# APPENDIX E.

## CONSTITUTION AND FORM OF GOVERNMENT OF NEW SOUTH WALES.

(By ALEXANDER OLIVER, M.A., Barrister-at-Law, Parliamentary Draftsman of that Colony.)

New South Wales,—the name given to the eastern coast of New Holland by Captain Cook, and by which name that illustrious discoverer took possession of it, "in right of His Majesty King George the Third," on the 21st August, 1770,—originally comprehended the enormous territory lying between Cape York, in latitude 10° 37′, and South Cape, in latitude 42° 29′ (inclusive of all adjacent islands within those limits), and extending westward to the 135th meridian of east longitude. This was the area allotted to the colony of New South Wales by Governor Phillip's commission, as announced to the first colonists on the 7th February, 1788; and, roughly speaking, it constituted about half the Australian continent. But by the separation into independent colonies—first of Tasmania (then known as Van Diemen's Land), in 1825; then of South Australia, in 1836; afterwards of Victoria, in 1851; and finally of Queensland, in 1859—the original limits of New South Wales have been vastly curtailed, and now embrace an area computed at 316,320 square miles, and lying between the 28th and 37th parallels of south latitude and the 141st and 154th meridians of east longitude.

The alteration of the territory at first appropriated for the establishment of this colony has been accompanied by an equally marked alteration in its form of government. Originally a Crown colony of the strictest type, in which the Crown governed by its representative, the Governor, who himself constituted the Executive and the Legislature, New South Wales, having passed through various intermediate stages of nominee and mixed Legislative Councils, finally, by the present Constitution Act, which, with some modifications, had received the Queen's sanction on the 16th July, 1855, and had been proclaimed in Sydney on the 24th of November of the same year, became possessed of representative institutions, modelled, as closely as was practicable, upon those principles of responsible government which have for centuries been a distinguishing characteristic of the mother country. The first legislative ordinance on the statute book of this colony bears date the 28th September, 1824, and was passed a few weeks after the gazetting of the first Legislative Council (11th August, 1824). It was an Act declaring that promissory notes and bills of exchange payable in Spanish dollars should be deemed as valid for all purposes as if they had been drawn payable in sterling money. When that Act was passed the Legislature consisted of the Governor (Sir Thomas Brisbane) and "five principal officers," who, in terms of the Secretary of State's despatch of the 19th January, 1824, were empowered "to make laws and ordinances for the peace, welfare, and good government" of the colony.

In that year the population of the colony stood at 32,702 souls, and its revenue at £49,471. Sixty years afterwards (1884) the population was estimated at 921,268 souls, and the revenue at £7,117,592. The former will probably reach one million during the year 1886.

During that period, both the political system and the apparatus of government have been entirely remodelled; and, so far as the present Constitution of the colony is a factor in its government, it is strictly true to say that New South Wales has never furnished an exception to the general truthfulness of that declaration of Sir Arthur Helps—"that the British people, and their near relations in America and the colonies, are the most governable people on the face of the earth."

Under the present Constitution Act, 18 and 19 Vict., cap. 54, there have been twelve Parliaments, including the Parliament convened on the 17th November, 1885; the first having been assembled on the 22nd May, 1856. The statutory duration of the representative Chamber was originally fixed at 5 years; but by an Act passed in 1874 (37 Vict., No. 7) the duration of the Assembly was limited to 3 years, to which term its existence still remains limited.

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NOTE.—The writer, in dealing with some of the subjects treated after page 696, has made frequent use of a valuable paper written by Mr. A. H. Simpson, Barrister-at-Law, for the Government of this colony, but not yet published (Decr., 1885). In adopting Mr. Simpson's opinions, however, care has been taken to consult Todd, Merivale, and other authorities whenever possible.

The Constitution Act, though it introduced into New South Wales the principle of responsible government, in no way abrogated or abridged the supreme authority of the Sovereign. All laws are still passed in the name of Her Majesty, but "by and with the advice of the Legislative Council and Legislative Assembly;" and the whole apparatus of government is, legally, the Queen's, though exercised in her name by her representative, the Governor, acting with the advice and through the medium of his responsible advisers, the Ministers for the time being.

The Governor, though chief of the Executive, and representative of the Sovereign, is not a factor in the Legislature, except so far as the Constitution Act, the letters patent constituting the office of Governor, and his instructions repose in him certain powers and impose on him certain duties in respect of the summoning, proroguing, and dissolving of Parliament, the appointment of Members of the Legislative Council, and the exercise by the Legislature of certain functions. The general scope and character of these powers and duties will be understood from the following *précis*:—

## The Governor.

Since the year 1879, the practice of appointing the Governor by letters patent under the great seal has been discontinued.* The office of Governor is now constituted and declared by letters patent, not *pro hâc vice*, but permanently, and by a standing commission. The Governor receives his appointment by commission under the sign manual and signet, which recites the letters patent of the 29th April, 1879, as well as the instructions issued also under sign manual and signet, in further signification of the Sovereign's "will and pleasure." In terms of the letters patent, the Governor is authorized and directed "to do and execute all things that belong to his office, according to the tenor of the 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 colony." The tenure of the office of Governor is now generally limited to six years.

In the event of the death, incapacity, or removal of the Governor, or of his departure from the colony, the Government is to be administered (1) by the Lieutenant-Governor, or, if there be no such officer in the colony, (2) by the Administrator, according to the directions contained in the letters patent and the instructions.

The Lieutenant-Governor is appointed by a commission directed to Sir Alfred Stephen, dated 30th April, 1879; and the Administrator is appointed by a commission of the same date, directed to the President of the Legislative Council for the time being.

The Lieutenant-Governor, or, in his absence, the Administrator, is also empowered to execute the office of Governor during any temporary absence of the Governor from the seat of government. The absences of the Governor from the colony are regulated by the instructions. He may not leave the colony without special leave of the Sovereign, except for the purpose of visiting the Governor of a neighbouring colony, for periods not exceeding one month at any one time, nor exceeding in the aggregate one month for every year's service in the colony; but it is not considered a departure from the colony to leave it for any period, not exceeding one month, if the Governor shall have previously, in writing, informed the Executive Council of his intended absence, and have duly appointed a Deputy pursuant to the letters patent.

This Deputy must be in the first instance the Lieutenant-Governor; but, if there be no such officer, the Governor can appoint any person he pleases.

The office of Governor is thus provided for by three different commissions, and the office of Deputy, during temporary absences of the Governor, is provided for on each occasion by an instrument under the great seal of the colony, pursuant to section XIII. of the letters patent. The office may therefore be executed by—(1) the Governor himself, (2) the Lieutenant-Governor, (3) the Administrator, (4) the Governor's Deputy.

Taking the letters patent and instructions as constituting together one code declaring the Governor's functions, they may be thus summarized:—

1. The Governor is the keeper of the great seal of the colony, and under that seal all grants and dispositions of lands which may lawfully be granted or disposed of by the Crown must pass.
2. The Governor appoints, under the great seal of the colony, all members of the Executive Council. He also summons that council, and presides at its meetings, but in his absence a member appointed by him or the senior member. (When there is a vice-president of the Executive Council the duty of presiding in the absence of the Governor devolves on him.)

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* This change, which was first carried out in the governorship of Lord Augustus Loftus, was proposed by Sir Alfred Stephen, the present Lieutenant-Governor of the colony, during the governorship of Sir Hercules Robinson.

