RESPONSIBLE GOVERNMENT

(1873 - 1878)

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BY

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PREFACE.

On the whole students of South African history have neglected to study our Constitutional development, and studies on South African Constitutional Law are few and far between. It seems that the South African student has a greater liking for the more controversial subject of political history, while studies on the economic and social aspects of our development are not wanting.

In preparing this essay on "Responsible Government" I acutely felt the lack of adequate and reliable secondary authorities on South African Constitutional History and Law. Inevitably I had to fall back upon the biographies of the statesmen of the early 1870's. Here again I was disappointed. Most of the biographies were ex parte accounts. A laudable exception I found in Walker's "Life of Lord de Villiers".

Mention, however, must be made of Mr. Kilpin's work on the early Parliamentary life at the Cape. Historians usually pour vials of professional wrath on "popular works". Now it is true that both "The Romance of a Colonial Parliament and "The Old Cape House" contains much gossipy material. Nevertheless, they both contain valuable material and views, not found even in the most "professional works". The "Annexures" to both these little books are invaluable to the student of Colonial Constitutional History.

Primary Sources exist in abundance. I was, however, greatly disappointed at the despatches of both the Governor and the Secretary of State for the Colonies, contained in the "Government House Records" (to be found in the Government Archives, Cape Town) inasmuch as they do not contain useful references to the working of the Colonial Constitution.

The "Merriman Papers" I found very interesting, though not so enlightening as I had hoped. I am deeply indebted to Mr. D. Varley, Librarian of the South African Public Library, Cape Town, for placing my request to read through such letters touching the working of the Constitution before the Board of Trustees of the Merriman Collection, and obtaining their permission to do so.

The Cape Parliamentary Papers are to be found printed in the Annexures to the Votes and Proceedings of the House of Assembly and Legislative Council. Several of these sets are to be found in Cape Town. The Librarian of the Parliamentary Library kindly gave me permission to use the set stowed away in the basement of that Library.

The Imperial Parliamentary Papers are to be found in the "Blue Books" relating to South African affairs. Here, again, several complete sets exist. The set most easily accessible to the public is to be found in the Government Archives.

As to the debates in Parliament. As an official Hansard of these early years is lacking, I had to turn to newspaper reports. The most satisfactory reports I found in the Cape Argus.

Recently, a very valuable source of information has come to light in England in the shape of Governor Barkly's private letters. (see, in this connection, the Johannesburg "Star", 12/8/43) The prevailing circumstances however, will prevent the South African student to see these letters for some time to come.

In writing this essay I have assumed two things, e.g. that the reader is aware of the existence of freedom of speech in Parliament, granted by Act No. 1 of 1854, and

secondly, that the only language recognised by the Constitution was English.

Furthermore, this essay is concerned only with the most salient features of the working of Responsible Government into which I have entered in some detail.

I am greatly indebted to, and take this opportunity of thanking, Messrs. Rooseboom and Louw of the House of Assembly, for tackling the unenviable task of typing the essay and thereafter proof-reading it for mistakes, grammatical and otherwise, in the typescript.

I have made use of certain abbreviations of which an explanatory list is given below.

J. F. Keller
7th. Oct., 1943

Abbreviation	Explanation.
A 1 - 77	Paper printed by Order of the House of Assembly in 1877.
C 3 - 74	Paper printed by Order of the Legislative Council in 1874.
G 44 - 76	Paper printed by Order of the Government in 1876.
G.H. 1/21	Twenty-first folio of the 1st series of Government House records.
181) [C - 459])	Imperial Bluebooks.
V & P, 1873.	Votes and Proceedings of the House of Assembly, 1873.
Minutes, 1875	Votes and Proceedings of the Legislative Council, 1875.
M.P. No. 53 of 1874	Merriman Paper, No. 53 in 1874.
C.A. 10/5/76	Cape Argus: 10th May, 1876.
C.H.B.E. Vol.8.	Cambridge History of the British Empire. Vol. 8.

