Parliament. Accounts, duly audited, are regularly laid before Parliament. The Treasury's power to spend without the authority of Parliament is limited to a small sum; but if no Appropriation Act is passed during the three months after the beginning of any financial year, the Minister of Finance may act for such three months upon the appropriation for the period immediately preceding. The procedure in respect to supply follows closely the practice of the House of Commons. No vote may be proposed except by a Minister of the Crown. There is provision for the increase of a particular vote by a transfer by the Governor of a certain amount from another vote; but the votes in question must be in the same class and the transfer must not increase the total sum appropriated for that class. In these cases the action of the Governor is, of course, ministerial and not discretionary.

Permanent provision is made for certain expenditure in the Civil List Act.* The remaining expenditure is reviewed by Parliament each year in the Estimates.†

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*The last Act is No. 22, 1908. It provides for the payment to the Crown every year out of the Consolidated Fund of certain sums by way of salaries and allowances to the Governor, Executive Council and Ministers, and the Attorney-General. The Judicature Amendment Act, No. 41, 1913, repealed that part of the Civil List Act which provided for the salaries of the judges, and it is now the Act authorising the payment of these salaries from the Consolidated Fund.

†For the opinion of the Solicitor-General as to the power of the House of Representatives over the estimated expenditure since the institution of the Public Service Commissioner, see *Appendix Journals H. of R.* 1913, B. 4.

9. Procedure.

The procedure follows closely that of the Imperial Parliament.* The Speakers of both Houses are elective, and the confirmation of the Governor is required for the election; they have only casting votes, are salaried, and may resign or be removed by a vote of their respective Houses. The casting vote is usually employed so as not to prevent further consideration of the matter by the House, as when the Grey Ministry was retained in power by the casting vote in 1877.† In 1881, 1910, and 1913 there were notable instances of the application of the closure in debate. Unless otherwise expressly provided, an Act comes into force the day it receives the Governor's assent, or if reserved, the day on which the Crown's assent is notified in the Dominion by the Governor. Laws are enacted by "the General Assembly of New Zealand in Parliament assembled." The heading of Acts is still in Latin, *e.g.*, "*Anno Quarto Georgii V. Regis. No. —.*"

When a Bill has passed both Houses it is examined and certified by the Clerk of Parliaments. He then submits it for the opinion of the Attorney-General, who gives his certificate in the following form:—

> "I hereby certify that, in my opinion, the Bill the Short Title whereof is above set forth contains nothing which is repugnant to the Law of England, or which requires that His Excellency the Governor should withhold his assent therefrom in virtue of the Royal Instructions of the eighteenth day of November, 1907."

On the same sheet below, the advice to assent is recorded and signed by a Minister, generally the Prime Minister:

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*See Standing Orders of the H. of R.; 1908, No. 101; Erskine May. *Parliamentary Practice*; Ilbert, *Legislative Methods and Forms*. Freeman and Abbott, *A.B.C. of Parliamentary Procedure*.

†*App. Journals*, 1877, A7.

His Excellency the Governor is respectfully advised to assent to the above-named Bill.

The Bill is then presented to the Governor and assent is recorded on the Bill itself at the end in this form:

In the name and on behalf of His Majesty I hereby assent to this Act this day of 191 .

Governor.

Reservation is recorded in the same place thus:

Reserved for the signification of His Majesty's pleasure thereon.

Governor.

10. Privileges of Parliament.

No colonial parliament possesses the "privileges of parliament" without express statutory authority. These privileges are a part of the *lex et consuetudo Parliamenti* which belong exclusively to the Imperial Parliament and do not apply to colonial parliaments by virtue of the introduction of the common law into the colonies.* But a colonial parliament enjoys the ordinary powers necessary to preserve order in its deliberations.

Section 52 of the Constitution Act conferred on the two Houses the power of making standing rules and orders, and this was done. In 1865, however, the General Assembly in exercise of its general legislative power passed the Parliamentary Privileges Act which gave the two Houses the same privileges as those enjoyed by the House of Commons on January 1st. 1865, in so far as they are consistent with the Constitution Act. Other legislation followed† and the law was consolidated in 1908, No. 101, sections 242-71.

**Kielly v. Carson*, 4 Moore P.C. 63. *Doyle v. Falconer*, 1866, 4 Moore P.C. (N.S.) 203. *Fenton v. Hampton*, 11 Moore P.C. 347.

†In 1866, 1872, 1875, 1878, 1883, 1884.

The nature and extent of the privileges are similar to those enjoyed by the House of Commons.*

11. Conflicts between the Houses.

There is in New Zealand no statutory provision, such as there is in the Commonwealth of Australia Act, 1900, for the settlement of differences between the two Houses. Such differences may arise in the course of general legislation, but some of the more important cases have occurred in connection with the respective powers of the Houses in regard to money bills. In 1855 the Secretary of State, on being addressed on the subject at the instance of the Legislative Council, expressed the opinion that bills of supply ought not to be changed or altered by the Council but must be either wholly accepted or wholly rejected by it. In 1862 the House of Representatives claimed that a breach of privilege had been committed by the Legislative Council by indirectly submitting a certain class of instrument to a tax or duty; but the Law Officers of the Crown were of opinion that the House of Representatives could not by imposing a tax or duty on a particular kind of legal instrument exclude the Legislative Council from the power of originating or amending bills relating to such instruments. In 1872 the Law Officers upheld the House of Representatives in its claims of privilege regarding money bills,† which are practically those of the Commons before the Parliament Act of 1911.‡ It would appear from recent cases that if the Council

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*See for the law of privilege, Keith, *Responsible Government*, I, 446-63; Thomas, *Leading Cases*, 34-52; Anson, *Part I, Parliament*, V, 4; Ridges, *Constitutional Law*, 65-72; Lowell, *Government of England*, Vol. I, 243-6; Broom, *Constitutional Law*, Part III.

†For particulars of these cases see *Appendix to Journals of the House of Representatives*, 1887, Vol. I, A8, and *The Constitution and Government of New Zealand*, pp. 194-205.

‡On the respective financial powers of the Lords and Commons before 1911, see Lowell, *Government of England* I, 279, 286, 341, 400; Anson, *Part I, Parliament*, Chaps. I and IX.

inserts an appropriation clause in a bill, a Governor's message must be obtained for it and the House must resolve that it will not insist on its privilege, or the bill will not be proceeded with.

Disagreement as to general legislation may become acute whenever a well-established Ministry fails to secure a permanent majority in the Council. When the Atkinson Ministry asked Lord Onslow to appoint a number of fresh Legislative Councillors before its resignation in 1891,*the majority of the members of the House of Representatives protested against fresh appointments being made until after the meeting of Parliament. The new Liberal Ministry, though strong in the House, had only a small following in the Council† and wished to ensure more favourable consideration of its measures there by the appointment of twelve new Councillors.‡ The Governor, Lord Glasgow, demurred; but the Secretary of State advised him to accept the advice of his Ministers. This episode recalls the creation of peers in Great Britain in 1711-12 and the threats of creation in 1832 and 1911 to overcome the opposition of the Lords to Government measures. It is understood, of course that if during a conflict between the two Houses, recourse is had to a dissolution and a general election, and the Ministry has a majority, the Council will yield regarding the point at issue. Ordinarily differences are settled by the method of conference between delegates of the two Houses.

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*See above, Chap. XXII, page 326.

†31 of the Councillors were supporters of the Opposition and 5 of the Ministry.

‡See above, Chapter XXII, page 331.

CHAPTER XXV.

THE JUDICIAL SYSTEM.

1. Sources of Law.

The direct sources of New Zealand law are either external or internal.

(a) *External Sources.*

(1) When British sovereignty was proclaimed over these islands, and they were constituted a dependency of New South Wales, they at once became subject to the law of England, both common and statute, in so far as the same was reasonably applicable to the circumstances of the infant state: and subject to legislation since that date the law of England as it then existed still prevails in New Zealand. Examples of statute law so in force are the Confirmation of the Charter, the Petition of Right, the Habeas Corpus Act, and the Wills Act. There are of course many the applicability of which can be determined only by judicial decision. From its nature the common law is binding in nearly every respect, although here again upon a few points the Courts have been asked to determine whether its doctrines are applicable to the circumstances of such a colony as New Zealand. Thus it was a question in *Lord v. Commissioners of Sydney* (12 Moore P.C. 473) whether the English presumption that a grant of land bounded by a river passes the soil *ad medium filum aquæ* was susceptible of application to New South Wales. Not only is New Zealand subject to the common law as it was received in 1840, but later applications of it by the English Courts are followed here, subject to the qualifications

to be noted presently when we come to deal with the Courts.

(2) New Zealand is also controlled by such Acts of the Imperial Parliament as are expressly made applicable to it, either specially or in common with other dominions of the Crown. There are further many Acts which relate to New Zealand, although not strictly in force here: that is to say Acts in operation in the United Kingdom or in some other part of the British Dominions in respect to this Colony. Examples of this class are the Medical Practitioners in Colonies Act 1858 (21 and 22 Vic. Cap. 90) and the Colonial Probates Act 1892 (55 and 56 Vic. Cap 6.)

(3) There are further such Acts of the Imperial Legislature—the Copyright Act, the Merchant Shipping Act, and the Foreign Enlistment Act, for example—as are expressly made applicable to the whole of the King's dominions.

(4) It need hardly be stated that prerogative orders, including Charters and Letters Patent issued by virtue of the royal prerogative on the advice of a responsible minister, are binding upon the Colony. As an example we may take the Charter of the University of New Zealand.

(5) There are lastly ordinances of the Governor and Legislative Council of New South Wales from the establishment of the dependency down to April 25th 1842, the date on which the repealing ordinance (No. 19 of Session II.) came into force.

(b) *Internal Sources.*

The internal sources are as follows:—

(1) The Ordinances and Acts of the various New Zealand legislatures, namely the ordinances of the Legislative Council of New Zealand during twelve

sessions from 1841 to 1853, those of the Legislative Council of New Munster 1849, those of the various Provincial Councils which sat from 1854 to 1876, and the Acts of the General Assembly of New Zealand from 1854 to the present time.

As we have already seen, these Acts required and still require the assent of the Crown expressed through the Governor, while any Act may be disallowed by the Crown within a certain term after its passage through Parliament and its acceptance by the Governor. But it is worthy of note that out of many thousands of enactments the royal assent has been refused to only eight, the last instance being in 1911, and that only ten have been disallowed, the last disallowance dating back to 1867.

In 1908 the whole of the general statute law, except that dealing with native lands, was codified and re-enacted, so that none of the old ordinances of the Legislative Council are now in force as such, and only a few local and personal ordinances of the former Provincial Councils.

(2) Orders and regulations issued by various bodies to which the General Assembly has delegated certain of its powers, such as the Orders of the Governor in Council and the by-laws of corporations and the like.

(3) Proclamations by the Governor issued in virtue of authority derived from some Imperial Act or Prerogative Order, or from some of the various Colonial bodies which have from time to time been competent to legislate for New Zealand—such as the proclamation of 10th March, 1848, fixing the boundaries of the provinces of New Ulster and New Munster.

2. The Courts.

(a) *Criminal Courts.*

New Zealand may fairly claim to possess a complete and efficient system for the administration of justice, freed from unnecessary technicalities. On the criminal side provision is made for the summary trial of petty offences before either one or two Justices of the Peace or a Stipendiary Magistrate.*

The procedure of these Courts is regulated by the Justices of the Peace Act, 1908. An appeal lies to the Supreme Court upon a point of law in any case, and upon matter of fact where a fine exceeding £5 or imprisonment for more than three months has been imposed.

