THE LEGISLATIVE COUNCIL OF WESTERN AUSTRALIA.

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In 1827 an undefined area " on the western coast of New Holland " was annexed by Great Britain with the object of forestalling any designs which France may have had of establishing a colony in that area. By Order in Council it was declared to be a colony by settlement as from 2nd May 1829, the first Governor (Stirling) entering on his new domain on 1st June of the same year. On 14th May 1829 an Act (10 Geo. IV. c.22) to provide for the government of the new colony received the royal assent: His Majesty was empowered by Order in Council to set up a Legislative Council of not less than three persons, but no Order was issued until 1831. The Act is not flattering in its references to the new possession; it recites that " divers of His Majesty's Subjects have, by the Licence and Consent of His Majesty, effected a Settlement upon certain wild and unoccupied Lands on the Western Coast of New Holland and the Islands adjacent, which Settlements have received and are known by the Name of Western Australia." No attempt was made, except in an indirect manner, to define the boundaries of Western Australia; the Act merely declares that " no Part of the Colonies of New South Wales and Van Dieman's Land, as at present established, shall be comprised within the said New Colony or Settlements of Western Australia." In this circuitous manner emphasis was laid on the intention to annex the whole of " New Holland " not then included in New South Wales and Tasmania.

The first Legislative Council was established in 1831, and consisted of the Governor, the Senior Military Officer next in command, the Advocate-General, the Colonial Secretary, and the Surveyor-General. In 1839 the Governor was authorised to nominate four unofficials for appointment to the Council; but when the Collector of Revenue and Customs was made an ex officio member in 1847, the number of unofficials was reduced to three. The constitution and membership of the Legislative Council remained unchanged until 1867, shortly before the assumption of representative government; Western Australia was unable at an earlier date to satisfy the financial requirements of 13 & 14 Vict. c. 59 and thus was disqualified from obtaining a partly elective Legislative Council.

In 1865 it was announced that the transportation of convicts would cease within three years, which would mean the discontinuance of the grants-in-aid from the British Treasury except for the Civil List proper. The major obstacle to the assumption of representative government having been removed, agitation for action under the Act of 1850 became widespread and produced in 1865 a petition signed by the requisite one-third of all householders. This petition was duly presented to the Legislative Council; but the latter, by no means convinced that the Colony was ripe for representative government, was not then prepared to sign its own death warrant by introducing the necessary Bill. It resolved to communicate the petition to the Secretary of State with a rider of its own which recommended that the Governor should be authorised to nominate six unofficials (instead of three) to its number. For some

undisclosed reason the Colonial Office decided to ignore the petition and to approve the recommendation of the Legislative Council; by Order in Council of 14th May 1868 the Council was reconstituted, and was to consist of six official members in the persons of the Governor, the Senior Military Officer, the Colonial Secretary, the Surveyor-General, the Attorney-General, and the Treasurer and Collector of Internal Revenue, and of six unofficial members to be nominated by the Governor. In view of the resentment at what was regarded as the high-handed action of the Secretary of State in ignoring the readiness of the colony to shoulder the additional financial burdens which must be assumed on the acquisition of representative government, the Governor was unwilling to incur the responsibility of nominating the unofficials and welcomed a suggestion put forward by the supporters of representative government that he should nominate persons assured of public support. The proposal was that the colony should be divided into six electoral districts for the purpose of choosing suitable persons; one of the proposed districts, rejecting every alternative to representative government, refused to take any part in the scheme. The remainder, however, proceeded to hold elections, and the Governor later nominated to the legislative Council the five persons who had headed the poll; he was obliged to exercise an independent choice of the sixth member.[1] All the unofficial nominees were to hold office for three years from the date of publication in the *Government Gazette* of the notice of their appointment (7th July 1868). The numerical equality of official and unofficial members in the reconstituted Legislative Council did nothing to reconcile the opponents of the Crown Colony system; within two years a second petition was signed by the requisite number of householders and was presented to the Council. On this occasion the latter made no attempt to stem the tide of events, and by Ordinance No. 13 of 1870, exactly forty-one years after the commencement of Governor Stirling's administration, made provisions for the introduction of representative government under 13 & 14 Vict. c. 59.