3. The Governor appoints, in the Queen's name, all such judges, commissioners, justices of the peace, and other "necessary officers and Ministers of the colony" as the Queen herself might lawfully appoint; and he is empowered to remove or suspend from the exercise of his office any officer appointed by commission or warrant. All such commissions, unless the law otherwise provides, are to be granted during pleasure only.
4. The Governor exercises the Royal prerogative of pardon in respect of all offences committed within the colony or for which the offender may be tried in the colony, either by pardoning informing accomplices or by pardoning the principal offender, or remitting his sentence, or respiting its execution. He also remits fines, penalties, and forfeitures due or accrued to the Crown. He cannot, however, pardon or remit on the condition of removal from the colony, except in the case of offences of a political nature. Upon all capital convictions the Governor is required by the 12th section of the instruction to call upon the presiding judge for a written report of the case, which is considered at the first convenient meeting of the Executive, which the judge himself may also be required to attend and produce his notes taken at the trial. The Governor must not pardon or reprieve any capital convict "unless it shall appear to him expedient so to do upon receiving the advice of the Executive Council, but in all such cases he is to decide either to extend or to withhold the pardon or reprieve according to his own deliberate judgment, whether the members of the Executive Council concur therein or otherwise." If the Governor dissents from the advice of his Ministers, he is required to enter on the minutes a full statement of his reasons.
5. The Governor exercises the Royal authority also in appointing the members of the Legislative Council, in summoning, proroguing, and dissolving "any legislative body" now or hereafter to be established within the colony. The summonses to serve in the Legislative Council are under the great seal of the colony, and are subject to the provisions of the Constitution Act (18 & 19 Vict. c. 54).
6. In the execution of these powers it is expressly provided (by Article VI. of the Instructions) that the Governor is to consult the Executive Council in all cases except such as are of such a nature that, in his judgment, the Queen's service "would sustain material prejudice" by so doing, or "when the matters to be decided are too unimportant to require the council's advice," or "too urgent to admit of their advice being given;" but in all such urgent cases the Governor must at the earliest practicable period communicate to the council the measures which he has adopted and his reasons for adopting them. But it is also specifically declared that the Governor may act in opposition to the advice of the Executive Council if he shall in any case think fit so to do, but in any such case he is required to fully report the matter for the information of the Sovereign (*i.e.*, to the Secretary of State for the Colonies) "by the first convenient opportunity, with the grounds and reasons of his action."
7. The Governor is the Sovereign's delegate, for the purpose of giving Her assent to or dissent from all Bills passed by the Legislature, also of reserving any such Bill for the signification of Her pleasure. In the exercise of this important function the Governor is guided to a large extent by the 10th article of his instructions; but in practice it is customary for the Governor to obtain the opinion of the law officers of the Crown (the Attorney-General) before giving his assent to any Bill which may be presented to him. There are eight kinds of Bills, however, to which the Governor is expressly prohibited from giving the Queen's assent. They are as follow:—
   (1.) Divorce Bills. (This is always understood as referring to private Divorce Bills.)
   (2.) Bills granting land, money, or other donation or gratuity to the Governor.
   (3.) Bills affecting the currency.
   (4.) Bills imposing differential duties other than are allowed by the "Australian Colonies Duties Act 1873."
   (5.) Bills of which the provisions appear inconsistent with imperial treaty obligations.
   (6.) Bills interfering with the discipline or control of Her Majesty's forces in the colony by land or by sea.
   (7.) Bills of an extraordinary nature and importance, whereby the Queen's prerogative, or the rights and property of Her subjects not residing in the colony, or the trade and shipping of the United Kingdom and its dependencies, may be prejudiced.

(8.) Bills containing provisions to which the Queen's assent has been once refused or which have been disallowed, unless they contain a clause suspending their operation until signification of the Queen's pleasure, or unless the Governor is satisfied that there is urgent necessity for bringing any such bill into immediate operation, in which case he is authorized to assent to the Bill in the Queen's name, if it is not repugnant to the law of England or inconsistent with imperial treaty obligations; and in every such case he is required to transmit the Bill to Her Majesty, together with his reasons for assenting to it

8. The Governor is further required, to the utmost of his power, to promote religion and education among the "native inhabitants" of the colony, and especially to take care to protect them in their persons and in the free enjoyment of their possessions, and, by all lawful means, to prevent and restrain all violence and injustice which may in any manner be practised or attempted against them.

The practice in assenting to or reserving Bills is regulated by sections 31–33 of 5 and 6 Vict., cap. 76; 7 and 8 Vict., cap. 74, sec. 7; and 13 and 14 Vict., cap. 59, secs. 13, 32, and 33. The short effect of these enactments is that no reserved Bill has any force in the colony until the Queen's assent thereto has been communicated by the Governor, by message, to the Legislative Council, or proclamation; and that the Queen may, within two years after the receipt of any Bill by the Secretary of State to which the Queen's assent has already been given by the Governor, declare her disallowance of such Bill; in which case the Bill becomes null and void by message of the Governor or proclamation signifying such disallowance. In the case of reserved Bills, they are laid before the Queen in Council, who may assent to them within a period of two years from the day on which they were presented to the Governor.

All Acts of Parliament are required, by 7 Vict., No. 16, sec. 9, to be enrolled and recorded in the Office of the Registrar-General, at Sydney, within ten days of their becoming law.

In addition to or extension of the powers conferred on the Governor by the letters patent and his instructions, the Constitution and Electoral Acts cast upon him a variety of functions in connexion with those of the Legislature or necessary for the purposes of administering the Queen's government. Thus, it is the Governor who appoints the President of the Legislative Council; summons the Legislative Assembly; prorogues or dissolves it; appoints the day on which, after a general election, the Assembly shall proceed to the despatch of business; fixes the time and place for every Parliamentary Session; notifies the demise of the Sovereign; approves of the standing orders of each Chamber; appoints, with the advice of the Executive Council, all public officers, except such minor officers whose appointment is vested in heads of departments, and, without such advice, appoints his responsible Ministers; issues all warrants for the payment of money from the revenue for any authorized service; issues the writs for general elections; and, when there is no Speaker, or in his absence, issues writs to fill vacancies in the Assembly; and appoints the returning officers of all electoral districts, and the polling-places; he also issues the writs for the additional members under the "expansive" clauses of the Electoral Act.

In reference to these powers, it may be mentioned that the Governor has very rarely exercised in this colony, in constitutional times, the power of vetoing or refusing to give the Queen's assent to a Bill. The course taken is to reserve any Bill which in his opinion is open to any of the objections enumerated in his instructions. When the Governor dissolves Parliament he performs that act by proclamation, which, technically speaking, only dissolves the Assembly, inasmuch as the Members of the Legislative Council are summoned for life, but the dissolution of the Assembly nevertheless suspends all the functions of the Legislative Council, and is, in effect, a dissolution of Parliament for all practical purposes.

In exercising the prerogatives of summoning, proroguing, or dissolving Parliament the Governor is in nearly all cases guided by the advice of the Ministry, and the two first of them can scarcely give rise to questions of difficulty. The last, however, may easily do so. The relations which exist between the Ministry and Parliament in this colony have, to a very large degree, been moulded on the constitutional rules obtaining in England, viz., that the Cabinet must consist "of (1) Members of the Legislature, (2) holding the same political views, and chosen from the party possessing a majority in the House of Commons, (3) carrying out a concerted policy, (4) under a common responsibility to be signified by a collective resignation in the event of Parliamentary censure, and (5) acknowledging a common subordination to one chief Minister."

Parliamentary censure involving loss of office can only be pronounced by the Lower House. This follows necessarily from rule 2. The support of a majority of the popular Chamber is necessary to enable Ministers to take office; the withdrawal of that support involves their resignation. This withdrawal may be shown in three ways:

by (1) a formal vote of censure or of want of confidence; (2) a vote conveying disapproval of specific conduct; (3) the rejection of important legislative measures introduced by the Ministry. In any such case it is the duty of Ministers to resign, or to advise the Sovereign to dissolve Parliament in order that the question may be referred to the country.