Abbreviation.	Explanation.
Cunynghame: My Command:	Sir A.T. Cunynghame: My Command in South Africa, 1874-1878.
de Kiewiet: Imperial Factor:	C.W. de Kiewiet: The Imperial Factor in South Africa.
de Kock: Confederation:	W.J. de Kock: Federation and Confederation in South Africa, 1870-1880, with special reference to the Cape Colony.
Eybers: Select Documents.	G.W. Eybers: Select Constitutional Documents illustrating S.A. History, 1795-1910.
Hardinge: Life of Carnarvon.	Sir A.H. Hardinge: Howard Henry Molyneux Herbert, Fourth Earl of Carnarvon.
Hofmeyr: Life of Hofmeyr.	J.H. Hofmeyr & F.W. Reitz: The Life of Jan Hendrik Hofmeyr.
Kilpin: Romance.	The Romance of a Colonial Parliament.
Laurence: Life of Merriman.	Sir P.M. Laurence: The Life of John Xavier Merriman.
Martineau: Life of Frere.	J. Martineau: The Life and Correspondence of Sir Bartle Frere.
Molteno: Life of Molteno.	P.A. Molteno: The Life and Times of Sir John Charles Molteno.
Theal: History.	G.M. Theal: History of South Africa, 1873-1878.
Walker: History.	E.A. Walker: A History of South Africa.
Walker: de Villiers.	E.A. Walker: The Life and Times of Lord de Villiers.
Wilmot: History.) Wilmot:)	Count A. Wilmot: The History of our Own Times in South Africa, Vol. I.
Wilmot: Life of Southey..	Count A. Wilmot: The Life and Times of Sir Richard Southey.

CHAPTER ONE.

THE CONSTITUTION.

The Constitution of the Cape Colony belongs to the category of "written constitutions". Several drafts were made locally before it finally sailed to England for ratification and consent [1], and, on its return to its Motherland, came into operation on the 1st July, 1854. [2] This Constitution, with such subsequent amendments as it became necessary to pass from time to time, served the Cape Colony until it was incorporated in the Union in 1910.

The most distinctive features of this Constitution are the following :-

I.

A nominated Executive, consisting of a Colonial Secretary, an Attorney-General, a Treasurer and an Auditor. They could sit in either House, take part in discussions, subject to the Standing Rules and Orders of the Houses, but could not vote [3]. The first Parliament interpreted this section to include "eligibility to serve on Select Committees, and the right to move or second motions" [4]. Being nominated, the Executive was responsible to the Crown and not to Parliament.

II.

A Council, consisting of 15 members [5], subsequently increased to 21 [6] elected, 7 members for the Eastern Districts, and 8 for the Western Districts [7], directly by the adult male population of the Colony possessing the

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1) C.H.B.E., Vol. 8, pp.368-376.
2) For Constitution see Eybers: Select Documents, pp.45-55.
3) Constitution Ordinance, Section 79.
4) C.H.B.E., Vol. 8, p.377.
5) Constitution Ordinance, Section 2.
6) Act No. 3 of 1865.
7) Constitution Ordinance, Section 4.

franchise. The cumulative vote was allowed for elections [8]. The Chief Justice was to preside over its deliberations [9], with a casting vote in case of equality of votes.[10] Five members formed a quorum and all matters were to be decided by a majority of votes [11]. It was also provided that the Chief Justice could, from time to time, take part in the discussions [12].

What has struck the eye of all historians is the wide powers given to the Council in matters financial [13].

"In view of its elective character, the Council was given the power of amending as well as rejecting money Bills".[14]

It was the only Colonial Upper House to have the right of increasing as well as rejecting money Bills [15].

Prospective Legislative Councillors had to be at least 30 years old, not subject to any legal incapacity to be registered as a voter, and to possess unencumbered immovable property to the value of £2,000, or, with movables, to the value of £4,000, over and above all debts [16]. Each member had, before being allowed to take his seat, to declare that he was qualified under this clause to sit in the Council [17]. Members held seats for ten years, but after the first five years 8 members, 4 for each district, were to vacate their seats, and fresh elections held, those 4 members elected by the fewest votes in their Divisions. so to vacate their seats. After such elections they would hold their seats for 10 years, the remaining 7 members of the original Council vacating their seats after the expiration of 10 years from the date of the original election [18].