In the case of indictable offences the preliminary investigation is conducted before a Magistrate or Justices, who, upon a *prima facie* case being made out, commit the prisoner for trial in the Supreme Court. There the trial follows the usual English course. The matter comes first before a grand jury, and if a true bill is found the indictment is then dealt with by a jury of twelve. In the selection of a jury, which is done by ballot, the prisoner has six peremptory challenges and an unlimited right to challenge for cause. The Crown has the same rights, and may also order any juror to stand aside until the panel has been exhausted. The Juries Act provides for trial by a special jury in cases where in the opinion of the Court or Judge, "expert knowledge is required." Aliens have no right to a jury *de medietate linguæ.* Where a Maori is charged with an offence against a Maori, the accused may demand a Maori jury. The verdict of a jury must be unanimous

*The Police Offences Act, 1908; The Indictable Offences Summary Jurisdiction Act, 1908.

and if after a retirement of four hours it is unable to agree the Judge may, if he thinks fit, discharge it and order a new trial.

There is no Court of Criminal Appeal, but the Supreme Court may reserve any question of law for the determination of the Court of Appeal, and, should it refuse to do so, the party asking it may with the consent of the Attorney-General move the Court of Appeal for leave to appeal.* The Court may give leave to apply to the Court of Appeal for a new trial on the ground that the verdict is against the weight of evidence.†

Upon an application for the mercy of the Crown the Governor in Council may direct a new trial if he entertains a doubt as to the justice of the conviction.‡ Under sec. 69 of The Judicature Act, 1908, in cases of extraordinary importance or difficulty, the Supreme Court may remove the matter into the Court of Appeal for trial before the Judges at bar.

It is legally within the power of the Privy Council to allow criminal appeals, but Dr. Keith thinks that it is not likely that they will again be permitted.§

(b) *Civil Courts.*

On the civil side there is first the Magistrate's Court, a court of record possessing civil jurisdiction generally where not more than £200 is involved, except in actions for false imprisonment, illegal arrest, malicious prosecution, seduction, or breach of promise of marriage.|| The Court has no power to determine the validity of any devise or bequest nor of limitations under any will or settlement, nor to determine a question of title to hereditaments unless such question arises only incidentally. In lieu of a Magistrate, two or more Justices may sit and hear cases in which not

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*Sec. 442, Crimes Act, 1908. †Ib. Sec. 446. ‡Ib. Sec. 447.
§*Responsible Government*, Vol. III, page 1359.
||For the precise limits see section 6 of No. 6, 1913.

more than £20 is involved. In actions under £20 the Court may receive any evidence whether strictly legal or not, and give judgment according to equity and good conscience.

An appeal lies to the Supreme Court upon matter of fact where more than £50 is involved, and upon point of law as of right where more than £20 is in issue, or with the leave of the Court where the amount is below that figure.

The District Courts Act, 1908, makes provision for Dictrict Courts, with considerably larger powers than are possessed by the Magistrates Court, but by Order in Council of 9th May, 1909, the districts then in existence under the Act were abolished and no new districts have since been created. The Act is therefore at present a dead letter.

The Supreme Court of New Zealand is the central Court upon which the whole administration of Justice depends. The first court of this name was constituted under an ordinance of 1841 and was declared to be a Court of Record with the same jurisdiction as that possessed by the Courts of Queen's Bench, Common Pleas, and Exchequer at Westminster, and by the Lord Chancellor, and having exclusive jurisdiction as to wills of personal property, infants, idiots, and lunatics. In 1844 additional powers were granted, including jurisdiction as an Instance Court of Vice-admiralty. The law relating to the Court has been amended and consolidated from time to time, but its jurisdiction has remained unimpaired. Finally the Supreme Court Act, 1882—now consolidated in the Judicature Act of 1908—was passed, and under this it was enacted that "there shall continue to be in and for the Colony of New Zealand a High Court of Justice, called as heretofore the Supreme Court, which shall be a Court of Record for the adminis-

tration of justice throughout the Colony; provided and it is declared that the Supreme Court heretofore and now holden and henceforth to be holden shall be deemed and taken to be the same Court." The existing jurisdiction was continued (secs. 16 and 17.) The Court consists of one judge called the Chief Justice, and of such other Judges as may from time to time be appointed. The salary of a judge may not be diminished during the continuance of his commission. Under section 8 of the Judicature Act, 1908, the Crown may, upon the address of both Houses of the General Assembly, remove any judge from office and revoke his commission. Upon the like address the Governor may suspend, whilst, if the General Assembly is not in session, the Governor may exercise the same right upon his own initiative, but in such case the suspension cannot last beyond the then next sitting of the General Assembly.

The rules of procedure of the Court have varied much from time to time. General Rules were introduced in 1856, and these with modifications remained until 1882 when a Code of Civil Procedure was embodied in the Supreme Court Act of that year. This has since remained substantially the same and now forms part of the Judicature Act. By it the former technical system of pleading was abolished. No special forms of action now exist, and every action is brought upon a statement of claim which simply alleges the facts upon which the plaintiff relies and specifies the relief which he seeks.

Law and equity are administered concurrently in the one Court, which consists of one division only, and where there is any conflict between the rules of law and the rules of equity the latter shall prevail.

Certain actions are tried before the judge alone, certain before common or special juries of four, and others before common or special juries of twelve.

From any judgement, decree, or order of the Supreme Court an appeal lies to the Court of Appeal, save that the determination of the first-named on appeals from inferior Courts is final unless leave to appeal further is given. Provision however is made for a direct appeal in important cases from the inferior Court to the Court of Appeal, and also for the removal of proceedings from the Supreme Court. The Court of Appeal consists of the judges of the Supreme Court, sitting in two divisions of five each, three members being competent to form the Court.* The judgement is in accordance with the opinion of the majority present: if those present are equally divided the judgement or order appealed from stands.

(c) *The Independence of the Judges.*

As in England the independence of the judges is amply provided for by the method of appointing them, the conditions of tenure of the judicial office, the fixation of the judges' salaries, the nature of the oath of office, the publicity of judicial proceedings and judgements, the immunity of the judges for acts done or words spoken by them in their judicial capacity, and the prohibition of the interference by the Crown with the due course of justice.

In the Crown Colony period the judges were to be appointed, under the Charter of 1840, by the Governor, the office being granted during pleasure.† But Ordinance I. of Session II., 1841, provided for a Chief Justice and other judges to be appointed by the Crown or the Governor. In 1844 by III. No. 1 the Crown was to appoint, the Governor being given only power of provisional appointment. The constitutional practice was that judges so appointed were removable

*Judicature Amendment Act, 1913, No. 41. Sections 5 and 7.
†Section 58 of Instructions of 1840.

only for misconduct; and the method of removal was by revocation of the patent of appointment by writ of *scire facias* or by action of the Governor in Council under the Imperial Act of 1782, 22 Geo. III. Cap. 75, generally known as Burke's Act, subject to an appeal to the Privy Council.

The Constitution Act of 1852 provided for a Chief Justice and a puisne judge, whose salaries should not be diminished during their term of office.* By No. 22, 1858, the judges were to be appointed by the Governor in the name of the Crown, the Governor now of course acting on the advice of his ministers, and they were thenceforth to hold their offices during good behaviour; but the Governor was empowered to remove a judge and revoke his patent or commission upon an address from both Houses, and if Parliament was not in session the Governor-in-Council might suspend a judge, but not beyond the end of the next parliamentary session. Salaries were not to be diminished during the judges' tenure of their office. In 1862 and 1863 the Civil List Vote for judges' salaries was increased; the Act of 1873 provided for five judges.† No. 29, 1882, altered the method of dismissal by providing that the Crown might remove on the joint address from the Houses, and that the Governor-in-Council might suspend on the joint address as well as during the parliamentary recess. In 1900 provision was made for six judges by No. 15, and in 1904 the salary rate was increased by No. 16.‡ The law relating to the judges was consolidated in 1908 in the Civil List Act (No. 22) and the Judicature Act (No. 89.) In 1910 the number of puisne judges was increased to six and in 1913§ to seven. There seems to

*Salaries: £1000 and £800 respectively.
†Chief Justice £1.700; four puisne judges £6,000.
‡Chief Justice £2,000; five puisne judges £9,000.
§No. 41.

be some doubt as to whether Burke's Act of 1782 is applicable to a self-governing Dominion, but the weight of opinion is that the procedure under it would not be appropriate.* Since it is the Crown and not the Governor who has the power to remove a judge upon a joint address, that power will not be exercised as of course and without inquiry into the circumstances by the Privy Council.† Since fixation of salary is one of the guarantees of the independence of a judge, the Crown or Governor has no power to appoint a new judge when no salary has been provided for him by Parliament. This was decided for New Zealand in the case *Buckley v. Edwards*.‡ A salary must be provided by the Civil List or other Act and the appointment made afterwards. It was said by one of the judges in the case mentioned, speaking of the appointee without salary: "The judge is absolutely dependent upon the Ministry of the day for the payment of any salary and has to come before Parliament as a suppliant to ask that a salary be given him. It is difficult to conceive a position of greater dependence. No judge so placed could indeed properly exercise the duties of his office. One of these duties, for instance, is the trial of petitions against the return of members of Parliament. How could a judge in this position be asked to take part in such a trial? Against the occurrence of such a state of things obviously neither the power of the purse which Parliament has, nor the power of removal by address, can be a sufficient protection." The independence of the judges is even more important in New Zealand than in England, for the Supreme Court of the Dominion may be called upon to decide as to the validity not only of actions of the officers of the

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*See Keith, *Responsible Government*, pp. 1341-2.
†Keith, page 1342.
‡1892. A.C. 387.

executive government,* but of the Acts of the Dominion Parliament itself, which unlike the British Parliament, is not a sovereign body and may exceed its powers.

The judges of the Supreme Court enjoy the same immunities from action for any judicial act or omission as those of the British judges,† that is to say, among other things, an action will not lie against a judge for acts done or words spoken in his judicial capacity, even though his motive is malicious, nor for excess of jurisdiction unless it can be proved that he knew or should have known that he was exceeding his powers.

(d) *The Judicial Committee of the Privy Council.*

By Order in Council of 10th January, 1910, (repealing previous Orders of 10th May, 1860, and 16th May, 1871) an appeal to His Majesty in Council lies:

(*a.*) As of right, from any final judgement of the Court of Appeal where the matter in dispute on the Appeal amounts to or is of the value of five hundred pounds sterling or upwards, or where the Appeal involves, directly or indirectly, some claim or question to or respecting property or some civil right amounting to or of the value of five hundred pounds sterling or upwards; and

(*b.*) At the discretion of the Court of Appeal from any other judgement of that Court, whether final or interlocutory, if in the opinion of that Court the question involved in the Appeal is one which by reason of its great general or public importance, or otherwise, ought to be submitted to His Majesty in Council for decision.

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*For an account of the way in which the judges may restrain the illegal action of the Executive, see Dicey, *Law of the Constitution*, especially Chaps. V, VIII, and XII.

†See Thomas, *Leading Cases in Constitutional Law*, pp. 109-115.

(*c.*) At the discretion of the Supreme Court from any final judgement of that Court if in the opinion of that Court the question involved in the Appeal is one which by reason of its great general or public importance or of the magnitude of the interests affected, or for any other reason, ought to be submitted to His Majesty in Council for decision.

Should the Court refuse leave, then the Privy Council has, apart from the order referred to, power to grant a similar leave to appeal.* The procedure in regard to appeals to the Privy Council has been much simplified in New Zealand and the Colonies as a result of representations made at the Colonial Conference of 1907.†

The King in Council has exercised from of old both original and appellate jurisdiction. By an Act of 1833‡ this jurisdiction, as it then stood, was vested in the newly created Judicial Committee of the Privy Council, consisting of the Lord President of the Council, the Lord Chancellor, such Privy Councillors as hold or have held certain high offices, any two other Councillors and, in ecclesiastical cases, every Councillor who is an archbishop or bishop. The Act of 1833 also empowers the Crown to call any Privy Councillor to the Committee. In 1871 provision was made for four paid members, superior judges at Westminster or chief justices in India; but their places have now been taken by the Lords of Appeal in Ordinary appointed under the Acts of 1876 and 1887.§ These Acts also describe certain "high judicial"

*By the Order in Council of 10th May, 1860, provision was made for appeals from Supreme Court to Privy Council, but although this order was not revoked by that of 16th May, 1871, it was held that a litigant should first exhaust his right of appeal within the Colony (see letter from Registrar of Privy Council published in N.Z. Gazette, 1871, p. 308). The position is doubtless the same under the Order in Council of 10th Jan., 1910.