These rules were tacitly adopted by this colony, with the written constitution of which they in fact form part. The question, however, has arisen more than once, whether the Governor is bound to grant a dissolution on the recommendation of Ministers who have been defeated. In Victoria the point was considered in July, 1881, when Mr. Berry, after a defeat by a majority of three votes, recommended the Governor to dissolve Parliament, setting out in a minute of the 4th July, 1881, various reasons in support of his advice, and stating that there was no instance in England since 1832 when a dissolution had been refused to a Minister who requested it. To this the Marquis of Normanby replied by a minute of 5th July declining to accept the advice of Ministers. He said—

"The Governor cannot admit the principle advanced by Ministers that a Premier has a right to a dissolution whenever he may advise one. It may be true that in England there may be no direct evidence of a Minister having been refused one, but the Governor would ascribe that circumstance, first, to the fact that English statesmen have been reluctant to advise a dissolution except when their claim was undoubted, and, secondly, to the circumstance that the same publicity is not given in England to the communications between the Crown and the Government as is done in the colonies, and he feels perfectly confident that under circumstances such as those which exist here at present no Minister would ask for a dissolution.

"If the principle were once admitted that a Minister had a right to a dissolution whenever he saw fit to advise one, a vital blow would be struck at the power and independence of Parliament. The Minister would then become the master of Parliament instead of the servant of the Crown, and the knowledge that a vote against the Government might terminate its existence would act as a constant drag upon the independence of Parliament and the exercise of that supervision over the actions of the Government which it is its right and duty to exercise.

"It is the duty of the Governor to act fairly and impartially between all parties, and after a careful consideration of the whole circumstances of the case, he feels that he would not be justified in dissolving the present Parliament, which has not yet completed its first session, when there is no great question of public interest at issue between the Government and the House which could justly be referred to the country, until he has convinced himself that no other combination can be arrived at by which the Government of the colony can be carried on; and he must therefore, at any rate at present, decline to accept the advice of Ministers."

A somewhat similar case arose on two occasions in this colony in 1877. In March of that year, Sir John Robertson, the then Premier, after a defeat in the Assembly, recommended a dissolution; and again, in September of the same year, his successor, Sir Henry Parkes, recommended the same course. Supplies for the year had not been voted by September, and in each case the Governor (Sir H. Robinson) declined to consent to a dissolution unless supplies were previously provided for. In each case the House refused to grant supplies, and the Ministers resigned.

It can hardly be doubted that the conduct of the Governor in either colony was constitutional. Unless a Minister has a right to demand a dissolution, a contention which it would be very difficult to sustain, it is clearly the duty of the Governor to weigh all the circumstances of the case, and only to grant a dissolution if it appears to be for the public interest so to do. A dissolution when the Crown is without supply is obviously a grave evil; it either leaves the public servants unpaid, thereby subjecting them to great and unmerited hardships, or it necessitates the money being found and paid irregularly, a proceeding which in 1872 the Parliament of New South Wales emphatically condemned. It might, however, even in such a case, be right to grant a dissolution if thereby still graver evils were avoided.

As a general rule, it is usual to grant a dissolution at the request of a new Ministry if the House has been elected whilst their predecessors were in office. A Government is supposed to have an advantage in a general election, and a new Ministry may fairly object to carry on the Government with a House elected under influences adverse to them. For a Governor, however, to promise a dissolution as a condition precedent to the construction of an Administration or the acceptance of the position of his responsible advisers has generally been thought unconstitutional, or, at all events, wrong in principle, as it places Parliament at the mercy of a Ministry independently of their policy.

With respect to the prerogative of granting pardons or remissions of sentences or respites of execution, the Governor's instructions are thus explained in a despatch of Lord Carnarvon of the 4th May, 1875:—

"It should therefore be understood that no capital sentence may be either carried out, commuted, or remitted, without a consideration of the case by the Governor and his Ministers assembled in Executive Council. A minor sentence may be commuted or remitted by the Governor, after he has duly considered the advice either of his Ministers collectively in Executive Council, or of the Ministers more immediately responsible for matters connected with the administration of justice; and whether such advice is or is not tendered in Executive Council, it would seem desirable that, whether also given orally or not, it should be given in writing.

"Advice having been thus given to the Governor, he has to decide for himself how he will act. Acting as he does in an Australian colony under a system of responsible government, he will allow greater weight to the opinion of his Ministers in cases affecting the internal administration of the colony than in cases in which matters of Imperial interest or policy or the interests of other countries or colonies are involved. For example, in two recent cases in New South Wales, (1) when a kidnapper on the high seas, tried and sentenced under an Imperial Act by the colonial court, was pardoned; and (2) when a sentence was commuted on condition of exile from the colony, questions arose in regard to which it could not be contended that the affairs and interests of New South Wales alone were involved.

"It is true that a Governor may (and indeed must, if in his judgment it seems right) decide in opposition to the advice tendered to him. But the Ministers will have absolved themselves of their responsibility; and though in an extreme case, which for the sake of argument may be stated, although it is not likely to arise in practice, Parliament, if it disapproves the action taken, may require the Ministers to resign, either on the ground that they tendered wrong advice, or that they failed to enforce recommendations deemed to be right, I do not think the great principle of Parliamentary responsibility is impaired by this result. On the other hand, a Governor who, by acting in opposition to the advice of his Ministers, has brought about their resignation, will obviously have assumed a responsibility for which he will have to account to Her Majesty's Government.'

The despatch then points out that if the responsibility rested with the Ministers, political and social pressure might be brought to bear on them with injurious results to the administration of justice.

In connexion with the exercise by the Governor of the prerogative of chief command over the forces, it would seem that this is to some extent an exception to the rule that every exercise of the prerogative is subject to the control of Parliament.

The Governor's powers as Commander-in-Chief are regulated and the existence of a standing force made possible by the Military and Naval Forces Regulation Act 1871, which renders the military and naval forces subject to the Imperial Mutiny Act and the Naval Discipline Acts. This Act vests the command over the military and naval forces of the colony in the "Governor"; that term being defined to mean "the Governor with the advice of the Executive Council," *unless the context shall otherwise indicate.* A similar course is pursued in the Volunteer Regulation Act 1867, which makes the Governor, as the Queen's representative, Commander-in-Chief of the local volunteer forces; gives him power to appoint officers, to make regulations for the general government, &c., of the volunteer forces, and to call them out in case of necessity; "the Governor," as in the former statute, being defined to mean "the Governor with the advice of the Executive Council," *if this meaning is not inconsistent with the context or subject matter.* This obviously leaves open in both Acts the question when the context or subject matter excludes the statutory definition, and requires the Governor to act on his own responsibility. Looking at the constitutional position of the Commander-in-Chief in the mother country, it would be difficult to imagine a case in which the Governor would not be bound to act under Ministerial advice, although in some matters, *e.g.*, questions of discipline, the initiative might, for convenience' sake, be left to the Governor personally. In other parts of the British colonial empire the Governor exercises no more authority in military matters than he does in the routine of any other department of local administration, and though the statutes above referred to may not be very clearly worded, there ought to be little doubt that this is his true position in New South Wales.

In this colony the Colonial Secretary occupies the place corresponding to the Secretary for War in England, and is the adviser of the Governor in all matters connected with the naval and military establishments not sufficiently important to come before the Executive Council. In the event of a war breaking out, the appointment of an officer to take active command over the colonial forces would doubtless, in accordance with constitutional precedent, be made by the Cabinet.