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8) C.H.B.E., Vol.8, p.376.
9) Constitution Ordinance: Sect.2.
10) Ibid: Sect.3.
11) Ibid.
12) Ibid: Sect.2.
13) C.H.B.E., Vol.8, p.377; Kilpin: "Romance of a Colonial Parliament, p.85.
14) C.H.B.E., Vol.8, p.377.
15) Kilpin: Op. Cit. p.85.
16) Constitution Ordinance: Sect. 33.
17) Ibid: Sect. 64.
18) Ibid: Sect. 5.

The main criticisms that can be levelled at the constitution of the council, in the light of subsequent events, are the following :-

(1) The wide powers given to the Council in matters financial soon proved to be anomalous. Clashes on money bills occurred rather too frequently, and, as no deadlock provisions were embodied in the Constitution, such clashes could only be brought to a successful termination by one of the two Houses giving way. The only other way open was to dissolve Parliament, and to fight the election on the issue upon which the deadlock had taken place. Molteno had recourse to this method when the Council set the "Seven Circles Bill" aside as a breach of privilege of that House [19]. This was clearly unsatisfactory. The wide powers on financial matters should have been curtailed, and a satisfactory method of terminating deadlocks found.

(2) The official recognition given to the division between East and West tended to keep alive and aggravate the agitation for separation [20]. Molteno, realising this, succeeded in obliterating it by the Seven Circles Act [21]. Nevertheless, great harm was done by this official recognition.

(3) No provisions were made to fill vacancies during the non-existence of Parliament. After the Council elections of 1874 had been completed, and before Parliament met, Mr. Vintcent, elected member, died. On the 28th of May the Treasurer-General informed the House of the vacancy, and moved that the Governor be informed. Mr. De Smidt wanted to know why the vacancy ~~had not been~~ had not been reported earlier. The Treasurer-General explained and stated that provision would be made for the future [22]. This was done

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19) De Kock: Confederation, p.84; G.H. 31/12. Barkly to Kimberley, 2-7-73
20) C.H.B.E., Vol. 8, p.376.
21) Act 18 of 1874.
22) Minutes: 1874, p.7.

by Section 9 of the Seven Circles Bill [23].

III.

There was to be a House of Assembly consisting of 46 members [24], subsequently increased to 66 [25]. With the passing of the "Wodehouse Representation Act" [26], the total number came to 68.

The Colony was divided into electoral districts, 22 in number. Twenty-one of these districts returned 2 members each, Cape Town returning 4 [27]. Cumulative voting was allowed only in the division of Cape Town [28]. The Assembly was to elect one of their own members as Speaker to preside over their deliberations [29], who had no vote except in case of an equality of votes [30]. Prospective members had to be registered voters, but aliens who had obtained "a deed of burghership", i.e. had been registered as voters, could not be elected [31]. Aliens were likewise excluded from membership of the Council [32]. If a member of either House failed to attend during one whole session without permission, he forfeited his seat [33]. Members of both Houses had to make an oath or affirmation, as provided for [34], and members could resign by addressing a letter to that effect to the presiding member of the House in which they sat [35]. All disputed elections were to be decided by the Houses themselves in committee [36]. The procedure in such a case was to appoint a select committee to enquire and report [37]. Voting was by word of mouth, no literacy test of any kind being required [38].

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23) Act 18 of 1874.
24) Constitution Ordinance: Sect. 6.
25) Act 3 of 1865.
26) Act 7 of 1872.
27) Constitution Ordinance: Sect. 7.
28) Ibid: Sect. 46.
29) Ibid: Sect. 63.
30) Ibid: Sect. 6.
31) Ibid: Sect. 47.
32) Ibid: Sect. 33.
33) Ibid: Sect. 71.
34) Ibid: Sections 61 and 62.
35) Ibid: Sections 69 and 70.
36) Ibid: Sections 67 and 68.
37) See for instance: S.C. C2-72. Petition of R.w.Murray Jun V. & P. 1875, p.388 and A.4 - 74.
38) C.H.B.E., Vol.8, p.376.