†See Keith, *Responsible Government*, Vol. III, pp. 1361-5, and Orders in Council of 21st Dec., 1908, and 10th Jan., 1910, reprinted in Stout and Sim, *Practice and Procedure of the Supreme Court of N.Z.*

‡3 and 4 Wm. IV, Cap. 41.

§39 and 40 Vict., Cap 59. 50 and 51 Vict., Cap. 70.

offices, the present and former occupants of which are also members of the Committee.

The archbishops and bishops do not now sit as full members of the Committee, but only as assessors in ecclesiastical causes. By the Judicial Committee Amendment Act, 1895, it was provided that if any person who is or has been Chief Justice or Judge of a Superior Court in any of what are now known as the self-governing Dominions is also a member of the Privy Council, he shall be a member of the Judicial Committee, but not more than five such members may exist at any time. By the Appellate Jurisdiction Act, 1913, this number was increased to seven, and at the same time the number of Lords of Appeal in Ordinary was raised to six. Under the Appellate Jurisdiction Act, 1908, the Crown may authorise a colonial judge or ex-judge to sit as an assessor in cases from his Dominion. In 1913 the Appellate Jurisdiction Act increased the number of Lords of Appeal in Ordinary to six and the maximum number of Dominion judges on the Judicial Committee to seven.

As a working Court the Committee consists of the Lord Chancellor, the six Lords of Appeal in ordinary, two Councillors appointed under the Act of 1833, and any Dominion judges who may attend under the Acts of 1895 and 1908.

The King in Council is still a court of investigation of offences against the State, the offenders being committed for trial before the ordinary tribunals; and the Crown may refer to the Privy Council any petition or claim of right for which the ordinary tribunals afford no remedy. The Act of 1833 provides for reference by the Crown to the Judicial Committee of any matters other than appeals which it may think fit to refer to it; and such matters as the suspension and removal of judges in the colonies, colonial boundary questions, and the financial powers of legislative

councils have been so referred.* Under the Legislative Council Act, 1891, the Committee hears appeals in regard to the appointment of legislative councillors in New Zealand. It has also a jurisdiction in certain patent, copyright, and education matters arising in England.

Before the institution of the Court of Appeal by the Judicature Acts of 1873-5-6, it had to hear appeals from the maritime and probate, lunacy, and divorce courts, and it still has a certain appellate jurisdiction in maritime and prize cases. But its main work now is to hear appeals from the Courts in the Colonies, India, the Channel Islands, the Isle of Man, the Consular Courts, and in ecclesiastical cases in England. Not all colonial appeals, however, lie to the Privy Council, appeals in shipwreck enquiries, for example, going to the High Court of England.† In some cases, too, that cannot be regarded as ordinary judicial matters, *e.g.* election petitions, the Privy Council will not entertain an appeal.

The power of the Crown to hear appeals from any Court in the Dominions, whether a Court of Error or not, is part of the royal prerogative, but it is also supported by statute, viz., the Judicial Committee Act of 1844. Dr. Keith points out that "the result of this statute has been to prevent the right to hear appeals being barred in any case whatever unless it is barred by an Imperial Act."‡ The right to appeal may, of course, be limited though not barred, by colonial legislation. The power of hearing appeals "is exercised in two ways; on the one hand a code of rules is laid down permitting appeals as of right, that is to say, appeals which automatically take place if the conditions laid down are fulfilled, while

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*See Keith III. pp. 1382-5.
†Merchant Shipping Act, 1894. Sect. 478.
‡Keith, *Responsible Government*, III, p. 1357.

in addition it is open to any disappointed suitor to ask the Privy Council to give him special leave to appeal from the decision of any Court whatever. The rules in the first case normally apply only to the final Court of Appeal as it is not usual that appeal should lie as of right from two Courts in one Dominion."* But in New Zealand appeals lie of right both from the Supreme Court and the Court of Appeal, for in some matters there is no provision for an appeal from the Supreme Court to the Court of Appeal, in which cases the provisions cited above from the Order in Council of 10th January, 1910, will apply.

The procedure of the Judicial Committee is in some respects unique. Three members form a quorum, and, if the cause is ecclesiastical, at least three assessors must attend. The decision is that of the majority, a collective report being made. Technically, appeals are to the King in Council, and the judgement of the Committee is advice tendered to the Crown; an Order of the King in Council is then made in accordance with such advice. At the beginning of each reign a general Order in Council is made referring to the Judicial Committee all appeals to the Crown in Council. The Privy Council, unlike the House of Lords, is not necessarily bound by its own judgements.

At times severe attacks have been made upon the Judicial Committee. Ignorance of colonial law and history, and long-delayed judgements are the strongest charges brought against it.† But gradually steps are being taken to improve the Committee as the Supreme Court of Appeal for the Dominions, and it

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******Ib.* **page 1359. See above, p. 363.**

†Note the protests of the judges of the Supreme Court of N.Z. in connection with the case ***Wallis v. Solicitor-General of N.Z.*** **(1903) A.C. 173.**

is of the greatest importance in maintaining whatever there is of organic political unity in the Empire. It is the chief legal safeguard against excess of powers by the Colonial parliaments and governments, since it alone can review the decisions of the colonial courts on the question of the validity of colonial laws and the actions of colonial officials.*

(e) *Native and Industrial Courts.*

The Native Land Court and Native Appellate Court have exclusive jurisdiction over questions relating to native lands. The Arbitration Court is another special Court vested with jurisdiction to determine industrial disputes, and to try claims for compensation under the Workers' Compensation Act 1908.

(f) *Admiralty and other Jurisdiction.*

New Zealand adopted the Colonial Courts of Admiralty Act, 1890, (53 and 54 Vict. C. 27) which regulated and extended admiralty jurisdiction in civil matters. The Supreme Court was constituted a Colonial Court of Admiralty with power to make rules of practice and procedure. Appeals are to the Crown in Council. But the Crown still retains the right to establish a Vice-Admiralty Court or Courts in the Dominion. The Governor is *ex-officio* Vice-Admiral if no other person is appointed. The Admiralty Offences (Colonial) Act of 1849 gave colonial Courts admiralty jurisdiction in criminal matters, even over vessels in a foreign country, on navigable rivers, and

*For discussions *re* the efficiency and amendment of the Judicial Committee, see the Reports of the Imperial Conferences of 1907 and 1911; Keith, *Responsible Government*, III, pp. 1376-82; Clark, *Australian Constitutional Law*, pp. 335-57; Ewart, *The Kingdom of Canada*, pp. 235-45; Haldane, *Education and Empire*, p. 128; Jebb, *Colonial Nationalism*, pp. 303-4, and *The Britannic Question*, pp. 118-9; and the debates on the Appellate Jurisdiction Bill, 1913.

over foreigners either on high seas or navigable rivers. The Territorial Waters Jurisdiction Act, 1878, (41 and 42 Vic. Cap. 73) allows jurisdiction in offences on the sea, whether by British subjects or by aliens, within a certain distance of the coasts.

Certain other Imperial Acts grant extended jurisdiction to our Courts in common with those of other British possessions. Such are the Extradition Acts, 1870 and 1873, Merchant Shipping Act, 1894, Fugitive Offenders Act, 1881, the Army Act, 1881, Colonial Defence Acts, 1865 and 1909, Colonial Prisoners Removal Acts, 1869 and 1884, Coinage Act, 1870, Official Secrets Act, 1911, and the Slave Trade Acts.

(g) *The Prerogative of Mercy.*

The Crown has the undoubted prerogative of pardoning an offender or reducing his penalties after conviction, subject to certain statutory limitations;* and this prerogative has always been delegated to the Governor. In Crown Colonies it has been exercised by him in person, in accordance with the patent or instructions; but after the establishment of responsible government the demand was made that it should be exercised only upon the advice of Ministers.† This demand was conceded to Canada in 1878 with the reservation that wherever a pardon or reprieve might directly affect the interests of the Empire or of any place beyond the jurisdiction of the Dominion, the Governor should take these interests specially into his own personal consideration before coming to a decision on the advice of his ministers. The subject of assimilating the powers of Australasian Governors to those conferred on the Governor-General of Canada

*See Todd, *Parliamentary Government in England*, I, 204-8; Ridges, *Constitutional Law*, 413-5.

†See the despatches on the subject in *Constitution and Government of New Zealand*, pp. 207-210; and for the history of the prerogative in the Colonies, Keith, *Responsible Government*, pp. 1386-1422.

was discussed at the Colonial Conference of 1887; but the necessary alterations in the royal patent and instructions were not made till 1892, and then mainly because of the despatch of Lord Onslow on February 7th, 1891, to the Secretary of State in connection with the grant of a pardon on ministerial advice to Mahi Kai, convicted of murder, in which the Governor said: "The present practice is attended with much that is undesirable for the representative of Her Majesty. He is liable to be accused of being actuated by religious or sectarian motives, or by class prejudice. Deputations of various kinds wait upon him. The counsel for the prisoner claims to be allowed to place before him facts alleged to have come to light since the trial, and thus endeavours to turn the Governor into a Court of Appeal. Parliament may in its debates endeavour to influence public opinion to put pressure on the Governor."*

Generally the Governor may pardon offences only against the law of the Dominion; he may pardon offences not committed in the Dominion provided they are triable there; and he may pardon contempts of Court even against the objection of the judge. He has no authority to grant an amnesty; but, as was done by Sir George Grey in 1865, he may issue a proclamation announcing that certain persons shall not be prosecuted.

3. The Authority of Precedents.

It will be seen from the foregoing that the ultimate judicial authority for New Zealand is the Privy Council. The decisions of the Judicial Committee of that body are binding upon all the Colonial Courts, over-riding the authority even of the House of Lords.

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*In South Africa the old mode of exercising the prerogative is used mainly because of the varied racial composition of the population.

The judgements of the Court of Appeal are binding upon the Supreme Court and all inferior Courts while those of the Supreme Court control the Courts below it. Technically speaking the Supreme Court and Court of Appeal are free to disagree with Divisional Courts and the Court of Appeal in England, and cases are not rare in which the judgements of single English judges have failed to secure the concurrence of Colonial judges. But so far as the English Court of Appeal is concerned, it has been laid down by the Privy Council that, at all events in matters where the Colonial legislature has followed the enactments of the Home Parliament, the Colonial Courts should govern themselves by the decisions of that Court. "It is of the utmost importance that in all parts of the Empire where English law prevails the interpretation of that law by the Courts should be as nearly as possible the same."* The Supreme Court, however, is bound by the decision of the Court of Appeal of New Zealand, and not by a later English decision even of the House of Lords: the decision of the Court of Appeal of New Zealand is binding upon the Supreme Court until it has been over-ruled by the Privy Council or by the Court of Appeal itself.†

* *Trimble v. Hill*, 5 A.C. 342.
† *Stewart v. Taylor*, 7 Gazette L.R. 455.

Chapter XXVI.

POLICE AND DEFENCE.

1. Police.

During the Crown Colony period the police were under the direct control of the central government. The Municipal Corporations Ordinances of 1842 and 1844 provided for municipal constables on the English plan, but they did not come into force, nor were the royal instructions of 1846 followed in regard to the creation of a borough police. The Constabulary Force Ordinance (VII, 2) 1846, empowered the Governor to establish an armed constabulary force, and a large part of this Ordinance was embodied in our law as late as the consolidating Police Force Act, 1908, No. 145. During the Provincial period the police was the concern of the Provincial governments, but reverted to the central government at the abolition, when the powers of the Superintendents of the Provinces were vested in the Governor. The police is at present organised under The Police Force Act, 1913, No. 61, which repealed the Act of 1908. The general control is in the hands of the Commissioner of Police, appointed by the Governor, who also appoints the superintendents, inspectors, and sub-inspectors of districts. The Commissioner appoints the sergeants and constables. The powers and duties of constables are set out in the Act and in sections 65-9 of the Police Offences Act, 1908, No. 146.* Special constables are provided for and regulated by the

*For the powers, duties, and responsibilities that constables "may by law have or be liable to" see Maitland, *Justice and Police*, and *Constitutional History*, 488-92, 502-3.