The advent of representative government was regarded merely as a stepping stone to responsible government; but for some years the Colonial Office turned a deaf ear to Western Australian clamour for the latter, largely on the ground that a colony with such a small population (which was only 45,000 even in 1890) should not be entrusted with sole powers of disposal of its vast vacant lands. In 1887, however, the demand could no longer be gainsaid; the Legislative Council, by a very large majority, passed a resolution in favour of responsible government. Early in 1889 an election was held at which this was virtually the only controversial issue; when the new Legislative Council met it passed a second resolution, without a single dissentient vote, asking for self-government, and at its second session considered and passed a Bill to give effect to its resolution. The Bill was sent to England; the Secretary of State considered that substantial alterations were desirable, but the Bill was referred to a Select Committee which ultimately recommended its adoption *in toto*. It

1. Martin Wight, in *The Development of the Legislative Council* (Faber & Faber Limited, 1946), incorrectly asserts (at 76-77) that Western Australia went through a preliminary stage with a one-third elective minority, and refers again in Appendix 6 to an elected minority in 1867. The account in Keith, *Responsible Government in the Dominions* (Oxford University Press, 1928) I., 10, is also inaccurate in some details.

passed both Houses without difficulty and received the royal assent as 53 & 54 Vict. c. 26.

The new constitution established a bicameral legislature consisting of a Legislative Assembly of thirty members (elected on a restricted franchise) and of a nominated Legislative Council of fifteen; but the latter was to be replaced by an elected Council six years later, or when the population (exclusive of aborigines) reached 60,000, whichever first happened. The change occurred in 1893. The new Council[2] was to consist of twentyone members, three from each of seven electoral provinces; one member from each province was to hold office for two years, a second for four years, and the third for six years, their successors being elected for the full period of six years. At the same time the number of members of the Legislative Assembly was increased to thirtythree. By an amending Act of 1896[3] the members of Council and Assembly were increased to twentyfour and fortyfour respectively, and by a further amending Act of 1899[4] six more members were added to both Houses; no further changes have been made since that date. The duration of the Legislative Assembly was reduced, by the 1899 Act, from four years to three, and adult suffrage was introduced as the electoral qualification; but although the franchise for the Legislative Council was made slightly more liberal than it had been in 1893, it was still restricted, and the modifications introduced in 1911[5] did not add very substantially to the number of electors. At the present moment the qualifications are those set out in the 1899 Act as amended in 1911, namely:—

(*a*) the tenant of a legal or equitable estate of freehold in possession within the Province, of the clear value of £50 sterling; or

(*b*) a householder within the Province, occupying a dwelling house of the clear annual value of £17 sterling; or

(*c*) the tenant of a leasehold estate in possession, within the Province, of the clear annual value of £17 sterling; or

(*d*) the holder of a lease of or licence over Crown lands within the Province (for pastoral, agricultural, or mining purposes) at a rental of not less than £10 per annum; or

(*e*) an enrolled municipal or Road Board District elector in respect of property within the Province, of an annual rateable value of not less than £17.[6]

A person can be registered and can vote in every Province in which he has one or more of the prescribed qualifications; but he cannot be registered in respect of more than one qualification in the same Province.

As to relations between the two Houses, it was assumed at the time of the adoption of the constitution that the Legislative Council would observe the conventions then established as to the powers of the House of Lords in regard to money matters. But convention was to some extent translated into Law by a provision which expressly denied to the Council

2. 57 Vict. No. 14.
3. 60 Vict. No. 18.
4. 63 Vict. No. 19.
5. 1 Geo. V., No. 31.
6. It will be noted that the qualifications under (*a*), (*b*), and (*c*) are expressed in terms of sterling, which word is omitted from the remainder. As the Australian pound is at a discount of 25%, does this mean that the freehold qualification is now £62 10s. in Australian currency? The point does not appear to have been considered by the courts, the legislature, or the Electoral Department.