All money Bills had to be initiated in the Assembly, but only upon the recommendation of the Crown, and Bills which by law and custom ought to originate with the Assembly, shall not originate in the Council [39]. Thus the old custom that the King asks for supplies, and that the Commons vote such supplies with the concurrence of the Lords was transplanted into the Colony. With the advent of Union, this custom was again adopted, and is still in use to-day [40].

The qualifications for electors were low. Every adult male person, a British subject by birth or naturalization, of sound mind, and who had not been "convicted of and sentenced for treason, murder, rape, theft, perjury or forgery, unless he shall have received a free pardon"[41] and who had been in occupation of premises to the value of £25 sterling for a period of 12 months next before the day of registration, or who had been "really and bona fide in receipt of salary or wages at and after the rate of not less than £50 by the year" for at least 12 months next before the day of registration, or in receipt of a "salary or wages at and after the rate of not less than £25 by the year, shall, in addition to such salary or wages, have been supplied with board and lodging" was entitled to be registered as voter and to vote at elections [42]. Certain joint occupiers were also entitled to be registered [43]. All persons qualified to vote would be elected to the Assembly, excepting bankrupts, office holders and naturalized aliens [44].

The franchise amounted practically to universal adult male suffrage. "The £25 franchise, based as it was

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39) Constitution Ordinance : Sections 80, 81 and 88.
40) See S.A.L.J., Vol.60: Article by R.Kilpin: "Parliamentary Procedure on Public Finance".
41) Constitution Ordinance: Sect. 10.
42) Ibid: Sect. 8.
43) Ibid: Sect. 9.
44) Ibid: Sect. 47.

upon the total value of premises and land occupied in the same constituency, was equivalent to an annual rental value of 30s., with the effect that about 80 per cent. of the adult male population in the colony were entitled to registration" 45). These fairly liberal qualifications were tightened up in 1892 by the Franchise and Ballot Act, and, in addition, a literacy test was imposed 46).

Now, as in England of that day, the basis of representation was still territorial 47). Every enfranchised division returned 2 members for the Assembly, irrespective of population, while in the Council each of the 2 divisions returned their respective quota of members without regard to population. With the advent of Responsible Government in 1872 there were, as we have seen, 68 members in the Assembly 48) and 21 in the Council 49). In that year the total number of registered voters amounted to 39,558 50), of which 21,432 were registered in the Western Division and 18,126 in the Eastern Division. On population basis therefore, the East was slightly over-represented in the Council, and the West slightly under-represented.

In the Assembly, also , the East was over-represented, being entitled, on population basis, to only about 30 seats. The West, again, was hopelessly under-represented, being entitled, on population basis, to about 38 seats.

Again, if one looks at the several divisions of the colony, one finds that some divisions ~~are~~ were over-represented, while others ~~are~~ under-represented. Again taking the 1872 Voters' Lists, we find that the largest division, outside of Cape Town, was Port Elizabeth, with 2,915

45) C.H.B.E., Vol. 8, p.376.
46) Act 9 of 1892, Sections 4 and 6.
47) C.H.B.E., Vol. 8, p.376.
48) Supra, p. 4.
49) Supra, p. 1.
50) Voters' Lists 1872; and Annexure B.

registered voters. On the other side of the scale we find the division of Victoria East with only 365 registered voters and East London with only 329 registered voters.

A member of the Legislative Council, Mr. Godlonton, drew attention to this state of affairs on the 12th June, 1874 51). He moved for a commission, with power to take evidence and call for papers, to enquire into and report upon such alterations as may be necessary to bring about a "more equitable adjustment of those political rights and privileges which, under Constitutional Government, are the common heritage of all classes of the community" 52).