Justice of the Peace Act, 1908, No. 91, sections 32-45, and the Police Offences Act, 1908, section 14.*

In 1909 the control and efficiency of the police system were reported upon by a Royal Commission.†

2. Land Defence.

In the Crown Colony period the means of defence, internal as well as external, were provided by the Imperial Government. In 1845 a defensive militia was organised (V, I.) and the importation and sale of warlike stores were regulated (VI, I.) and in 1846 their removal and manufacture (VII, 18). In 1847 the Maori troops were brought under the Mutiny Act (VIII. 1), the storing of gunpowder over a certain quantity was prohibited (VIII, 2), and an ordinance indemnified those concerned in the enforcement of martial law (VIII, 13.) Certain military pensions were authorised in 1849 (X, 3.)

After 1856 the General Assembly legislated for the militia and volunteers. In 1862 the House of Commons resolved that the self-governing colonies should bear the expense of defence against internal disorder and assist in paying for defence against external attack, and in 1863 they were informed they must pay for any imperial garrisons they might need. New Zealand was in the throes of the second series of Maori Wars, and Imperial troops remained here till 1870. Their presence occasioned many constitutional disputes among the Governor, the Imperial Government, and the local Ministers regarding their control and the custody and treatment of prisoners of war, and between the Governor and the General in command.‡ The Imperial Government successfully

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*For the origin of Special Constables see Melville Lee, *History of Police in England*, p. 276.

†See Report and Evidence, *Append. H R.* 1909, H. 16B.

‡See Collier, *Life of Sir George Grey*, Chap. XXI; Henderson, *Sir George Grey*, Chaps. XIV and XV; *Append. H.R.* 1862-9; Keith, *Responsible Government*, III, 1251-6.

asserted its right to control, through the Governor, its troops within the Colony, for which the Colony was paying only a small sum; but it was made clear that the Governor, as titular Commander-in-Chief had, as against the General commanding, only the right of general direction and no power of directing field operations. It is now understood that the Governor has no power or control over Imperial forces in the Dominion; but he may requisition them for service if occasion requires, and by the Colonial Regulations their officer commanding deals with the requisition according to his judgement of the circumstances.*

In the late seventies and the eighties the European situation stimulated local interest in defence. The existing defence works were the subject of reports by experts, and the Militia Act of 1886, No. 17, and the Australasian Naval Defence Act of 1887 are noteworthy measures. The growth of the German navy, the Boer War, and the rapidly growing power of Japan, as well as the developing sense of nationality, were the main causes of the reform of the defences during the last few years. In 1910 Lord Kitchener reported upon the defence of the Dominion. The land defence now rests on the Defence Act of 1909, No. 28, and the amending Acts of 1910, No. 21, and 1912 No. 20, which provide for compulsory military training for every male from fourteen to twenty-five years of age. In time of war, service is obligatory on all males between seventeen and twenty-five. But a member of the territorial force is not required to serve outside the Dominion without his consent. Parliament if not then sitting must be summoned whenever the force is called out for active service. The military forces are under a General Officer Commanding, appointed by the Governor, and there is in the

*Keith, pp. 263-4.

Dominion a section of the Imperial General Staff, and it, though subject to the local Government, may correspond direct with the Imperial General Staff at Home, to which a New Zealand officer is attached. To the meetings of the Committee of Imperial Defence a body summoned and presided over by the Prime Minister of the United Kingdom, a member of the Dominion Ministry may be summoned,* as well as to special conferences on Imperial Defence such as the London conference of 1909.

The discipline of the forces is provided for in the Acts named.† When they are outside the Dominion, they are still under its law unless they are serving with the Imperial troops, when the Imperial Act extends to them.

The Military Pensions Act, 1912, and the Pensions Act, 1913, provide military pensions for certain veterans of the Maori Wars.

3. Naval Defence.

In 1865 the Colonies were empowered to legislate to establish naval defence forces and the Admiralty was authorised to accept the services of such forces if offered.

By the Australasian Naval Defence Act of 1887, New Zealand began to contribute over £20,000 a year for a British-Australasian squadron then established, two vessels of which were to be permanently stationed in New Zealand waters. In 1903 No. 50 increased the annual navy subsidy to £40,000, which was again raised to £100,000 in 1908, No. 225. The Government's offer of a Dreadnought to the Crown in 1909

**E.g.*, the Dominion members of the Imperial Conference in 1911, and the New Zealand Minister of Defence in 1913.

†For the rights and duties of the soldier and martial law see Dicey, *Introduction to the Law and Custom of the Constitution*, Chaps. VIII and IX, and Appendices Nos. IV and VI; Anson, *Law and Custom of the Constitution*, Vol. II, Part II, Chap. VIII.

was confirmed by the Naval Defence Act, No. 9, the capital expenditure involved ultimately proving to be over three-quarters of a million pounds.* In 1913 a change from the policy of subsidising the British Navy was foreshadowed in the Prime Minister's Naval Statement† unless more satisfactory arrangements can be made with the Admiralty for the defence of the South Pacific; and the Naval Defence Act, No. 45, empowers the Governor to raise permanent naval forces by voluntary enlistment to serve within or beyond New Zealand, in any ship whether of the Royal Navy or maintained by the New Zealand Government. In time of war they are to be placed at the disposal of the British Admiralty. The Naval Discipline Acts and the Admiralty Instructions are to apply to these forces. The Act also repealed 1908, No. 225 and reconstituted the Royal Naval Reserve of New Zealand. It is probable that under this Act the Government will ask Parliament for funds to build, maintain, and man ships-of-war. If the Dominion proceeds along these lines, there will probably arise interesting constitutional questions as to the control of these ships in peace and in war and the authority of the New Zealand Government over them when they are beyond New Zealand waters,‡ as it is hardly likely that the legislation will cover all the situations that may develop.

*H.M.S. *New Zealand*, battle-cruiser, commissioned for service Nov. 23rd, 1912.

†*Append. Journals H.R.* 1913, H. 19 A.

‡For a discussion of similar questions in connection with the navies of Australia and Canada, see Keith, *Responsible Government* III, 1278-98.

Chapter XXVII.

MISCELLANEOUS.

1. The Public Service.

There has been an organised Civil Service since the establishment of the Colony, the subject of a series of laws down to the consolidating Act, 1908, No. 23. In 1912 an important change, made in order to diminish the risk of political influence upon the Service, was provided for by the Public Service Act, No. 23. From April 1st, 1913, the Public Service with the exception of the railway, defence, and police sections, has been controlled by the Public Service Commissioner, appointed by the Governor and liable to suspension by the Governor for misbehaviour or incompetence and thereupon to removal if the House of Representatives so directs. With him are associated two Assistant-Commissioners, appointed by the Governor and liable to suspension or removal by the Governor-in-Council on his recommendation. Appeals may be made from the decision of the Commisioner to an Appeal Board of three members, one of them appointed and another elected from the Service itself. The Service is divided into four main divisions, administrative, professional, clerical, and general, and the officers in each division are graded according to qualifications and work.

Entrance into the Service is normally by an elementary competitive examination, and promotion depends partly upon similar subsequent examinations.

According to the royal instructions, public offices not regulated by a law of the General Assembly must be held at the pleasure of the Crown.

The Public Service Superannuation Act, 1907, now embodied in the Public Service Classification and Superannuation Act, 1908,* instituted a common superannuation fund for the Service, to which every member must contribute. The teachers and police are associated with the Service in this scheme, but the railway men have a separate fund.

Dr. Keith† mentions two points of contrast between the Imperial Civil Service and the Public Service in the Dominions. No part of the latter is comparable with the Upper Division of the British Service, and the Dominion Services are, especially in Australasia, elaborately regulated by law. The Ministers in the Dominions do more routine administrative work than those at Home. The work of the Government is not so complicated here as it is there; and only elementary qualifications are tested in the competitive examinations in the Dominions.

2. The Churches.

In New Zealand there is no church "as by law established," as there is in England, the Church of England being here in the same position before the law as any other ecclesiastical body. The ecclesiastical law of England was not a part of the English law that is considered to have been taken with them by the early settlers to a British Colony.‡ The first colonial bishops were created towards the end of the 18th century by Letters Patent, but with no jurisdiction as in England over lay persons, their powers being limited to visitation and correction of the clergy. The first bishop of New Zealand, Bishop Selwyn, was similarly appointed in 1841, but Bishops

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*Amended in 1909, 1911, and 1912.
†*Responsible Government*, I. 344.
‡*In re the Bishop of Natal*, 1864, 3 Moore P.C. N.S. 115; Anson, *Law and Custom of the Constitution*, Vol. II, Part II, Chap. IX, 5.

Harper and Abraham in 1856 and 1858 were given powers of visitation only. In the case *Long v. the Bishop of Capetown*, 1863,* however, it was made clear that such grants were illegal, the Privy Council holding that the Crown cannot by letters patent create a bishop to exercise ecclesiastical or civil jurisdiction in a colony which has a representative legislature. "The Church of England," it said, "in places where there is no Church established by law, is in the same situation with any other religious body—in no better but in no worse position; and the members may adopt, as the members of any other communion may adopt, rules for enforcing discipline within their body, which will be binding on those who expressly or by implication have assented to them." In the case of *The Bishop of Natal* the Privy Council held that the Crown could not by letters patent alone establish a province or see or create an ecclesiastical corporation in a colony after having granted it a representative legislature, and in 1865 such practice was abandoned. In 1866 in *The Bishop of Natal v. Gladstone*† the Master of the Rolls held that in colonies with representative government it was for the civil courts to enquire into the administration and the extent and method of the jurisdiction of a bishop appointed by letters patent. The Crown may still appoint a bishop for service in colonies with representative government, and the bishop may be consecrated in England by license from the Crown, but he is not appointed to any particular diocese, and he has no jurisdiction. In the Colonies themselves of course, a bishop may be consecrated by other bishops without the royal license, if the action is in accord with the colonial law.

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*1 Moore P.C. N.S. 411.
†3 Eq. 1.

The Church of England in New Zealand is therefore a voluntary association of the kind referred to in the Privy Council judgement of 1863, and any question of its rights and duties is a civil question to be decided by the local courts according to the law of the Dominion regarding such associations. The Constitution of the Church was adopted at a conference at Auckland in 1857.*

3. Local Government.

By the abolition of the provinces the sole legislative power was left in the General Assembly, and no attempt has since been made to reintroduce a subordinate legislature. The powers of local bodies are confined entirely to local administration, taxation by means of rates, and the making of by-laws within clearly defined statutory limits.

The whole Dominion is in the first place divided into counties, and, except in certain counties where the Act is expressly suspended, there is a County Council for each county elected by ratepayers. Each ratepayer votes in respect of a member for the riding in which he is enrolled, and he may have one, two, or three votes according to the value of his property.† Elections are held triennially.

Under the Road Boards Act, 1908, provision is made for the constitution of Road Districts. These are smaller areas forming part of counties, but administered within certain limits by Road Boards. The members of such boards are elected by ratepayers, the number of votes possessed by each ratepayer varying as under the Counties Act. A general election is held

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*See Jacobs, *History of the Church of New Zealand;* Purchas, *Bishop Harper and the Canterbury Settlement*, Chap. IX; Collier, *Life of Sir George Grey*, 87.

†Sec. 41 Counties Act, 1908.

triennially, but each year a certain number retire and an election is held to fill their places.