any power to initiate any Bill to impose, vary, or repeal any tax, or any Bill to appropriate revenue, and by a further provision which *ex abundanti cautela* expressly empowered the Assembly to initiate such measures; but the Council could amend or reject such Bills when received from the Assembly. In 1893 the right of amendment was taken away; but the Council was to have power to request the inclusion of new provisions or the omission of others; the amending Act of 1899 repeated this provision, but is silent as to what is to happen if the Assembly rejects the Council's request. Keith states[7] that "it has been ruled, no doubt correctly, that the Council is not entitled to insist on its amendments" (sc. requests), and quotes in support a ruling of the Speaker in 1906; but the Council has never agreed with that ruling.

On various occasions during the early years of the century attempts were made to define more clearly the relative powers of the two Houses in regard to finance; but agreement could not be reached. A Joint Committee was set up in 1914 and made certain suggestions; but no action was taken thereon until 1921, when the constitution was amended by the deletion of the existing clauses and the insertion of new provisions which reproduce almost verbatim sections 53-56 of the Commonwealth Constitution. When the amending Bill was before the Assembly a further clause was adopted which has no counterpart in the federal constitution—"If the Legislative Assembly refuse to make any such amendments or omissions[8] the Legislative Council shall not be entitled to repeat, press, or insist thereon." But the Council refused to accept that clause; members of the Assembly asserted that the Joint Committee had agreed to it, to which the Council replied that if its representatives had in fact done so they had exceeded their instructions. In order to save the Bill the Assembly had to give way. In the light of later events it is significant that one Honourable member, in speaking to what he regarded as the most objectionable clause in the Bill, made this comment, "It is true that the Legislative Council may not amend what is known as a money Bill; but we can suggest amendments, which is substantially the same thing."[9]

Within two months of the passing of the Constitution Act Amendment Act the Legislative Council began to assert itself in regard to money Bills. It did not like certain clauses in the annual Appropriation Bill; one member moved to defer consideration of the Bill for approximately six weeks. Had that motion been carried, control of the finances of the State would have virtually passed from the government to the Legislative Council; but the motion having been defeated on the casting vote of the President, the Appropriation Bill itself then received a grudging assent.[10] In 1923 the Council took exception to certain clauses in the Land and Income Tax Bill, which it returned to the Assembly with a request for certain amendments. The Assembly gave short shrift to the request; whereupon the Premier, anxious to protect the measure from the danger of a total rejection by the Council, moved for the appointment of a small joint committee of both Houses which should endeavour to find an

7. *Responsible Government in the Dominions*, I., 490.
8. i.e., in a Money Bill.
9. Parl. Deb. (New Series), vol. 65, 1653.
10. Parl. Deb. (New Series), vol. 65, 2893.

acceptable compromise. The Assembly passed the motion on the condition that its representatives on the committee should be instructed to make no concessions whatever. Faced with this determined attitude on the part of the Assembly, the Council did not press its requests but passed the Bill as received from the other House.[11]

In 1924 the Council requested amendments to the Land and Income Tax Bill of that year; the Assembly declined to comply. Once again a joint committee was recommended and was in fact set up; but on this occasion the Assembly did not give to its managers definite instructions to stand their ground. In the result certain concessions were made by the Assembly; this has since been regarded as a precedent supporting the claims of the Council that its last word has not been said when it has made a request for amendment and that request has been refused.[12]

In 1927 the Council once more shot at its favourite target, the Land and Income Tax Bill, and requested amendments. The Assembly refused to adopt them; the Council repeated them, whereon the Speaker refused to permit a motion in the Assembly to consider these reiterated requests. He ruled that once the Assembly had declined to entertain a request for amendment of a money Bill, it would be sacrificing its constitutional superiority in regard to such Bills if it reconsidered a request which the Council was obviously bent on enforcing if it could. To permit the Council to repeat its requests would in the Speaker's opinion be tantamount to conceding to the Council the power of amendment which is expressly denied to it by the Constitution. This ruling was strongly criticised in the Council itself, which then decided to withdraw its request for amendment of the Land and Income Tax Bill on condition that the larger issue of the relative powers of the two Houses were referred to the Judicial Committee for final decision. The Assembly, not wishing its Bill to be rejected in the Council, agreed to the condition; several members, in expressing agreement with the proposal, doubted whether there were any constitutional means of bringing the matter before the Judicial Committee or, if there were, whether any ruling given by that body would be legally binding on both Houses.[13]