In submitting the motion he hoped that it would not be looked upon as a party motion "but (as) a subject that concerns the welfare of the whole colony" 53). He regarded the alterations the Government were endeavouring to bring about in the Constitution as patchwork, and not as a thorough-going reform.

Molteno, sensing danger if this motion were passed, described it as "counter and diametrically contrary to that which the Government have proposed with reference to the amendment of the Constitution". He did not believe "in periodically taking the Constitution to pieces and re-arranging it altogether". He regarded it as an effort to obstruct the Government in their policy of re-constituting the Legislative Council on the "seven circles" principle 54). Godlonton protested, but in vain. His motion was negatived by 10 votes to 9 55). Without apparently realising it, Molteno had let slip a golden opportunity of finally bringing the East on its knees, for as has already been pointed out, the East was greatly over-represented. But the Seven Circles

51) Minutes, 1874: p.36.
52) Ibid.
53) C.A. 16/6/74; Deb. 12/6/74.
54) Ibid.
55) Minutes, 1874: p.36.

Bill was a main point in Molteno's programme, hence he stuck to it. Be that as it may. What is certain is that this system was unjust on the bigger towns, and, subsequently, in the hey-days of the Bond, the over-represented country became the bulwark upon which the conservative Bond rested, to the exasperation of the "Progressives".

IV.

The story of the struggle for Responsbile Government has often been told, and it is unnecessary to recount it here. The upshot of this struggle was that the Responsible Government Bill passed both Houses of Parliament in 1872, was assented to by the Queen, and came into operation on the 1st December, 1872 56). The "Argus" earmarked the 29th November as "a red-letter day in the history of the Colony" 57).

He who reads the "Constitution Ordinance Amendment Act, No.1 of 1872", the full style and titles of the Responsible Government Act, is struck by its shortness. It consists of but ten sections and a preamble 58); yet the changes it brought about were momentous.

Two new offices were created by the Act: the office of the Commissioner of Crown Lands and Public Works, and the office of the Secretary for Native Affairs 59). The occupiers of these offices were to hold office during pleasure and perform such duties as would be assigned to them 60).

The third section, however, is the most important. It provided that the persons enumerated who held offices of profit under the Crown, would be eligible for election to the Council or the Assembly, provided they fulfilled the qualifications as prescribed by law. The persons enumerated

56) Government Gazette Extraordinary, 29/11/72
57) Cape Argus, 30/11/72.
58) For Act, see Eybers: Select Documents, pp.63-64.
59) Constitution Ordinance Amendment Act No.1 of 1872, Section 1.
60) Ibid: Sect. 2.

were those occupying the offices of Colonial Secretary, the Treasurer, the Attorney-General, the Commissioner of Crown Lands and Public Works and the Secretary for Native Affairs. Persons already members of either House could be appointed to such offices 61).

Such office holders could sit in either House, take part in the discussions, subject to the rules and orders of the House, but could only vote in the House wherein they had their seat.62) This entailed the repeal of section 79 of the Constitution Ordinance, and it was duly done away with 63).

The holders of the offices enumerated were entitled to salaries 64) but not to pensions 65). Provision was made for pensions for the holders of the offices above-mentioned, who vacated them as a result of the passing of the Responsible Government Bill 66).

Such then is the contents of this Act. It changed the whole political structure of the Executive Council. Whereas it had previously been nominated by the Crown and responsible to it, it now ceased to be responsible to the Crown and became responsible to Parliament. Furthermore, the Governor would now have to invite such persons to hold office as would have the confidence of a majority of members in Parliament, and whose policy Parliament would be prepared to endorse.