The Municipal Corporations Act, 1908, provides for the constitution and government of cities and boroughs. The election of members of a city or borough council is held biennially, that for the office of mayor annually. Electors must possess either a freehold, rating, or residential qualification, while in the case of husband and wife any qualification possessed by either of them shall be deemed to be possessed by each.* Upon the creation of a borough it ceases to form part of a county.† This Act was amended by No. 62, 1913, which provides *inter alia* for the biennial election of mayor.

NOTE.—1. The following are the principal statutes dealing with local government:—Counties Act; Road Boards Act; Municipal Corporations Act; Town Boards Act; Harbours Act; Public Works Act; Tramways Act; Rating Act; Land Drainage Act; Local Bodies Loans; Public Contracts and Local Bodies' Contractors Act; Local Elections and Polls Act—all of 1908 with subsequent amendments.

2. All parties have long agreed that the system of local government urgently demands reform. For the report of a conference of representatives of local bodies summoned to discuss the Local Government Bill circulated in 1912, see *Append. Journ. H.R.* 1912 Session II., Vol. iv., H. 14.

4. Periods of Constitutional History.

The history of the Constitution of New Zealand is naturally divided into the following periods:

(1) May 21st, 1840—November, 1840: New Zealand was a dependency of the Crown Colony of New South Wales under a Lieutenant-Governor.

(2) November 16th, 1840—January, 1853: A Crown Colony, with a Governor and

*Sec. 6 Municipal Corporations Act, 1908, and Sec. 3 of the amending Act (No. 81) of 1910.
†Sec. 9 Counties Act, 1908.

nominated Legislative Council. The separate Colony was created by Charter Nov. 16th, 1840, but it was not till May 3rd, 1841, that the letters patent were given effect to in the Colony. From March 10th, 1848, the Colony was divided into two Provinces, New Ulster and New Munster.

(3) January 17th, 1853—September, 1907: A self-governing Colony, with Governor, nominated Legislative Council and Elected House of Representatives. This period falls into two parts, divided at November 1st, 1876, when the Provincial governments were abolished.

(4) From September 26th, 1907: A self-governing Dominion. By royal proclamation of September 10th, 1907, the designation of the "Colony of New Zealand" was on September 26th changed to the "Dominion of New Zealand", a change accompanied by minor alterations, such as the omission of the Instruction to the Governor requiring as a fixed practice the reservation of certain classes of bills, the change of "Member of the House of Representatives" to "Member of Parliament," of "Colonial Treasurer" to "Minister of Finance," and of "Colonial Secretary" to "Minister of Internal Affairs.*

New Zealand ranks third among the self-governing Dominions, the usual order of precedency being Canada (July 1st, 1867), Australia (January 1st, 1901), New

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*See 1907, No. 50.

Zealand (September 26th, 1907), South Africa (May 31st, 1910), and Newfoundland (1583.) New Zealand is the only Dominion which is at present entitled to fly a special flag on land* as well as on sea.

†1901, No. 74.

Chapter XXVIII.

IMPERIAL CONTROL.

1. In Administration.

New Zealand, as part of the British Dominions, is controlled by the Imperial authorities in all the ordinary spheres of government, legislative, executive, and judicial. Its powers in all three may be limited in certain directions by both the Imperial Crown in Parliament, directly or through the Governor, and by the Imperial Crown in Council, acting on the advice of the Judicial Committee of the Privy Council. This has already been made clear in Chapters XXIV. and XXV.

In the executive sphere the degree of actual control is very slight in domestic affairs, and is exercised, for the most part indirectly, by the Governor in consultation with his Ministers.* Executive acts that are directed towards objects outside the Dominion are, however, effectively controlled; but as they are usually based on legislation, existing or imminent, the same principles of control apply as in legislation. Control in the judicial sphere is exercised through the right of appeal from the Dominions to the Crown and also by the paramount legislative power of the Imperial Parliament.

2. In Legislation.

(a) *Reservation and Disallowance.*

The restrictions on the legislative powers of the General Assembly have been described in Chapter

*For the exposition of the policy of the Imperial Goverment in this respect see the speech of Mr. Harcourt, Secretary of State for the Colonies, in the House of Commons, February, 1914, on the subject of the deportation of strike leaders from South Africa by the Union Government.

XXIV. The Governor is an essential part of this Legislature and may reserve a bill for the royal assent or refuse his assent forthwith.* The Crown may disallow a bill, even if it has been assented to by the Governor,† and the Courts may declare an Act or any part of it to be *ultra vires.* Up to 1907 bills dealing with any of the following subjects had to be reserved by the royal instructions: divorce, grants to the Governor, currency, differential duties, Imperial treaty rights, control of Imperial forces; as well as those of an extraordinary nature prejudicial to the royal prerogative, the rights of absentees, or British trade and shipping, and all bills containing provisions previously disallowed or to which assent had been refused. In 1907 following on the elevation of New Zealand to the status of Dominion, the instructions to reserve such bills were omitted; but the right to reserve still exists and is exercised at the Governor's discretion. If the royal assent to a reserved bill is not signified in the Dominion by Governor's Speech, Message, or Proclamation, within two years of its presentation to the Governor, the bill has no force; and a reserved bill has no force until assented to. Disallowance of a bill assented to by the Governor must be made by Order in Council within two years of its receipt by the Secretary of State, and renders the bill null and void from the date of the Governor's signification of the disallowance. Only bills that are altogether *ultra vires* or otherwise objectionable are disallowed; in the case of clauses it is the practice of the Imperial Government to draw the attention of the local Government to the matter so that an amending bill may be passed.‡ Refusal to assent by the Governor is now very rarely exercised,

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*Constitution Act, Section 56. †Section 58.

‡For a discussion of the relative merits of reservation and disallowance, see Keith, *Responsible Government*, p. 1018.

though there are several examples in the earlier years of constitutional government.*

(b) *Internal Affairs.*

Legislative control by the Imperial Government in the internal affairs of New Zealand diminished rapidly as the Colony entered upon responsible government. The accepted principle is that the self-governing Colonies are alone responsible for their domestic government; for example, in finance though the greater part of their public loans are raised in England, the Imperial Government acknowledges no responsibility and claims no control.† For self-government an independent source of revenue is required to avoid the necessity of grants from the Imperial treasury, and the only available sufficient source at the time of the institution of self government was the waste land of the Crown.† Control of this was therefore given to the Colonial government by section 72 of the Constitution Act. In 1856 an Act allowing the Provincial Councils to legislate for these lands was disallowed. In New Zealand, Native affairs were closely bound up with land administration. The Constitution Act, section 71, empowered the Crown by letters patent to cause the laws of the Maoris to be maintained; and the Governors reserved Maori affairs for Imperial control until 1861. Since that time the General Assembly has exercised full power in this respect, though the section in the Constitution Act has not been repealed. The Crown will not entertain petitions from Maoris on the subject of their lands, and refers them to the Dominion Government.

*For an interesting case, in which Sir George Grey, then Premier, advised the Governor to refuse his assent, see *Append. Jour. H.R.*, 1878, A2, p. 14.

†See Keith, *Responsible Government*, II, 1037-47.

‡For the arguments for and against the control of Crown lands by the Dominion Governments, see Keith, *id.* 1051-3.

The Dominion Parliament may legislate to diminish the royal prerogative; but much legislation of this kind requires to be reserved. Examples are bills reducing the Governor's salary, touching the prerogative of mercy or conferring the right to use the epithets, "royal" or "chartered". Parliament may naturalise aliens within the Dominion, but its Naturalisation Acts have no force beyond; whilst naturalisation in the United Kingdom means naturalisation throughout the Empire. But it cannot create a separate nationality within the Empire.* These restrictions spring partly from the territorial limitation upon Dominion legislation, and operate in the same way in regard to such matters as copyrights and the grant of honours. Colonial honours are awarded by the Crown, on the advice of Imperial Ministers as well as Colonial, for they are usually meant to have currency throughout the Empire. The Colonial Ministry must be consulted, but its advice may not be accepted.†

(c) *External Affairs.*

Of late years, general trade relations with other countries, shipping, immigration, and treaty rights have provided the chief spheres of Imperial control. In 1846 the Canadian colonies were given certain legislative freedom as to customs duties and in 1849 came the repeal of the last of the fiscal Navigation Laws. The Constitution Act, section 61,‡ provides that the General Assembly must not impose duties inconsistent with treaties with foreign powers. In 1870 a bill (No. 99) to authorise reciprocity with the Australian colonies was refused assent.§ After further negotiations the Act 36 and 37 Vict. Cap. 22, 1873, allowed

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*See Keith, *Responsible Government*, III, 1454-5; Jenkyns, *British Rule and Jurisdiction beyond the Seas*, p. 31.

†See *Append. Jour. H.R.*, 1879, A. 9, and 1880, A. 2.

‡See page 263 above.

§See Despatches in *Append. Jour. H.R.*, 1871 and 1872.

the institution of Australasian intercolonial duties but prohibited differential duties against other British countries and foreign states and duties inconsistent with treaties. It was not till 1895 that an Act, 58 and 59 Vict. Cap. 53, removed the legal bar to intercolonial preference. New Zealand did not take advantage of it till 1903 when she discriminated against certain foreign imports. In 1906 she made a reciprocity treaty with the South African Customs Union, but attempts at reciprocity with Australia failed.

Certain legislative rights over their coasting trade and ships registered in their territories were given to Colonial legislatures by the Merchant Shipping Acts of 1854, 1869, and 1894. Conflicts have occurred with the Imperial Government as to the extent of these rights. In 1903 a local shipping bill was assented to conditionally; the bill of 1909, No. 36, was assented to in 1911; and the amending bill of 1910, No. 85, which proposed to regulate wages and to discriminate against Asiatics on ships engaged beyond the coasting trade of New Zealand was reserved and not assented to.*

The legislation in restraint of Chinese immigration† has not occasioned much difficulty, and protests from Chinese to the Imperial Government have not been entertained, it being explained that the matter is one for the Dominion legislature.‡ But assent was refused to a bill of 1896 which proposed to restrict the immigration of other Asiatics, not including British Indians, the ground of the refusal being that the Imperial Government objected to discrimination against Asiatics as such. At the Colonial Conference of 1897 Mr. Chamberlain, Colonial Secretary, said: "What I venture to think you have to deal with is

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*See *Minutes of Imp. Conf. 1911, Append. Jour. H.R.*, 1911, A. 4, pp. 399-412; and *Append. Jour. H.R.*, 1909-11.

†1881, No. 47; 1888, No. 34; 1896, No. 19; 1907. No. 79; 1908, No. 230; 1910, No. 16.

‡*Append Jour. H.R.*, 1908, A. 1, p. 15; 1909, A. 2, p. 7.

the character of the immigration. It is not because a man is of a different colour from ourselves that he is necessarily an undesirable immigrant, but it is because he is dirty or immoral, or he is a pauper, or he has some other objection which can be defined in an Act of Parliament, and by which the exclusion can be managed with regard to all those whom you really desire to exclude." A language test was therefore imposed by 1898, No. 33, which was assented to. The bill 1910, No. 85, as we have already stated, was refused assent; and in drafting factory legislation care has to be exercised in providing for Chinese establishments in order to avoid reservation of the bills.

The treaty-making power is one characteristic of a sovereign state; in a non-sovereign state like the Dominion of New Zealand, it is either non-existent or limited. In the United Kingdom this power is exercised by the Crown acting on ministerial advice, and treaties so made bind New Zealand as part of the British Dominions, whether the General Assembly has sanctioned them or not. But it is recognised that to bind the subject in certain respects express parliamentary sanction is required. The Crown may declare war and make peace without the consent of Parliament, but it cannot make a treaty affecting the private rights of the subject,* imposing a tax or changing the law of the land, and, since 1890, it is doubtful whether it can cede territory of its own act. Moreover Parliament exercises an indirect check inasmuch as in most cases recourse must be had to legislation in order to carry out treaty provisions. There are indications that these conventions requiring parliamentary sanction for treaties, will be insisted upon by the Dominion legislatures with increasing force.