The position of the Governor as Commander-in-Chief does not, without special appointment from Her Majesty, give him power to take command of Imperial troops in the colony. That duty belongs to the military officer appointed by the Home Government. Except in cases of actual invasion, it is the duty of the Governor, acting with the advice of his Ministers, to determine the objects and the extent for and to

which the Imperial troops are to be employed, but he is bound to consult the commanding officer, and to leave to him the decision of all military questions.

It remains to consider the far more difficult question of the power of the Governor to proclaim martial law. There is no doubt that this may be done by the Governor with the consent of Parliament; but this is little more than a truism, for of course the legislative power may enact any laws it thinks proper. The difficulty arises where the emergency is too sudden to obtain the sanction of Parliament, and this would generally be the case. On the other hand, some authorities appear to lay down that the Governor has power, either with the advice of Ministers or in his own discretion, to suspend all law, and hand over the lives and properties of Her Majesty's subjects to the arbitrary rule of military tribunals; on the other, that there is no power in the constitution to meet such a case, and that the Governor must encounter the danger by proclaiming martial law on his own responsibility, and trust to Parliament to indemnify him afterwards.

The power to proclaim martial law must rest either on statute or the prerogative of the Crown, and as there is no statute conferring such a power in this colony, it must, if existing at all, be a matter of prerogative.

It is clear from authority that all powers, which can in any way be necessary to put down rebellion or riot, can be exercised by the Governor and other authorities as a matter of common law, quite apart from any proclamation of martial law; and the duty of exercising these powers, however perilous it may be, is in a special degree incumbent on the Governor, as being entrusted with the powers of government for preserving the lives and property of the people and the authority of the Crown. It is claimed, however, by some writers that martial law goes much further than this, and enables the authorities not merely to use all necessary means for putting down rebellion or riot, but afterwards to punish those who have engaged in it, or are suspected of having done so, by trying them before military tribunals. There is a vastly preponderating weight of authority that in this sense "martial law" is unknown to the law of England. It may be said, if this be so, that the proclamation of martial law is useless. But this is not the case. Although it confers no power on the Governor which he would not have possessed without it, its object is sufficiently explained in a joint opinion given in 1838 by Sir J. Campbell and Sir R. M. Rolfe, the Attorney and Solicitor General of England, afterwards Lords Campbell and Cranworth. "The object of it [the proclamation] can only be to give notice to the inhabitants of the course which the Government is obliged to adopt for the purpose of restoring tranquillity. In any district in which, by reason of armed bodies of the inhabitants being engaged in insurrection, the ordinary course of law cannot be maintained, we are of opinion that the Governor may, even without any proclamation, proceed to put down the rebellion by force of arms, as in case of foreign invasion, and for that purpose may lawfully put to death all persons engaged in the work of resistance. The right of resorting to such an extremity is a right arising from and limited by the necessity of the case, *quod necessitas cogit, defendit.* For this reason we are of opinion that the prerogative does not extend beyond the case of persons taken in open resistance, and with whom, by reason of the suspension of the ordinary tribunals, it is impossible to deal according to the regular course of justice. When the regular courts are open, so that criminals might be delivered over to them to be dealt with according to law, there is not, as we conceive, any right in the Crown to adopt any other course of proceeding. Such power can only be conferred by the Legislature. The question how far martial law, when in force, supersedes the ordinary tribunals can never, in our view of the case, arise. It cannot be said in strictness to *supersede* the ordinary tribunals, inasmuch as it only exists by reason of those tribunals having been already practically superseded."

In the year 1867, in consequence of the events which had taken place in Jamaica, certain rules were drawn up on the subject of martial law and appended to a circular despatch sent to the different Colonial Governors. These rules will be found in Parliamentary Papers, Session 1867.

Happily, it has never been necessary to proclaim martial law in this colony, but such an event nearly happened in 1861. Three men were arrested in Burrangong for a brutal assault on the Chinese, and a body of miners, estimated at from 800 to 2,000, attempted to release them by force. The attack was repulsed, but the Superintendent of the Mounted Patrol, apprehending a fresh attack, withdrew his force of 57 men to Yass, leaving the gold-field unprotected. He pressed for as strong a force of military as could be spared. The Executive Council met, and despatched an officer to the spot with as strong a force as they could, requesting him to report by telegram whether, in his opinion, the proclamation of martial law was necessary. In anticipation of his report, the proclamation was actually prepared for the Governor's signature, but fortunately it became unnecessary to issue it.

Annexed is a list of all the Governors of New South Wales, from 1788 to 1885, with the dates of their assumption of and retirement from office:—

LIST OF GOVERNORS OF NEW SOUTH WALES.

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| Captain A. Phillip, R.N. ... ... | From | 26 | Jan., | 1788 | to | 10 | Dec., 1792. |
| Captain F. Grose (Lieutenant-Governor)... | ,, | 11 | Dec., | 1792 | ,, | 12 | Dec., 1794. |
| Captain Paterson, N.S.W. Corps (Lieutenant-Governor) | ,, | 13 | Dec., | 1794 | ,, | 1 | Sep., 1795. |
| Captain Hunter, R.N. ... ... | ,, | 7 | Sep., | 1795 | ,, | 27 | Sep., 1800. |
| Captain P. G. King, R.N. ... ... | ,, | 28 | Sep., | 1800 | ,, | 12 | Aug., 1806. |
| Captain W. Bligh, R.N. ... ... | ,, | 13 | Aug., | 1806 | ,, | 26 | Jan., 1808. |
| During Governor Bligh's suspension the Government was successively administered by— | | | | | | | |
| Lieutenant-Colonel G. Johnstone * / Lieutenant-Colonel Foveaux * / Colonel William Paterson * | ,, | 26 | Jan., | 1808 | ,, | 28 | Dec., 1809. |
| Major-General L. Macquarie ... ... | ,, | 1 | Jan., | 1810 | ,, | 1 | Dec., 1821. |
| Major-General Sir T. Brisbane, K.C.B. ... | ,, | 1 | Dec., | 1821 | ,, | 1 | Dec., 1825. |
| Colonel Stewart, 3rd Regiment or Buffs (Acting Governor) | ,, | 6 | Dec., | 1825 | ,, | 18 | Dec., 1825. |
| Lieutenant-General R. Darling ... ... | ,, | 19 | Dec., | 1825 | ,, | 21 | Oct., 1831. |
| Colonel Lindsay, C.B. (Acting Governor) | ,, | 22 | Oct., | 1831 | ,, | 2 | Dec., 1831. |
| Major-General Sir Richard Bourke, K.C.B. | ,, | 3 | Dec., | 1831 | ,, | 5 | Dec., 1837. |
| Lieutenant-Colonel K. Snodgrass (Acting Governor) | ,, | 6 | Dec., | 1837 | ,, | 23 | Feb., 1838. |
| Sir George Gipps ... ... ... | ,, | 24 | Feb., | 1838 | ,, | 11 | July, 1846. |
| Sir Maurice O'Connell ... ... ... | ,, | 12 | July, | 1846 | ,, | 2 | Aug., 1846. |
| Sir Charles A. Fitz Roy ... ... | ,, | 3 | Aug., | 1846 | ,, | 17 | Jan., 1855. |
| Sir William Thomas Denison, K.C.B. ... | ,, | 20 | Jan., | 1855 | ,, | 22 | Jan., 1861. |
| Lieutenant-Colonel John F. Kempt (Administrator) | ,, | 23 | Jan., | 1861 | ,, | 21 | March, 1861. |
| The Right Honorable Sir John Young, Bart., P.C., K.C.B., G.C.M.G. (Administrator) | ,, | 22 | March, | 1861 | ,, | 15 | May, 1861. |
| Ditto, ditto, Governor-in-Chief ... ... | ,, | 16 | May, | 1861 | ,, | 24 | Dec., 1867. |
| Sir Trevor Chute, K.C.B. (Administrator) | ,, | 25 | Dec., | 1867 | ,, | 7 | Jan., 1868. |
| The Right Honorable the Earl of Belmore (P.C.) | ,, | 8 | Jan., | 1868 | ,, | 22 | Feb., 1872. |
| Sir Alfred Stephen, Knt., C.B. (Administrator) | ,, | 23 | Feb., | 1872 | ,, | 2 | June, 1872. |
| Sir Hercules George Robert Robinson, G.C.M.G. (Governor-in-Chief) | ,, | 3 | June, | 1872 | ,, | 19 | March, 1879. |
| Sir Alfred Stephen, Knt., C.B., K.C.M.G. (Lieutenant-Governor) | ,, | 20 | March, | 1879 | ,, | 3 | Aug., 1879. |
| The Right Honorable Sir Augustus William Frederick Spencer Loftus, P.C., G.C.B. | ,, | 4 | Aug., | 1879 | ,, | 10 | Nov., 1885. |
| Sir Alfred Stephen, C.B., G.C.M.G., (Lieutenant-Governor) | ,, | 10 | Nov., | 1885 | ,, | 12 | Dec., 1885. |
| The Right Honorable Baron Carrington, P.C., G.C.M.G. | ,, | 12 | Dec., | 1885 | ,, | (Still in office). | |