Furthermore, Responsible Government brought with it what is known as collective and individual responsibility. Each member of the Cabinet was individually responsible for the administration of his department, while the whole Cabinet was collectively responsible for the policy pursued by the Government. Also, the entire Cabinet was responsible

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61) Constitution Ordinance Amendment Act No.1 of 1872, Section 3.
62) Ibid: Sect. 4.
63) Ibid: Sect. 5.
64) Salaries, as provided for in Sect.7 :-
Col. Secretary £1,200 p.a.; The other 4 each £1,000 p.a.
65) Constitution Ordinance Amendment Act No.1 of 1872, Section 8.
66) Ibid: Sect. 6.

for the policy pursued by any individual member of the Cabinet in the administration of his department. The recent tendency of Cabinets to agree to differ, as did Ramsay MacDonald's in 1932 [67] and the Smuts Cabinet in 1943 [68], was unknown as yet to Parliamentary practice. Cabinet solidarity was the essence of Parliamentary government.

To claim, however, that the Colony was now "mistress in her own house", is greatly to exaggerate things. It is clear that even as far as internal matters went, Mother Downing Street still had the final say. Also, by virtue of the Colonial Laws Validity Act [69] the Imperial Parliament at Westminster could legislate for the Colony, such legislation overriding any local legislation that might be in conflict with it. Although this Act has been called "the charter of Colonial legislative independence" [70], it must be looked upon as merely definitive in scope, but definitive in a very elastic sense. The provisions of this Act which have a bearing upon Colonial Legislation are the following :-

> Section 2: "Any Colonial law which is or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the colony to which such law may relate, or repugnant to any order or regulation made under authority of such Act of Parliament, or having in the colony the force and effect of such Act, shall be read subject to such Act, order, or regulation, and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative."
>
> Section 3: "No colonial law shall be or deemed to have been void or inoperative on the ground of repugnancy to the law of England, unless the same shall be repugnant to the provisions of some such Act of Parliament, order, or regulation as aforesaid."
>
> Section 4: "No colonial law, passed with the concurrence of or assented to by the Governor of any colony, or to be hereafter so passed or assented to, shall be or be deemed to have been void or inoperative, by reason only of any instructions with reference to such law or the subject thereof which may have been given to such Governor by or on behalf of Her Majesty, by any instrument other than the letters-patent or instrument autho-

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67) See: W. I. Jennings: Cabinet Government, pp.219-221.
68) See: The Round Table, June 1943, pp.288-290.
69) Colonial Laws Validity Act (1865): 28-29 Victoria c.63.
70) A. V. Dicey: Law of the Constitution, 9th ed., p.105.

rising such Governor to concur in passing or to assent to laws for the peace, order, and good government of such colony, even though such instructions may be referred to in such letters-patent or last-mentioned instrument." 71)

Section 5: "Every colonial legislature shall have, and be deemed at all times to have had, full power within its jurisdiction to establish courts of judicature, and to abolish and reconstitute the same, and to alter the constitution thereof, and to make provision for the administration of justice therein; and every representative legislature (i.e. a colonial legislature which has half its members elected by the inhabitants of the colony) shall, in respect to the colony under its jurisdiction, have, and be deemed at all times to have had, full power to make laws respecting the constitution, powers, and procedure of such legislature; provided that such laws shall have passed in such manner and form as may from time to time be required by any Act of Parliament, letters-patent, order in council, or colonial law for the time being in force in the said colony" 72).

The reason for quoting the above sections in extenso is that, if they are not read alongside with a colonial constitution, the true nature and powers of the colony cannot be thoroughly understood, and the student of the constitution is then liable to draw falacious conclusions. Another good reason is that section 4 throws some light upon the anomalous position of the Governor of a Colony 73). Again, it forms part and parcel of Colonial Constitutional law, and can therefore not be left out of consideration when studying the constitution of a colony. It has been the fate of this Law to be underrated by South African historians.

V.

Such then was the Constitution of the Cape Colony when the first Parliament under Responsible Government met on the 24th April, 1873. It will be noticed that the position of the Governor has not been discussed. But his position is of such importance that it necessitates a separate chapter 74).

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71) In certain cases the Governor had to reserve Acts for the signification of the King's pleasure. See in this respect: Instructions to Barkly, [C-732], No.39, and instructions to Frere A8-78, p.7. For discussion of instructions to Governor, infra Chapt. 2.