For some reason, never fully explained, the government of the day made no attempt to bring the dispute before the Judicial Committee. It was not until 1934, when the Council requested amendments of the Financial Emergency Tax Assessment Act Amendment Bill, that the Assembly remembered the incident of 1927 and took the initiative in moving for a reference to the Judicial Committee, and for the appointment of a joint committee to settle the terms of reference. But the Legislative Council had now changed its mind about the wisdom or expediency of asking for a decision from the Judicial Committee; it rejected the request of the Assembly for a joint committee and passed a motion in the following terms, "The Legislative Council acquaints the Legislative Assembly that it does not desire the appointment of a Committee as requested, because the Legislative Council is of opinion that section 46 of the Constitution Acts Amendment Act 1899 (i.e., the section

11. Parl. Deb. (New Series), vol. 69, at 2054, 2063, 2086.
12. Parl. Deb. (New Series), vol. 71, at 2540, 2603, 2660, 2666.
13. Parl. Deb. (New Series), vol. 77, at 1363, 1677, 1982, 2021, 2082, 2158, 2262.

as amended in 1921) clearly sets out the powers of the Legislative Assembly and the Legislative Council respectively." Despite this reproof, the Assembly adhered stubbornly to its own view of the meaning of the section, which is the exact opposite of that upheld by the Council; and the government thereupon sought to approach the Privy Council without the co-operation of the other House. But the Secretary of State, in conformity with the settled policy of trying to avoid any participation in the domestic quarrels of a State of the Commonwealth, replied that the matter could be referred to the Judicial Committee (*i*) if the dispute related to legal and constitutional issues only, and (*ii*) if both Houses asked for the reference to be made. As the first condition only was satisfied, the Judicial Committee could not act.[14] The Council has not since changed its attitude. Both Houses are agreed that the meaning of section 46 is clear; but they differ as to what the meaning is. It is unfortunate that the dispatch of public business is bound to suffer because the constitutional declaration of the relation and powers of the two Houses is in fact much more obscure than either will admit. Every attempt to alter the franchise for electors to the Legislative Council has been repulsed by that body; a similar fate has befallen proposals made in 1944 and in 1945 to adopt the principles of the Parliament Act 1911, and a Bill which passed the Assembly in 1945 for holding a referendum on two proposals (*i*) the abolition of the Legislative Council or alternatively (*ii*) its reconstitution on the basis of adult frachise.

After nearly fifteen years' occupation of the Treasury benches the Labour Party lost the 1947 election, and has been succeeded by a coalition government of Liberals and Country and Democratic League members. While in opposition, members of the new government opposed alterations of the constitution of the Legislative Council on the ground that redistribution of the Assembly was much more pressing; if they carry out their pre-election undertaking to introduce a Redistribution of Seats Bill, will they then feel obliged to tackle the problem of inter-House relationship? The cynic may reply that they may not regard the latter as urgent since non-Labour governments can usually expect close co-operation from the Legislative Council.[15]

14. Parl. Deb. (New Series), vol. 94, at 2125, 2157, 2253, 2329, 2331, 2340, 2342. The terms of the Council message (see p. 2125) are significant: "Message from the Council that it disagreed to (*sic*) the further amendments made by the Assembly to the Council's amendments Nos. 1 and 2 and insisted on its original amendments, and also insisted on amendment No. 3 to which the Assembly had disagreed."

15. One of the first measures introduced by the new government, after the Legislature met for the first time on 31st July 1947, was a Supply Bill. The Assembly debated the Bill for five hours; the Council did not discuss it at all and, having agreed to the suspension of Standing Orders, passed the Bill through all stages in five minutes according to press reports. Is this "the shape of things to come" for the next three years?