## THE EXECUTIVE.

The Executive Council consists of the Colonial Secretary, the Colonial Treasurer, the Attorney-General, the Secretary for Lands, the Secretary for Public Works, the Minister of Justice, the Minister of Public Instruction, the Secretary for Mines, and the Postmaster-General, and sometimes a tenth is appointed as Vice-President of the Executive Council without a portfolio. These form the Governor's responsible advisers, and their responsibility is twofold, depending (1) on their retaining the confidence of the Governor; (2) on their retaining the confidence of the majority of the Assembly. The Governor's confidence is only withdrawn in very exceptional cases, and in the last resort, as will be seen further on, so that for all practical purposes Ministerial responsibility means responsibility to Parliament. That responsibility may, however, as in England, be anticipated on appeals to the constituencies, in which case the "direct action of the electors at the polling booths" may effect a change in the Governor's advisers independently of an adverse vote in Parliament. Any member of the Legislative Assembly vacates his seat by accepting any of the executive offices above mentioned, and has to be re-elected. It is rather the exception in this colony for more than one responsible Minister to have a seat in the Legislative Council; at the

* All of the New South Wales corps, afterwards 102nd Regt.

present time (December, 1885) the only member of the Cabinet in that Chamber is the Attorney-General.

The principles of Ministerial responsibility to Parliament and Parliamentary control over Ministers, as well as the obligation of the Governor, as the representative of the Sovereign, to select as his responsible advisers only such persons as enjoy the confidence of a majority of the representatives of the people, are constitutional axioms in this colony, having been transferred with the constitution of which they form so important a part, but with some necessary modifications arising from the fact that the colony is not an independent sovereign power but is a part of the British Empire. This renders it necessary that the representative of the Crown in the colony should not assent, as a matter of course, to the will of the local Parliament, but should in all cases which affect Imperial interests consult the Home authorities. For every act of the Crown represented by the Governor some Ministers are responsible to Parliament; in local matters the responsibility lies on the Ministry of the colony; in matters of Imperial interest the immediate responsibility lies on the Governor; the ultimate on the Home Ministry, to be enforced by the Imperial Parliament.

There are two cases in which the Crown acts directly, and not through the medium of the Governor or other representative: (1) the ultimate appeal from the decision of any Colonial tribunal lies to the Judicial Committee of the Privy Council; (2) the Crown retains the direct exercise of its prerogative as the fountain of honour in the bestowal of titular distinctions and honours.

Where the Crown does not act directly, it acts through the Governor as its representative. In all local matters it is the Governor's duty to be guided by the advice of his Ministers, and he should, as a general rule, refrain from interference with them, making, as Earl Grey expresses it, "a judicious use of the influence rather than of the authority of his office"; but he is bound to obey the law, and should refuse his sanction to any act which appears to him illegal.

In cases of routine the Governor acts, as a matter of course, on the advice of his Ministers, or even of one of them to whose department the matter in question may belong; but in matters of importance he is bound to be satisfied of the wisdom of the course proposed. For this purpose it is necessary that the fullest information should be afforded to him, and the fullest opportunity given of discussion with his Ministers. It should be his aim to co-operate cordially with them so far as possible; but in extreme cases, and in the last resort, he is entitled to dismiss his Ministers and seek other advisers. This was clearly laid down in a despatch of Sir M. Hicks-Beach to the Governor-General of Canada, 3 July, 1879:—"There can be no doubt that" the Governor "has an unquestionable constitutional right to dismiss his Ministers if from any cause he feels it incumbent on him to do so." This does not infringe the constitutional doctrine; if the Governor succeeds in forming a new Ministry, they are responsible to Parliament for the Governor's act in dismissing their predecessors; and if they are supported by the Lower House, or by the country if a dissolution takes place, the question is at an end. If they do not receive that support, the Governor must either give way or resign.

Where Imperial interests are involved, the Governor is the guardian of those interests, and cannot shelter himself behind the responsibility of his Ministers. He should communicate with the Home authorities. If they do not uphold his decision, he must yield or resign; while, if they do, the question then becomes one between the colony and the mother country.

It follows from the above remarks that in no case can the Governor be personally responsible to the Legislature for his conduct in office. That responsibility rests on his Ministers; he is only responsible to the Crown, *i.e.*, to the Imperial Parliament.

The mode in which the administration of public affairs is carried on is by means of a body of Ministers, Members of either the Legislative Council or the Assembly, and supported by a majority in the popular Chamber.

Constitutionally, each Minister is merely an adviser of the Governor, and may advise on one subject as freely as another. Convenience has dictated that each Minister should take charge of a particular department; and inasmuch as the duties of some of the Ministers are imposed on them by statute, it was thought desirable to pass an Act (44 Victoria No. 6) enabling any Member of the Executive Council, with the authority of the Governor in Council, to discharge the functions of any other Member; and also enacting that, if any Member is absent or disabled, the signature of any other Member to any official document shall be sufficient.

Under the old system of non-responsible Government, the Executive Council was assembled to consult and discuss with the Governor. Under the present system, Ministers deliberate on all questions of policy in private, and formal meetings of the Executive Council presided over by the Governor only take place for purposes required by law, or in regard to matters unconnected with party politics.

In the execution of any of his powers it is the duty of the Governor to consult the Executive Council. In special cases, where it might not be proper to consult the

Executive Council, or the matter is too unimportant to be laid before them, or too urgent to admit of their advice being taken in time, the Governor may act alone ; but in urgent cases he is bound at the earliest moment to communicate to the Council the measures he has adopted and the reasons thereof. The Governor, as before remarked, may act in opposition to the advice of the Executive Council, if he thinks right, but he must at the first opportunity report the matter to the Home authorities, with the grounds and reasons of his action.

The Executive Council cannot proceed to business unless duly summoned by the authority of the Governor, and there must be at least two Members present, exclusive of the Governor or the presiding Member, to form a quorum. The Governor attends and presides at the meetings, unless prevented by some reasonable or necessary cause. In his absence, the Vice-President presides, and in the absence of the latter the senior Member actually present, seniority ranking from date of appointment. A journal or minute is kept of all proceedings of the Executive Council, and at each meeting, before proceeding to business, the minutes of the last meeting are read over, and confirmed or amended, as the case may be.