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*Case of the *Parlement Belge*, 1879, 4 P.D. 129.

Though the treaty-making power rests absolutely with the Imperial Government, the colonies are allowed a voice in the mode of executing the provisions of treaties affecting them, and foreign states may not insist that only the Imperial Parliament shall legislate to give force to such treaties. It is also a convention that no treaty imposing obligations on the Dominions shall be made without their concurrence. A distinction must be drawn between commercial and political treaties. In regard to the former the Dominions have considerable powers. Since 1882 they may adhere to a commercial treaty within a certain time; since 1899 they may withdraw from such separately. But a Dominion must not offer to a foreign power tariff concessions which are not at the same time given to all other powers entitled to most-favoured-nation treatment by the Dominion; any concession given to a foreign power must be given also to the rest of the British Dominions; and a Dominion by itself must enter into no arrangements prejudicial to the interests of any other part of the Empire. If a Dominion makes a commercial treaty with a foreign power, as Canada did with France in 1907, it must negotiate not direct but through the Imperial Government. In the matter of political treaties the Dominions as yet have no power. There is consultation with a Dominion on questions specially affecting it, as with New Zealand on several occasions in regard to treaties affecting the New Hebrides,* and advantage was taken of the Imperial Conference of 1911 to expound and discuss British foreign policy in a conclave of Imperial and Dominion Ministers; but it is with the Imperial Government that the final decision rests, as it does in regard to all the foreign relations of the Empire.†

*See *Append. Jour. H.R.*, 1874, 1875, 1903, 1904, 1906, 1907.

†For the treaty-making power of the Crown, see Anson, *Law and Custom of the Constitution*, Vol. II, Part II, 107-8; Lowell, *Government of England*, Vol. I, 22; Keith, *Responsible Government*, III, 1101-57.

APPENDIX A.

1. GOVERNORS OF NEW ZEALAND

Captain William Hobson, R.N., Lieutenant-Governor under Sir George Gipps, Governor of New South Wales, Jan., 1840 to May 1841. Governor from May, 1841 to September 10th, 1842.

Lieutenant Shortland, Administrator, September 10th, 1842, to December 26th, 1843.

Captain Robert Fitzroy, R.N., December 26th, 1843, to November 17th, 1845.

Captain George Grey (Sir George Grey, K.C.B., in 1848), November 18th, 1845, to December 31st, 1853. Lieutenant-Governor till January 1st, 1848. Governor-in-Chief over the Islands of New Zealand and Governor of New Ulster and of New Munster, January 1st, 1848, to March 7th, 1853. Governor from March 7th, 1853, to December 31st, 1853.

E. J. Eyre, Lieutenant-Governor of New Munster, January 28th, 1848, to March 7th, 1853.

Major-General G. D. Pitt, Lieutenant-Governor of New Ulster, February 14th, 1848, to January 8th, 1851.

Lieutenant-Colonel Wynyard, Lieutenant-Governor of New Ulster, April 26th, 1851, to March 7th, 1853.

Lieutenant-Colonel Robert Henry Wynyard, C.B., Administrator, from 3rd January, 1854, to 6th September, 1855.

Colonel Thomas Gore Browne, C.B., from 6th September, 1855, to 2nd October, 1861.

Sir George Grey, K.C.B., Administrator, from 3rd October, 1861; Governor, from 4th December, 1861, to 5th February, 1868.

Sir George Ferguson Bowen, G.C.M.G., from 5th February, 1868, to 19th March, 1873.

Sir George Alfred Arney, Chief Justice, Administrator, from 21st March to 14th June, 1873.

Sir James Fergusson, Baronet, P.C., from 14th June, 1873, to 3rd December, 1874.

The Marquis of Normanby, P.C., G.C.M.G., Administrator, from 3rd December, 1874; Governor, from 9th January, 1875, to 21st February, 1879.

James Prendergast, Esquire, Chief Justice, Administrator, from 21st February to 27th March, 1879.

Sir Hercules George Robert Robinson, G.C.M.G., Administrator, from 27th March, 1879; Governor, from 17th April, 1879, to 8th September, 1880.

James Prendergast, Esquire, Chief Justice, Administrator, from 9th September to 29th November, 1880.

The Honourable Sir Arthur Hamilton Gordon, G.C.M.G , from 29th November, 1880, to 23rd June, 1882.

James Prendergast, Esquire, Chief Justice, Administrator, 24th June, 1882, to 20th January, 1883.

Lieutenant-General Sir William Francis Drummond Jervois, G.C.M.G., C.B., from 20th January, 1883 to 22nd March, 1889.

Sir James Prendergast, Chief Justice, Administrator, from from 23rd March to 2nd May, 1889.

The Earl of Onslow, G.C.M.G , from 2nd May, 1889, to 24th February, 1892.

Sir James Prendergast, Chief Justice, Administrator, from 25th February to 6th June, 1892.

The Earl of Glasgow, G.C.M.G., from 7th June, 1892, to 6th February, 1897.

Sir James Prendergast, Chief Justice, Administrator, from 8th February, 1897, to 9th August, 1897.

The Earl of Ranfurly, G.C.M.G., from 10th August, 1897, to 19th June, 1904.

The Right Honorable William Lee, Baron Plunket, K.C.M.G., K.C.V.O., from 20th June, 1904, to 8th June, 1910.

Hon. Sir Robert Stout, K.C.M.G., Chief Justice, Administrator, from 8th June, 1910, to 22nd June, 1910.

The Right Honourable John Poynder Dickson-Poynder, K.C.M.G., Baron Islington, D.S.O., from 22nd June, 1910, to 2nd December, 1912.

Hon. Sir Robert Stout, K.C.M.G., Chief Justice, Administrator, from 3rd December, 1912, to 19th December, 1912.

The Earl of Liverpool, K.C.M.G., M.V.O., from 19th December, 1912.

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2. EXECUTIVE COUNCIL, 1841-56.

(Not including the Officers Commanding the Forces.)

Willoughby Shortland, Colonial Secretary, from 3rd May, 1841, to 31st December, 1843.

Francis Fisher, Attorney-General, from 3rd May to 10th August, 1841.

George Cooper, Colonial Treasurer, from 3rd May, 1841, to 9th May, 1842.

William Swainson, Attorney-General, from 10th August, 1841, to 7th May, 1856.

Alexander Shepherd, Colonial Treasurer, from 9th May, 1842, to 7th May, 1856.

Andrew Sinclair, Colonial Secretary, from 6th January, 1844, to 7th May, 1856.

James Edward FitzGerald, M.H.R., without portfolio, from 14th June to 2nd August, 1854.

Henry Sewell, M.H.R., without portfolio, from 14th June to 2nd August, 1854.
Frederick Aloysius Weld, M.H.R., without portfolio, from 14th June to 2nd August, 1854.
Francis Dillon Bell, M.L.C., without portfolio, from 30th June to 11th July, 1854.
Thomas Houghton Bartley, M L.C., without portfolio, from 14th July to 2nd August, 1854.
Thomas Spencer Forsaith, M.H.R., without portfolio, from 31st August to 2nd September, 1854.
Edward Jerningham Wakefield, M.H.R., without portfolio, from 31st August to 2nd September, 1854.
William Thomas Locke Travers, M.H.R., without portfolio, 31st August to 2nd September, 1854.
James Macandrew, M.H.R., without portfolio, from 31st August to 2nd September, 1854.

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3. PARLIAMENTS OF NEW ZEALAND.

(The first date is that of the opening of the first session, the second that of the dissolution.)

First—May, 1854—September, 1855; 3 sessions.
Second—April, 1856—November, 1860; 3 sessions.
Third—June, 1861—January, 1866; 5 sessions.
Fourth—June, 1866—December, 1870; 5 sessions.
Fifth—August, 1871—December, 1875; 5 sessions.
Sixth—June, 1876—August, 1879; 4 sessions.
Seventh—September, 1879—November, 1881; 3 sessions.
Eighth—May, 1882—June, 1884; 3 sessions.
Ninth—August, 1884—July, 1887; 4 sessions.
Tenth—October, 1887—June, 1890; 4 sessions.
Eleventh—January, 1891—November, 1893; 4 sessions.
Twelfth—June, 1894—November, 1896; 3 sessions.
Thirteenth—April, 1897—November, 1899; 4 sessions.
Fourteenth—June, 1900—November, 1902; 3 sessions.
Fifteenth—June, 1903—November, 1905; 3 sessions.
Sixteenth—June, 1906—October, 1908; 4 sessions.
Seventeenth—June, 1909—November, 1912; 4 sessions.
Eighteenth—February, 1912—

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4. MINISTRIES.

(The name of the Prime Minister is given in brackets wherever it is not the name of the Ministry.)

Bell-Sewell (Henry Sewell), from 7th May, 1856, to 20th May, 1856.
Fox, from 20th May, 1856, to 2nd June, 1856.
Stafford, from 2nd June, 1856, to 12th July, 1861.

Fox, from 12th July, 1861, to 6th August, 1862.
Domett, from 6th August, 1862, to 30th October, 1863.
Whitaker-Fox (Frederick Whitaker), from 30th October, 1863, to 24th November, 1864.
Well, from 24th November, 1864, to 16th October, 1865.
Stafford, from 16th October, 1865, to 28th June, 1869.
Fox, from 28th June, 1869, to 10th September, 1872.
Stafford, from 10th September, 1872, to 11th October, 1872.
Waterhouse, from 11th October, 1872, to 3rd March, 1873.
Fox, from 3rd March, 1873, to 8th April, 1873.
Vogel, from 8th April, 1873, to 6th July, 1875.
Pollen, from 6th July, 1875, to 15th February, 1876.
Vogel, from 15th February, 1876, to 1st September, 1876.
Atkinson, from 1st September, 1876, to 13th September, 1876.
Atkinson (reconstituted), from 13th September, 1876, to 13th October, 1877.
Grey, from 15th October, 1877, to 8th October, 1879.
Hall, from 8th October, 1879, to 21st April, 1882.
Whitaker, from 21st April, 1882, to 25th September, 1883.
Atkinson, from 25th September, 1883, to 16th August, 1884.
Stout-Vogel (Robert Stout), from 16th August, 1884, to 28th August, 1884.
Atkinson, 28th August, 1884, to 3rd September, 1884.
Stout-Vogel (Sir R. Stout, K.C.M.G.), 3rd September, 1884, to 8th October, 1887.
Atkinson, Sir H. A., from 8th October, 1887, to 24th January, 1891.
Ballance, 24th January, 1891, to 1st May, 1893.*
Seddon, from 1st May, 1893, to 21st June, 1906†
Hall-Jones, from 21st June, 1906, to 6th August, 1906.
Ward, 6th August, 1906, to 28th March, 1912.
Mackenzie, from 28th March, 1912, to 10th July, 1912.
Massey, from 10th July, 1912.

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*Owing to the death of the Premier, the Hon. J. Ballance, on 27th April, 1893.

†Owing to the death of the Premier, Right Hon. R. J. Seddon, P.C., on 10th June, 1906.

APPENDIX B.

PREROGATIVE INSTRUMENTS.

1. LETTERS PATENT OF NOV. 18TH, 1907.

LETTERS PATENT passed under the Great Seal of the United Kingdom, constituting the Office of Governor and Commander-in-Chief of the Dominion of New Zealand.

Letters Patent dated November 18th, 1907.