72) Quoted from Dicey, op.cit.

73) For discussion of Governor's position, infra Chapt.2.

74) Infra, Chapt. 2.

With this Constitution as instrument, the Molteno Cabinet governed the country from the 1st December, 1872, until they were dismissed by Sir Bartle Frere on the 5th February, 1878. It is with the working of this Constitution that the following pages are mainly concerned. There are but a few Constitutional changes to record; indeed, colonial history under Responsible Government is singularly barren as far as Constitutional History proper is concerned. There was, however, "a good deal of Parliamentary history" 75).

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75) Eybers: Select Documents: Introduction, p.xxxix.

CHAPTER TWO.

THE GOVERNOR AND HIGH COMMISSIONER.

I.

> "The position of a Governor of the Cape in 1875 was additionally complicated because he was also Her Majesty's High Commissioner with duties that extended beyond the borders of the Cape, and therefore strictly beyond the control of a responsible ministry". 1)

Even the position of the Governor in all the Colonies of the Empire was still anomalous, and the Governor's "uncertain position between a responsible ministry and the Home Government had not yet been defined by an accepted body of precedent,.....". 2)

This being the state of affairs, let us proceed to a discussion of the duties of the Governor assigned to him by the constitution and by instructions issued to him on his appointment, always, however, reading such duties alongside with the Colonial Laws Validity Act.

II.

With the introduction of Responsible Government it became necessary to revoke the Commission and Instructions issued to Governor Barkly in 1870, and to issue a new set of Instructions to suit the altered circumstances. 3) Again, when Sir Bartle Frere succeeded Barkly in 1877, new Letters Patent constituting the office of Governor, alongside with a fresh batch of Instructions were issued. 4) It may be remarked here that no fresh Instructions were issued to the High Commissioner in 1872. And it is only in 1877 that a fresh Commission and Instructions again appear. 5)

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1). De Kiewiet: Imperial Factor, p.77. (italics mine).
2). Ibid: For a discussion of the position of the Governor-General in Canada, see: Neuendorff: Studies in the evolution of Dominion Status: Part I, chapter 1-5.
3). For copy, see [C.732], No. 39 of 1872 and A.9-73.
4). For copy, see A.8-78, p.1-9.
5). A. 8-78, p.10-11.

A. The Constitution Ordinance enjoined the Governor to summon both Houses of Parliament to sit and deliberate at the same time and place, [6] such sessions of Parliament to be held at least once a year. [7] He was empowered to prorogue, by speech or proclamation, both Houses together, and, in the same way, dissolve, either both Houses together, or the Assembly alone, without dissolving the Council. [8] It was only in 1897 that the Governor was empowered to dissolve the Council, without, at the same time, dissolving the House of Assembly. [9]

All Bills appropriating to the public service any sum of money from or out of Her Majesty's revenue within the Colony had first to be recommended to the House of Assembly by the Governor. Also, no money could be issued from the Treasury excepting under the authority of the Governor. [10] The Governor could transmit drafts of Bills to any of the two Houses for initiation, but money Bills had to originate in the Assembly. [11] The Governor, however, shared with the Council the privilege of amending money Bills, and returning them to the Assembly. [12] Under responsible government of course, such amendments could only be made on the advice of the Ministers. This again, it is feasible to assume, would only occur if a flaw was detected in the Bill after it had passed both Houses.

All Bills enacted by the Houses were to be submitted for Royal assent to the Governor, who was to declare according to his discretion, subject to the provisions of the Constitution Ordinance and such instructions issued to him, that he assented to, reserved for the signification

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6). Constitution Ordinance: Sect. 60.
7). Ibid: Sect. 77.
8). Ibid: Sect. 74.
9). Legislative Council Dissolution Act, No. 9 of 1897.
10). Constitution Ordinance: Sect. 80.
11). Ibid: Sections 81 & 88.
12). Ibid: Sect. 88.

of Her Majesty's pleasure, or refused to assent to such Bill. Before assenting to such Bill, however, he could make such amendments to the Bill " as he shall think needful or expedient" and return it to the Houses for concurrence. [13] Here again, it would be exercised, under Responsible Government, upon ministerial advice, upon the detection of a flaw. It would therefore be idle to say that it was a meaningless addendum.