Appended is a list showing the administrative arrangements under each Minister and the public business with which he is charged, made up to date (Decr. 1885) :—

ADMINISTRATIVE ARRANGEMENTS.

(1.) The Colonial Secretary is charged with—

The Great Seal of the Colony.
The departmental business connected with the two Houses of Parliament, including the official publication of the debates.
The Executive Council office.
The naval and military establishments, including the volunteer corps (except public school cadets).
The care of the fortifications, works of defence, and military land.
The execution of capital sentences.
Foreign correspondence.
Correspondence with Colonial Governments.
The appointment of magistrates.
The Department of the Agent-General resident in London.
The Department of Audit.
The Police Department.
The Fire Brigades Board.
Fish reserves and fisheries.
Civil Service Board.
Registrar of Friendly Societies.
Theatrical licences.
The Department of the Registrar-General.
The administration of the Electoral Act, 44 Vic. No. 13.
The institutions for the care and treatment of the insane, and the administration of the laws relating to lunacy.
The metropolitan and country hospitals.
Charitable institutions aided from the consolidated revenue.
Medical establishment, including the officers appointed for the purposes of vaccination.
Immigration.
Business relating to ecclesiastical establishments.
The superannuation of public officers.
The publication of the *Government Gazette.*
The naturalization of aliens.
Business relating to municipal institutions.
The botanic gardens and Government domain.
And all matters of business not expressly assigned and confided to any other Minister.

The Colonial Secretary corresponds with—

The judges of the Supreme Court and the other judges.
The President of the Legislative Council, and the Speaker of the Legislative Assembly, and the principal officers of either House of Parliament when it may be necessary.
The foreign consuls.
The returning officers of electoral districts.
The heads of the several churches.
And also, as occasion may arise, with other public officers and public bodies.

(2.) The Colonial Treasurer is charged with—

The management of the consolidated revenue.
The collection of Customs duties, and the taxes, imposts, and charges payable to the consolidated revenue under other Acts of Parliament.
The Government banking business.
The management of the public debt.
The raising of Government loans.
The inspection of public accounts.
The business of distilleries and refineries.
The Public Stores Department, including all contracts relating thereto.
The Government Printing Office, including the manufacture of stamps.
The payment of Imperial pensions.
The care, regulation, and supervision of harbours and navigable rivers.
The maintenance and regulation of lighthouses and coast signal lights.
The appointment and regulation of pilots.
The business of quarantine.
The engagement and discharge of seamen, and all matters relating to mercantile shipping and navigation.
The storage and safe custody of gunpowder and explosive materials.
The management of the abattoirs.
Harbour and river improvements other than the construction of works expressly assigned to the Department of Public Works.
The leasing of quays, wharves, and ferries.
The Treasurer corresponds with the banking institutions transacting business on behalf of the Government, in the colony and elsewhere, and with all Government departments and officers on the subject of collecting, expending, and accounting for the public revenues.

(3.) The Attorney-General is charged with—

Advising Government on all legal questions.
The office of the Crown Solicitor.
The Parliamentary Draftsman.
The law reporters.
The Crown Prosecutors.
Clerks of the peace.
The Attorney-General corresponds with the other Ministers on all questions on which his legal opinion may be required, and in certain cases with the judges, the sheriff, and officers of the Supreme Court, the Inspector-General of Police, the coroners, the benches of magistrates, and the police magistrates.

(4.) The Secretary for Lands is charged with—

The Survey Department.
The business relating to the alienation of Crown lands.
The reserves for recreation and other public purposes.
The dedication of permanent and temporary commons.
The business of the church and school estates not otherwise provided for by the Act specially dedicating the revenues thereof to the purposes of public instruction.
Public cemeteries, excepting those of Sydney and Camperdown.
Auction and pre-emptive leases of Crown lands.
Occupation of Crown lands for pastoral and other purposes.

(5.) The Secretary for Public Works is charged with—

The construction and maintenance of railways and works and buildings connected therewith.
The construction of fortifications and other works of military defence.
The construction and maintenance of docks and engineering establishments.
The construction of wharves, basins, and breakwaters.
The construction and maintenance of tramways.
The erection and repairs of public buildings.
The erection of lighthouses and signal stations.
The construction and maintenance of bridges.
The formation and maintenance of roads not under municipal control, and military roads.
The working and management of railways and tramways.

(6.) The Minister of Justice is charged with—

The business relating to the office of Chief Justice, and to the Puisne judges, and to the Supreme, Circuit, and District Courts, and to the office of Chairman of Quarter Sessions.

The Sheriff's Department.
The Insolvency Court.
The courts of petty sessions.
The police magistrates.
The coroners.
The Licensing Act.
Gaols and penal establishments.
All matters relating to the commutation or remission of sentences other than capital.
Reformatory institutions, including the performance of all acts prescribed to be performed by the Colonial Secretary under the Act 30 Vic. No. 4.
Patents (letters of registration).
Copyright registry.
Sydney and suburban cemeteries, including the Necropolis.
The administration of the Acts relating to newspapers.

(7.) The Minister of Public Instruction is charged with—
The administration of the Act 43 Vic. No. 23.
The University and affiliated colleges.
The grammar schools and other scholastic institutions aided from the consolidated revenue.
The Free Public Library, and free libraries under the Act 31 Vic. No. 12.
The Observatory and Museum.
The literary and scientific institutions aided from the consolidated revenue.
Public scholarships.
Industrial schools and charitable schools aided from the consolidated revenue, including the performance of all acts prescribed to be performed by the Colonial Secretary under the Act 30 Vic. No. 2.
Orphan schools aided from the consolidated revenue.
The management of the church and school estates.
All lands dedicated for the purposes of public instruction by Act of Parliament or otherwise.
Public school cadet corps.

(8.) The Secretary for Mines is charged with—
The administration of the Acts for the regulation of mining operations, and all business relating to mining on Crown lands and to mining generally.
Geological and mining surveys.
The examination of coal-fields.
The inspection of collieries and mines.
The plantation and preservation of forest and timber reserves.
The inspection of sheep and cattle with a view to the prevention and eradication of disease.
Public pounds.
Works for the storage of water in the pastoral districts.
The performance of all acts prescribed under the Acts 25 Vic. No. 2, 39 Vic. No. 13, and 43 Vic. No. 29, to be performed by the Secretary for Lands in regard to such occupation, and also the performance of the duties relating to public gates prescribed under the Act 39 Vic. No. 10 to be performed by the said Secretary for Lands.
The proclamation and alignment of roads and streets not assigned to the Department of Public Works.
The regulation of commons.
Public parks and recreation grounds.
Surveys of public parks.
Resumption of roads under sec. 27 of 43 Vic. No. 29.
Part 6 Crown Lands Act 1884.
State forests and timber reserves.
Ringbarking, and trespassing on Crown lands.
Public Watering Places Act 1884, and protection of certain reserves from trespass.

(9.) The Postmaster-General is charged with—
The transmission and regulation of mails throughout the colony.
Contracts and other arrangements for postal communication with other British colonies.
The postal communication with Great Britain and with foreign countries.
The construction and maintenance of electric telegraphs.
The Electric Telegraph Department and all business relating to telegraphic communication.

The Money Order Department.
The Government Savings Banks.
The Postmaster-General corresponds on departmental matters with the Post Office authorities of other colonies.