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 certain Letters Patent, under the Great Seal of our United Kingdom of Great Britain and Ireland, bearing date at Westminster, the Twenty-first day of February, 1879, Her late Majesty Queen Victoria did constitute, order, and declare that there should be a Governor and Commander-in-Chief in and over the Colony of New Zealand and its Dependencies (therein called the Colony) and that appointments to the said Office when vacant should be made by Commission under the Royal Sign Manual and Signet:

And whereas by an Act passed in the Session holden in the Twenty-sixth and Twenty-seventh years of the Reign of Her late Majesty Queen Victoria, entitled 'An Act to alter the Boundaries of New Zealand,' the Colony of New Zealand was defined as comprising all Territories, Islands, and Countries lying between the one hundred and sixty-second degree of East Longitude and the one hundred and seventy-third degree of West Longitude and between the thirty-third and fifty-third parallels of South Latitude:

And whereas by a Proclamation bearing date the twenty-first day of July, 1887, issued by the Governor of New Zealand under authority of Letters Patent passed under the Great Seal of Our United Kingdom, bearing date the eighteenth day of January, 1887, the Islands situate in the South Pacific Ocean between the parallels of 29 degrees and 32 degrees South Latitude and the meridians of 177 degrees and 180 degrees West Longitude, known as the Kermadec Group, were, from and after the first day of August 1887, annexed to and became part of the Colony of New Zealand.

And whereas by a Proclamation bearing date the tenth day of June 1901, issued by the Governor of New Zealand by

authority of an Order by Us in Our Privy Council dated the thirteenth day of May 1901, made by virtue and in exercise of the powers vested in Us by the *Colonial Boundaries Act* 1895, the Boundaries of the Colony of New Zealand were on and after the eleventh day of June 1901 extended so as to include the islands of the Cook Group, and all other the Islands and Territories which were then or might thereafter form part of Our Dominions situate within the following boundary line, viz.:—A line commencing at a point at the intersection of the 23rd degree of South Latitude and the 156th degree of Longitude West of Greenwich, and proceeding due North to the point of intersection of the 8th degree of South Latitude and the 156th degree of Longitude West of Greenwich, thence due West to the point of intersection of the 8th degree of South Latitude and the 167th degree of Longitude West of Greenwich, thence due South to the point of intersection of the 17th degree of South Latitude and the 167th degree of Longitude West of Greenwich, thence due West to the point of intersection of the 17th degree of South Latitude and the 170th degree of Longitude West of Greenwich, thence due South to the point of intersection of the 23rd degree of South Latitude and the 170th degree of Longitude West of Greenwich, and thence due East to the point of intersection of the 23rd degree of South Latitude and the 156th degree of Longitude West of Greenwich:

And whereas by Our Royal Proclamation, bearing date the ninth day of September, 1907, We did ordain, declare, and command that on and after the Twenty-sixth day of September 1907 the Colony of New Zealand and the territory belonging thereto should be called and known by the title of the Dominion of New Zealand:

And whereas it has become necessary to make provision for the office of Governor and Commander-in-Chief in and over Our Dominion of New Zealand:

I. Now, therefore We do by these presents revoke and determine the above-recited Letters Patent of the Twenty-first day of February 1879, but without prejudice to anything lawfully done thereunder. And We do by these presents constitute, order, and declare that there shall be a Governor and Commander-in-Chief in and over Our Dominion of New Zealand (hereinafter called the Dominion), comprising the Territories, Islands, and Countries forming the Colony of New Zealand as defined in the above-recited Act, passed in the Session holden in the Twenty-sixth and Twenty-seventh Years of the Reign of Her late Majesty Queen Victoria, entitled 'An Act to alter the Boundaries of New Zealand', together with the further Islands and Territories included within the Boundaries of the Colony of New Zealand by the above-recited Proclamations of the Governor thereof, dated respectively the Twenty-first day of July 1887 and the Tenth day of June

1901; and that appointments to the said office when vacant shall be made by Commission under Our Sign Manual and Signet.

II. We do hereby authorize, empower, and command Our said Governor and Commander-in-Chief (hereinafter called the Governor) to do and execute all things that belong to his said Office, according to the tenor of these Our 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 now or shall hereafter be in force in the Dominion.

III. Every person appointed to fill the Office of Governor shall, with all due solemnity, before entering on any of the duties of his Office, cause the Commission appointing him to be Governor to be read and published at the seat of Government, in the presence of the Chief Justice, or some other Judge of the Supreme Court of the Dominion, and of the Members of the Executive Council thereof, which being done, he shall then and there take before them the Oath of Allegiance, in the form 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'; and likewise the usual Oath for the due execution of the Office of Governor, and for the due and impartial administration of justice; which Oaths the said Chief Justice or Judge is hereby required to administer.

IV. The Governor shall keep and use the Public Seal of the Dominion for sealing all things whatsoever that shall pass the said Public Seal, and until a new Public Seal shall be provided for the Dominion, the Public Seal used as the Public Seal of the Territories, Islands, and Countries prior to the Twenty-sixth day of September 1907 known as the Colony of New Zealand shall be deemed to be the Public Seal of the Dominion.

V. There shall be an Executive Council for the Dominion, and the said Council shall consist of such persons as were immediately before the coming into force of these Our Letters Patent Members of the Executive Council of New Zealand, or as may at any time be Members of the Executive Council of the Dominion in accordance with any Law enacted by the Legislature of the Dominion, and of such other persons as the Governor shall, from time to time, in Our name and on Our behalf, but subject to any Law as aforesaid, appoint under the Public Seal of the Dominion to be members of the Executive Council of the Dominion.

VI. The Governor, in Our name and on Our behalf, may make and execute, under the said Public Seal, grants and dispositions of any lands which may be lawfully granted and disposed of by Us within the Dominion.

VII. The Governor may constitute and appoint, in Our name and on Our behalf, all such Judges, Commissioners, Justices of the Peace, and other necessary Officers and Ministers of the Dominion as may be lawfully constituted or appointed by Us.

VIII. When any crime has been committed within the Dominion, or for which the offender may be tried therein, the Governor may as he shall see occasion, in Our name and on Our behalf, grant a pardon to any accomplice in such crime 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, may grant to any offender convicted in any Court, or before any Judge, or other Magistrate, within the Dominion, a pardon, 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 the Governor thinks fit; and further may remit any fines, penalties, or forfeitures due or accrued to Us. Provided always that the Governor shall in no case, except where the offence has been of a political nature unaccompanied by any other grave crime, make it a condition of any pardon or remission of sentence that the offender shall absent himself or be removed from the Dominion.

IX. The Governor may, so far as We Ourselves lawfully may, upon sufficient cause to him appearing, remove from his office, or suspend from the exercise of the same, any person exercising any office or place within the Dominion under or by virtue of any Commission or Warrant granted, or which may be granted, by Us, in Our name, or under Our authority.

X. The Governor may exercise all powers lawfully belonging to Us in respect of the summoning, proroguing, or dissolving any Legislative Body, which now is or hereafter may be established within the Dominion, and in respect of the appointment of Members thereto.

XI. In the event of the death, incapacity, or removal of the Governor, or of his departure from the Dominion, Our Lieutenant-Governor, or, if there be no such Officer in the Dominion, then such person or persons as We may appoint under our Sign Manual and Signet, shall, during Our pleasure, administer the Government of the Dominion, first taking the Oaths hereinbefore directed to be taken by the Governor, and in the manner herein prescribed; which being done, We do hereby authorize, empower, and command Our Lieutenant-Governor, and every other such Administrator as aforesaid, to do and execute during Our pleasure all things that belong to the Office of Governor and Commander-in-Chief according

to the tenor of these Our Letters Patent, and according to Our Instructions as aforesaid, and the Laws of the Dominion.

XII. In the event of the Governor having occasion to be temporarily absent for a short period from the seat of Government or from the Dominion, he may in every such case, by an Instrument under the Public Seal of the Dominion, constitute and appoint Our Lieutenant-Governor, or if there be no such Officer, then any other person to be his Deputy during such temporary absence, and in that capacity to exercise, perform, and execute for and on behalf of the Governor during such absence, but no longer, all such powers and authorities vested in the Governor by these Our Letters Patent, as shall in and by such Instrument be specified and limited, but no others. Provided, nevertheless, that, by the appointment of a Deputy as aforesaid, the power and authority of the Governor shall not be abridged, altered, or in any way affected, otherwise than We may at any time hereafter think proper to direct.

XIII. And We do hereby require and command all Our Officers and Ministers, Civil and Military, and all other the inhabitants of the Dominion, to be obedient, aiding, and assisting unto the Governor or such person or persons as may from time to time, under the provisions of these Our Letters Patent, administer the Government of the Dominion.

XIV. 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.

XV. And We do direct and enjoin that these Our Letters Patent shall be read and proclaimed at such place or places within Our Dominion as the Governor shall think fit.

In Witness whereof We have caused these Our Letters to be made Patent. Witness Ourself at Westminster, the Eighteenth day of November, in the Seventh year of Our Reign.

By Warrant under the King's Sign Manual.

MUIR MACKENZIE.

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2. INSTRUCTIONS passed under the Royal Sign Manual and Signet to the Governor and Commander-in-Chief of the Dominion of New Zealand.

Dated November 18, 1907.

EDWARD R. & I.

INSTRUCTIONS to Our Governor and Commander-in-Chief in and over Our Dominion of New Zealand, or in his absence to Our Lieutenant-Governor or other Officer for the time being administering the Government of Our said Dominion.

WHEREAS by certain Letters Patent bearing even date herewith We have constituted, ordered, and declared that there shall be a Governor and Commander-in-Chief (therein and hereinafter called the Governor) in and over Our Dominion of New Zealand (therein and hereinafter called the Dominion):

And whereas We have thereby authorized and commanded the Governor to do and execute all things that belong to his said office, according to the tenor of Our 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 are now or shall hereafter be in force in the Dominion:

Now know you that We do by these Our Instructions under Our Sign Manual and Signet direct and enjoin and declare Our will and pleasure as follows:—

I. In these Our Instructions, unless inconsistent with the context, the term 'the Governor' shall include every person for the time being administering the Government of the Dominion, and the term 'the Executive Council' shall mean the members of the Executive Council for the Dominion who are for the time being the responsible advisers of the Governor.

II. The Governor may, whenever he thinks fit, require any person in the public service to take the Oath of Allegiance, together with such other Oath or Oaths as may from time to time be prescribed by any Law in force in the Dominion. The Governor is to administer such oaths or cause them to be administered by some Public Officer of the Dominion.

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

IV. The Executive Council shall not proceed to the dispatch of business unless two members at the least (exclusive of the Governor or of the member presiding) be present and assisting throughout the whole of the meetings at which any such business shall be dispatched.

V. In the execution of the powers and authorities vested in him, the Governor shall be guided by the advice of the Executive Council, but if in any case he shall see sufficient cause to dissent from the opinion of the said Council, he may act in the exercise of his said powers and authorities in opposition to the opinion of the Council, reporting the same to Us without delay, with the reasons for his so acting.

In any such case it shall be competent to any Member of the said Council to require that there be recorded upon the

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

VI. The Governor 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 Dominion which he is to require from the clerks, or other proper officers in that behalf, of the said Parliament.

VII. The Governor shall not pardon or reprieve any offender without first receiving in capital cases the advice of the Executive Council, and in other cases the advice of one, at least, of his Ministers; and in any case in which such pardon or reprieve might directly affect the interests of Our Empire, or of any country or place beyond the jurisdiction of the Government of the Dominion, the Governor shall, before deciding as to either pardon or reprieve, take those interests specially into his own personal consideration in conjunction with such advice as aforesaid.

VIII. All Commissions granted by the Governor to any persons to be Judges, Justices of the Peace, or other officers, shall, unless otherwise provided by law, be granted during pleasure only.

IX. The Governor shall not quit the Dominion 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, except for the purpose of visiting the Governor-General of Australia, or the Governor of any neighbouring Colony 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 Dominion.

X. The temporary absence of the Governor 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 Our said 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 a departure from the Dominion within the meaning of Our said Letters Patent.

XI. From and after the date of the coming into operation of Our above-recited Letters Patent of even date, the Instructions issued to the Governor of the Colony of New Zealand under the Sign Manual and Signet of Her late Majesty Queen Victoria, bearing date the Twenty-sixth day of March 1892

shall, without prejudice to anything lawfully done thereunder, be revoked.

Given at Our Court at Saint James's this Eighteenth day of November 1907, in the Seventh year of Our Reign.