## The Parliament.

By the Constitution Act, no definition is given of the relative powers of the two Houses, but, as a matter of constitutional law, it seems to be well established that the Legislative Council should in this colony discharge "the legislative functions of the House of Lords," while the Assembly should exercise "the rights and powers of the House of Commons." By the Constitution Act, Money Bills must originate in the Assembly, and this is sufficient to justify that House in claiming a general control over public revenue and expenditure. The resolution of the House of Commons of 3rd July, 1678—"All aids and supplies and aids to His Majesty in Parliament are the sole gift of the Commons, and it is the undoubted and sole right of the Commons to direct, limit, and appoint in such Bills, the ends, purposes, considerations, conditions, limitations, and qualifications of such grants, which ought not to be changed or altered by the House of Lords"—has also been regarded by the best authorities as applicable to the corresponding representative body in this colony. In all other matters it is considered that the powers of the two Chambers in this colony are co-ordinate; but the question what constitutes a Money Bill has on several occasions given rise to serious doubts, and much inconvenience has been caused by the vagueness of the language used in the first section of the Constitution Act, requiring that "all Bills for appropriating any part of the public revenue for imposing any new rate tax or impost" shall originate in the Legislative Assembly. One of the latest instances of such inconvenience occurred when the Public Health Bill of the Dibbs Administration was introduced into the Legislative Council by the then Attorney-General, the Honorable W. B. Dalley, Q.C.

The two Houses, however, do not possess the respective powers and privileges of the Houses of Lords and Commons, for the *lex et consuetudo Parliamenti* apply only to the latter. Thus neither House has power to punish for contempt, even when committed in its face, and still less for a contempt committed beyond its walls. In common with every legislative body, each House may remove an obstruction offered to deliberation during its sitting, this being necessary for self-preservation. Thus a Member guilty of disorderly conduct in the House may be removed or excluded for a time or even expelled, but he cannot be punished by the House by imprisonment or any other restraint of the person. If the act amounts to a common law offence, of course it may be brought before the courts. The right to expel a Member for dishonorable conduct outside the walls of the House has been very recently claimed and exercised by the Assembly. Whether the Assembly possesses the power of suspending an offending or obstructive Member from the service of the House for a longer period than the sitting when the offence or obstruction took place is at present *sub judice*. In the case of Mr. A. G. Taylor, one of the Members for Mudgee, which happened in April, 1884, the Supreme Court has decided that the power of suspension for more than a sitting is not possessed by the Assembly; but that decision has been appealed from, and the Privy Council has not yet (December, 1885) determined the point. The power was exercised in Mr. Taylor's case pursuant to one of the new Rules of Procedure of the House of Commons, as adopted by the Assembly in terms of its First Standing Order.

In 1881, an Act was passed providing for the summoning, attendance, and examination of witnesses before either House of Parliament, or any Committee of either House. The penalty for disobedience to a summons is arrest on a Judge's warrant, which authorizes the production of the defaulter before the House or Committee for the purpose of giving evidence. And the penalty for refusing to answer any lawful question may be a month's imprisonment.

Although theoretically both Houses are co-ordinate except in respect of the initiation of certain classes of Bills to which reference has already been made, no provision is made in ordinary cases for any dead-lock which may ensue from the divergent views of bodies so different as a Council nominated by the Crown and an Assembly elected by manhood suffrage. As a matter of fact, the differences between the two Houses have never in this colony produced the condition of things known as a dead-lock, unless, perhaps, on the occasion presently to be mentioned. Differences of opinion on the subject of legislative proposals, and the respective powers of the two Chambers to initiate or amend certain classes of measures, have frequently brought the two Houses almost to the verge of a conflict; but, fortunately, the conflict has been always avoided by mutual concessions, or the willingness of the nominated Chamber to accept the "evident sense" of public opinion whenever it has been ascertainable.

It will be noticed that by the Constitution Act no limit is placed to the number of Members of the Legislative Council other than a minimum limit of twenty-one. In extreme cases the Governor might overcome the resistance of the Council by appointing

a number of new Members sufficiently large to turn the scale by their votes, or, as it is popularly termed, to "swamp" the Council. Such a measure lies outside the ordinary working of the Constitution; it amounts, in fact, to a change in the balance of power between the two Houses, only to be resorted to in cases of grave necessity. If a Ministry has a right to advise the Governor to take such a course, in order to obtain a majority in the Upper House, it follows (to quote the words of the Duke of Newcastle, in a despatch of 4th February, 1861) that "on every change of Ministry the same argument will be equally good, and the consequence may be that the first act of each administration may be to swamp the Council, which has been previously swamped by their predecessors." The experiment has only been tried once in this colony, and then under peculiar circumstances which could hardly occur again. Under the Constitution Act, the Members of the first Legislative Council were appointed for five years, a term which expired on Monday the 13th May, 1861. At that time there was a disagreement between the two Houses on the subject of the Land Bills, the Assembly rejecting by large majorities the amendments of the Council, which the latter, by larger majorities, insisted on maintaining. On Friday the 10th of May, the Ministers advised the Governor, Sir John Young, to swamp the Council by appointing twenty-one new members, the appointment practically being for a single night, as there would be no sitting on Saturday, and the Council would be dissolved by lapse of time on Tuesday. The Ministers were supported by six-sevenths of the Assembly, and by the people, in a cry which had proved all-powerful on the hustings at the last general election in the previous December; and it was generally admitted that it would be impossible to form another Ministry, The Governor yielded to these considerations, and nominated the new Members; but the intention of the Ministers was defeated by the resignation of the President of the Legislative Council. This prevented a House being formed on that evening, and in fact brought the session to a close. The action of the Governor did not meet with the approval of the Home authorities, and a despatch of the Duke of Newcastle, of the 26th July, 1861, while making full allowance for the difficulty of the Governor's position, administered to him a grave rebuke for the course he had deemed right to follow. In consequence of these events, an understanding was come to between Sir John Young and the leading statesmen on each side that the number of the Legislative Council should be limited, as a matter of convenience, to twenty-seven, and that any additions should be made for the convenience of legislation, and not to strengthen a party.

In 1865 the Premier, Mr. (afterwards Sir James) Martin, advised the Governor to appoint two new Members, and his refusal led to the resignation of the then Colonial Secretary, Mr. Forster. In 1869 a similar request by the then Premier, Mr. (afterwards Sir John) Robertson, for the appointment of three new Members was refused by Lord Belmore. In each case the action of the Governor was approved by the Home authorities. The number of the Council has, it is true, been increased at various times till it reached its present figure, but in every case the additions were, or were at any rate regarded by the Governor as being, within the understanding above mentioned.

Practically, the difficulty of a dead-lock between the two Houses is met by the underlying feeling that the Assembly represents the body of the people, and that in matters not affecting Imperial interests, if the people have really made up their minds, the Council should give way. The check thus supplied is very valuable; it prevents what may be the popular caprice of the moment from becoming law, while it yields to the expression of what is the real and deliberately formed will of the people.

### The Legislative Council.

The Legislative Council is appointed by the Governor, and must consist of not fewer than twenty-one Members, who must be of full age, and either natural-born subjects of Her Majesty or duly naturalized. Four-fifths of the Members must be persons not holding any office of emolument under the Crown; but this does not apply to military and naval officers "in Her Majesty's Sea and Land Forces on full or half-pay or retired officers on pensions." The tenure of office is for life, but a Member may resign, and he vacates his office (*a*) by absence for two successive sessions without leave of the Crown or the Governor; (*b*) by becoming a citizen of a foreign state; (*c*) by becoming bankrupt or taking the benefit of any Act relating to insolvent debtors; (*d*) becoming a public contractor or defaulter; or (*e*) being attainted of treason or convicted of felony or any infamous crime. Any question of vacancy is tried by the Council itself, with a right of appeal to the Queen in Council, both for the person whose seat is in question and for the Attorney-General on behalf of the Crown. The present number of Members (Dec. 21st 1885) is fifty-eight.