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3. COMMISSION under the Royal Sign Manual and Signet, appointing the Right Honourable the Earl of Liverpool, M.V.O., to be Governor and Commander-in-Chief of the Dominion of New Zealand.

GEORGE R.I.

George the Fifth, 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 Right Well-beloved Cousin, Arthur William de Brito Savile, Earl of Liverpool, Member of Our Royal Victorian Order, Greeting.

WE do, by this Our Commission under Our Sign Manual and Signet, appoint you, the said Arthur William de Brito Savile, Early of Liverpool, to be, during Our pleasure, Our Governor and Commander-in-Chief in and over Our Dominion of New Zealand, 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 Eighteenth day of November, 1907, or in any other Letters Patent adding to, amending, or substituted for the same, according to such Orders and Instructions as Our said Governor and Commander-in-Chief for the time being hath already received, and to such further Orders and Instructions 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 the Commission under the Sign Manual and Signet of His late Majesty, King Edward the Seventh, bearing date the Fourth day of May, 1910, appointing our Right Trusty and Well-beloved Counsellor John Poynder, Baron Islington, Companion of Our Distinguished Service Order (now also Knight Commander of Our Most Distinguished Order of Saint Michael and Saint George), to be Governor and Commander-in-Chief in and over Our Dominion of New Zealand and its Dependencies.

IV. And We do hereby command all and singular Our Officers, Ministers, and loving subjects in Our said Dominion,

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 Ninth day of September, 1912, in the Third year of Our Reign.

By His Majesty's Command,

L. HARCOURT.

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4. DORMANT COMMISSION passed under the Royal Sign Manual and Signet, appointing the Chief Justice or the Senior Judge for the time being of the Supreme Court of New Zealand to administer the Government of that Dominion, in the event of the death, incapacity, or absence of the Governor and Lieutenant-Governor (if any).

Dated December 18, 1907.

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 Trusty and Well-beloved the Chief Justice or the Senior Judge for the time being of the Supreme Court of New Zealand: Greeting

WHEREAS by Our Letters Patent under the Great Seal of Our United Kingdom of Great Britain and Ireland, bearing date at Westminster, the Eighteenth day of November 1907, We did constitute, order, and declare that there should be a Governor and Commander-in-Chief in and over Our Dominion of New Zealand, and did authorize, empower, and command Our said Governor and Commander-in-Chief to do and execute all things belonging to his said office as therein is more particularly set forth:

And whereas by Our said Letters Patent We did declare that, in the event of the death, incapacity, or removal of Our said Governor and Commander-in-Chief or of his departure from the Dominion, Our Lieutenant-Governor, or if there should be no such Officer in the Dominion, then such person or persons as We might appoint under Our Sign Manual and Signet, should during our pleasure administer the Government of the same:

Now know you that by this Our Commission, under Our Sign Manual and Signet, We do appoint you the Chief Justice for the time being of Our said Dominion of New Zealand, until Our further pleasure shall be signified, to administer the Government thereof in case of the death, incapacity, or removal, or of the departure from the Dominion of Our said Governor and Commander-in-Chief, as well as of Our Lieutenant-Governor

(if any), with all and singular the powers and authorities granted by Our said Letters Patent, or by any other Letters Patent, adding to, amending, or substituted for the same; and, in the said event, and in case of the death, incapacity or departure from Our said Dominion of the said Chief Justice for the time being, then We do appoint you, the Senior Judge for the time being of the Supreme Court of Our said Dominion, then residing therein, and not being under incapacity, to administer the Government thereof, with all the powers and authorities aforesaid. And We do hereby authorize and require you the said Chief Justice or the said Senior Judge for the time being, as the case may be, to exercise and perform the said powers and authorities according to such Instructions as Our said Governor and Commander-in-Chief or Our said Lieutenant-Governor hath already received or may hereafter receive from Us, under Our Sign Manual and Signet, or through one of Our Principal Secretaries of State, and according to such laws as are now or shall hereafter be in force in Our said Dominion.

Provided always that you, the Senior Judge, shall act in the administration of the Government only when and so often as you, the said Chief Justice, shall not be present within the Dominion, and capable of administering the Government.

And We do hereby appoint that from and after the date of the coming into operation of Our above recited Letters Patent of the Eighteenth day of November 1907, this Our present Commission shall supersede the Commission under the Sign Manual and Signet of Her late Majesty Queen Victoria dated the Twenty-second day of February, 1879, appointing the Chief Justice or the Senior Judge for the time being of the Colony of New Zealand, to be administrator thereof, in the events therein specified.

And We do hereby command all and singular Our Officers, Ministers, and loving subjects in Our said Dominion, 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 eighteenth day of December 1907, in the Seventh year of Our Reign.

By His Majesty's Command,

ELGIN.

APPENDIX C.

SHORT LIST OF BOOKS.

1. *For the subjects of the earlier chapters*:—Maning, Old New Zealand. Earle, Residence in New Zealand in 1827. Polack, The New Zealanders. Cowan, The Maoris of New Zealand. Smith, Hawaiki. Macmillan-Brown, Maori and Polynesian. Andersen, Maori Life in Aotea. Newman, Who are the Maoris? Transactions of the New Zealand Institute (various volumes). Journal of the Polynesian Society.

   Tasman, Journal of a Voyage to the Unknown South Land, 1642. Rogers, Australasia, Part I., Chap. I. Cook's Journal of his First Voyage, edited by Wharton. Cook's Voyages of Discovery. Journal of Sir Joseph Banks. Kitson, Life of James Cook. McNab, Historical Records of New Zealand, Vol. I.

   Wilson, Story of Te Waharoa. Clarke, Early Life in New Zealand. Craik, John Rutherford, the White Chief (edited by J. Drummond). McNab, Murihiku and the Southern Islands; The Old Whaling Days. Marsden, Life and Work of Samuel Marsden (edited by Drummond) Hempleman's Piraki Log edited by F. A. Anson). Jacobson, Tales of Banks Peninsula. Sherrin and Wallace, Early History of New Zealand. Travers and Stack, The Stirring Times of Te Rauparaha. Buick, Te Rauparaha. Collins, The English Colony in New South Wales (edited by Collier). Carrick, Historical Records of New Zealand South. Buick, The Treaty of Waitangi.

   Roth, Crozet's Voyage. Thomson, Story of New Zealand. E. J. Wakefield, Adventure in New Zealand.

   E. G. Wakefield, A Letter from Sydney; England and America; The Art of Colonisation.

2. *General works on New Zealand and its history*:—Rusden, History of New Zealand, 3 vols. Reeves, The Long White Cloud. Irvine and Alpers, Progress of New Zealand in the Century. Saunders, History of New Zealand, 2 vols. Downie Stewart and Le Rossignol, State Socialism in New Zealand. Scholefield, New Zealand in Evolution. Siegfried, Democracy in New Zealand. Bibliographies of New Zealand by James Collier and Dr. Hocken.

3. *Biographies*:—Kitson, James Cook. Garnett, Edward Gibbon Wakefield. Reid, Life and Letters of Lord Durham. Henderson, Sir George Grey. Collier, Life of Sir George Grey. Rees, Life and Times of Sir George Grey. Drummond, Life of Richard John Seddon.

4. *Works dealing with the Constitutional development and relations of the British Colonies*:—Egerton, Short History of British Colonial Policy. Beer, Old Colonial Policy. Lewis, Government of Dependencies. Jenkyns, British Rule and Jurisdiction Oversea. Todd, Parliamentary Government in the British Colonies. Keith, Responsible Government in the Dominions, 3 vols. Burge, Foreign and Colonial Law. Trotter, Government of Greater Britain. The Cambridge Modern History, VII.; X., xxi.; XI., xxvii ; and XII., xx. An Analysis of the System of Government throughout the British Empire (Macmillan). Jebb, The Imperial Conferences; The Britannic Question. "The Round Table" (quarterly, Macmillan).

5. *Works on the theory and practice of the British Constitution*:—Anson, Law and Custom of the Constitution, 3 vols. Dicey, Introduction to the Law and Custom of the Constitution. Ridges, Constitutional Law. Low, Governance of England. Lowell, Government of England, 2 vols. May, Constitutional History of England (edited by Erskine), 3 vols. Marriott, English Political Institutions. Broom, Constitutional Law. Redlich, Parliamentary Procedure. Maitland, Constitutional History of England. May, Parliamentary Practice. Ilbert, Legislative Methods and Forms.

6. *Reports, Official Publications, etc.*:—Reports of the New Zealand Company, Nos. 1 to 27. The Ordinances of the Legislative Council of New Zealand, 1841-50. The Ordinances of the Legislative Council of New Munster. Statutes and Charters cited. Journal of Proceedings of the General Assembly. Appendices to the Journals of the House of Representatives. The New Zealand Government Gazette. Reports of the Church Missionary Society. Parliamentary Papers Relating to New Zealand.

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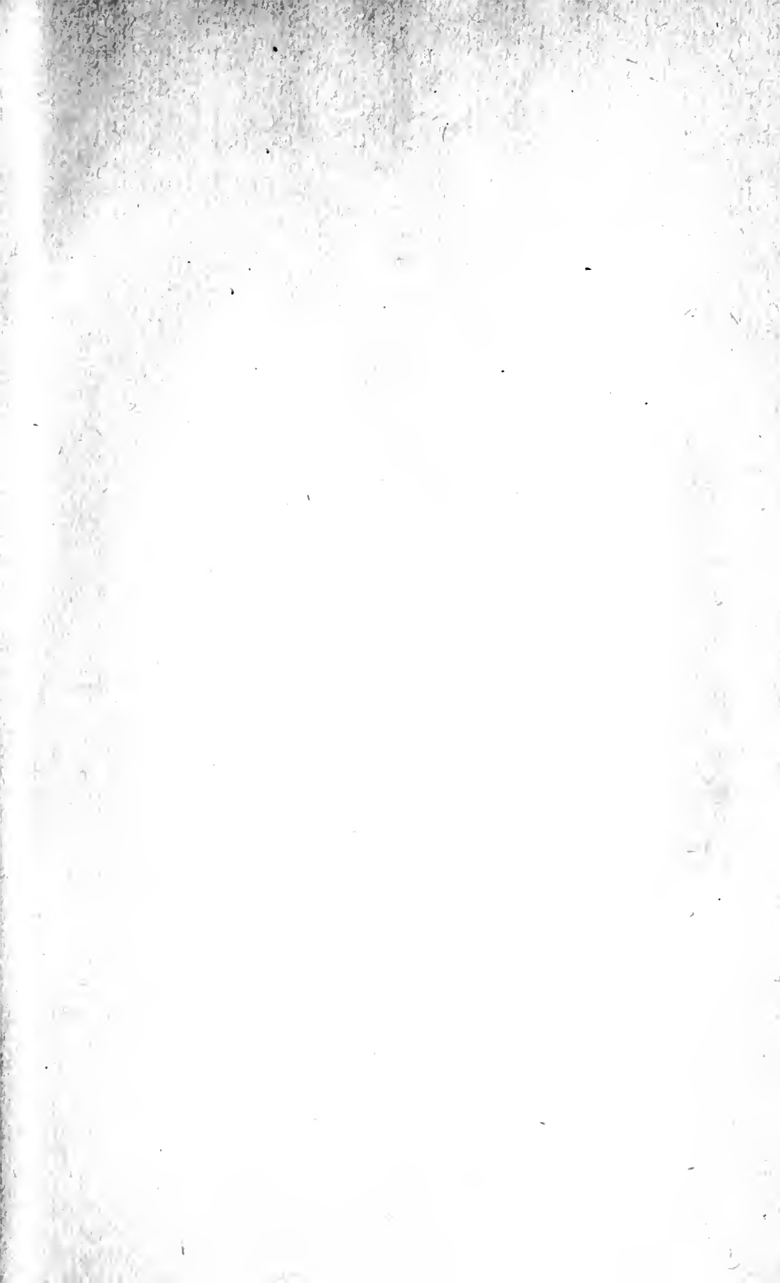

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