The Governor has power to appoint a President of the Council, and to remove him and appoint another in his stead. The President may take part in any debate, but he cannot vote, except by giving a casting vote where the numbers are equal, To constitute a quorum, there must be one-third of the Members present exclusive of the

President; or if one-third gives a fraction, the whole number next above one-third. All questions are decided by a majority of votes. There must be a session of the Council at least once in every year, and twelve months must not elapse between two sessions. No Member may sit or vote till he has taken the oath of allegiance, or made an affirmation in lieu of the oath. Pursuant to the provisions of section 35 of the Constitution Act, the Legislative Council have laid down Standing Rules and Orders for the regulation of their procedure, and the Legislative Assembly have done the same for their procedure; they are in the main similar, and provide for the introduction and passing of Public and Private Bills, for conferences, petitions, and other matters of detail not necessary to further particularize.

### The Legislative Assembly.

The Representative Chamber consists at the present time (21st December, 1885) of 122 members, returned by seventy-two electoral districts. A list of these districts is given in the Electoral Act of 1880, 44 Vic. No. 13. East, South, and West Sydney return each four members, the district of Mudgee three members, and the following twenty-five—Argyle, Balranald, The Bogan, Camden, Canterbury, Carcoar, Central Cumberland, Eden, Forbes, The Hastings and Manning, The Hume, The Upper Hunter, East Macquarie, Monaro, The Murray, The Murrumbidgee, Newcastle, New England, Newtown, Northumberland, Orange, Paddington, Redfern, Tamworth, and Young—return two members each, and the remaining districts one member each. To meet the growth of population, it is provided, by what are known as the "expansive clauses," that when a district which returns one member has 3,000 electors on the roll, or when a district which returns two members has 5,000 electors on the roll, or a district which returns three members has 8,000 electors on the roll, such district shall in each case be entitled to an additional Member; but the Governor must first by proclamation in the *Gazette* declare that the district is entitled to return an additional Member, and the proclamation is not to be issued unless the Governor is satisfied that the electors have reached the required number, and have not during the two years previously sunk below that number by more than one-fifth thereof. At the general election of 1885, the following electoral districts returned each an additional Member under the "expansive clauses," viz.:—Balmain, Canterbury, Central Cumberland, The Glebe, The Murrumbidgee, Newtown, Paddington, The Richmond, and Wentworth. Every male subject of the Queen who is over twenty-one, absolutely free, and a natural-born or naturalized subject, is entitled to be on the roll of electors, subject, however, to the following qualifications. A right to be on the electoral roll may be claimed either in respect of residence or property:—

(1.) Any man who claims this right in respect of residence must show that at the time of making out the electoral list he resides in the district in question, and has done so for the six months preceding.

(2.) Any man who claims in respect of property must show that at the time of making out the electoral list and during the six preceding months—

- (*a*) He is and has been owner of a freehold or leasehold estate in possession of the clear value of £100 or more; or
- (*b*) Is and has been in the receipt of rents and profits of the annnal value of £10 arising from freehold or leasehold estate; or
- (*c*) Occupies and has occupied a house, warehouse, office, shop, room, or building, either with or without land, of the annual value of £10; or
- (*d*) Holds and has held a Crown lease or licence for pastoral purposes within the district.

The six months' occupation required need not be of the same premises; it is sufficient if the claimant has occupied during the time some set of premises of the required value. A joint owner or occupier is entitled to vote, if his share reaches the required value.

A person must have one of the above-named qualifications to entitle him to be put on the roll; but the possession of all of them within one district would not give him more than one vote in that district. Of course he may have seventy-two votes, if he has a qualification within each district.

The following are disqualifications, the existence of which, either at the time of making out the electoral lists or of the election, disable a person from voting:—

(1.) Unsoundness of mind;

(2.) Receipt of aid from any charitable institution;

(3.) Being convicted of treason, felony, or other infamous offence, unless the person convicted has either received a free or conditional pardon, or has undergone his sentence;

(4.) Being in the naval or military service on full pay. Service in the militia or a volunteer corps is not a disqualification;

(5.) Being a police magistrate or belonging to the constabulary force (including the Inspector-General or Metropolitan Superintendent of Police).

The qualification for Members of the Assembly is the same as that for voters, excluding the conditions of residence or possession of property within any electoral district, *i.e.*, any man who would have a vote, if he had resided or held property for six months within an electoral district, and whether his name be on any electoral roll or not, may be elected a Member, subject, however, to the following exceptions :—

No person can be a Member of the Legislative Assembly—

(1.) Who is a Member of the Legislative Council ;

(2.) Who holds any office of profit from the Crown during pleasure or for a term of years ;

(3.) Who is in any way interested in any contract for or on account of the Public Service.

By the "Constitution Act Amendment Act of 1884," the disqualification of persons holding offices of profit does not apply to the holder of the office of Colonial Setretary, Colonial Treasurer, Attorney-General, Secretary for Lands, Secretary for Public Works, Minister of Justice, Minister of Public Instruction, Secretary for Mines, Postmaster-General, or of any new office of profit created by Act of Parliament. That disqualification is also inapplicable to officers in the army or navy. The third disqualification does not apply to any contract made by a company consisting of more than twenty persons.

If any unqualified person is elected, the election is declared void by the House, and, if such person sits or votes, he is liable to a penalty of £500.

By the Act 37 Vic. No. 7, no Assembly can sit for more than three years. There must be one session at least in every year, and twelve months must not elapse between two sessions. On first assembling after a general election, the members elect a Speaker, who presides at all sittings of the House. He has no vote except a casting vote when the number of votes on each side is equal. Twenty Members, exclusive of the Speaker, are necessary to form a quorum.

Writs for general elections must be made returnable not later than the 35th clear day after the day of issuing the proclamation of dissolution.

For general elections the writs are issued by the Governor, also for vacancies occurring between a general election and the meeting of Parliament. For all other vacancies the writs are issued by the Speaker, unless the office of Speaker happens to be vacant, or in case of the Speaker's absence from the colony, in which cases the writs are issued by the Governor.

After a general election, Parliament must meet not later than the seventh clear day after the date on which the writs were made returnable.

Any member may resign his seat, and he *ipso facto* vacates it if he fails to attend the House during the whole session without leave of the House, or if he becomes a subject of a foreign country, or becomes a bankrupt or insolvent, or a public defaulter, or is convicted of treason, felony, or any infamous crime.

Before taking his seat or voting, every Member must take the oath of allegiance, or make an affirmation in lieu of it.

The annexed table (which, however, does not pretend to statistical accuracy) shows the percentage of votes polled to electors on the rolls for the metropolitan, suburban, and country electorates, according to the returns made after the general election in 1885 :—

*Percentage of Electors on the Electoral Rolls of the Colony of New South Wales to Voters polling at the General Election 1885.*

| — | Number on Roll. | Number of Voters. | Per-centage. |
|---|---|---|---|
| Metropolitan electorates, viz., East, West, and South Sydney | 29,403 | 20,325 | 69·12 |
| Suburban electorates, including Central Cumberland and Parramatta | 52,493 | 33,587 | 63·98 |
| Country electorates ... ... ... ... | 125,750 | 72,134 | 57·36 |
| The Colony—where elections were contested and from which a return was received | 207,646 | 126,046 | 60·70 |
| Seven electorates uncontested ... ... | 15,444 | | |
| Two electorates (Northumberland and Newcastle) which sent in no return | 9,300 | | |
| Total Number on the Roll ... ... | 232,390 | | |