All Bills assented to by the Governor had to be transmitted as soon as possible "to one of Her Majesty's Principal Secretaries of State". Such Bill could, however, be disallowed within two years after its receipt in England. Such disallowance the Governor had then to communicate to the two Houses. [14]

Now the sections providing for the Royal assent must be read alongside with the Colonial Laws Validity Act. If a Bill passed by the Colonial Legislature ran counter to a statutory enactment of the Imperial Parliament extended to the Colony, such a Bill would be null and void to the extent that it ran counter to the Imperial enactment. [15] This, in fact, happened in the Cape Colony in 1874. The "Natal Criminals Act, No. 3 of 1874", providing for the imprisonment of the Amahlubi chief Langalibalele and his son on Robben Island for offences committed in Natal, was repugnant to the Imperial "Colonial Prisoners Removal Act, 32 & 33 Victoria C. 10" read alongside with 28 & 29 Victoria C. 63. [16] It does not reflect credibly upon the law adviser of the Cape Government that he was unaware of the existence of such an Act at the time of the passing of the Natal Criminals Bill.

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13). Ibid: Sect. 82.
14). Ibid: Sect. 83.
15). Colonial Laws Validity Act, 28 & 29 Victoria C. 63 sect. 2.
16). See Uys: In the era of Shepstone. p.94. N. 28 and [c.-1205] No. 50.Carnarvon to Pine 13/4/74.

If an Act so assented to was repugnant to the law of England, it would not be void or inoperative, provided, always, that it was not repugnant to a statutory enactment extended to the Colony. [17] Again, such law was not to be declared void or inoperative on the ground simply of instructions given to the Governor on behalf of Her Majesty, with reference to such a law or to the subject-matter of such law. [18]

Reference has already been made to the power of the Governor with reference to the assembling, prorogation, and dissolution of Parliament.[19] Now these powers, also, would have to be exercised upon ministerial advice under the system of Responsible Government.

In 1873, as we have already seen, the Legislative Council set the "Seven Circles Bill" aside as a breach of privilege of that House.20) Lacking any other means to overcome the Council's opposition, the Prime Minister advised a dissolution of both Houses simultaneously. The Governor acted upon this advice; announced to Parliament in his prorogation speech that he would dissolve both Houses,[21] and this was duly done by a proclamation of the 22nd of August. [22] The doctrine of ministerial responsibility entailed that the Governor act upon the advice of his Ministers. Thus, also, the recommendation that he had to give to money Bills before they could be introduced into the Assembly, would be given on the advice of his Ministers.

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17). Colonial Laws Validity Act, 28 & 29 Victoria C. 61., Sect. 3.
18). Ibid: Sect. 4.
19). Vide Supra, p. 14.
20). Vide Supra, p. 3.
21). See prorogation speech, 26/6/73 and GH 31/12. Barkly to Kimberley, 2nd July, 1873; Molteno: Life of Molteno: Vol.I, p. 219.
22). Govt. Gazette, 22/8/73.

If the Governor refused to take the advice of his Ministers, they would be bound to resign, and the task would be left to him to find new advisers who would consent to take upon themselves the responsibility for the Governor's actions. Before pursuing this topic further, it would be well to examine the Commission and Instructions issued to the Governor.

B. In comparing the Instructions issued to Barkly with those issued to Frere, it will be found that, excepting for some verbal alterations, they are exactly the same. There are, however, a few important differences between the Commission re-appointing Barkly as Governor, and the Letters Patent issued to Frere.

As far as the Commission and Letters Patent are concerned, the following are common to both:

The Governor was also to be Commander-in-Chief in and over the Colony with its territories, dependencies, the castle forts and garrisons erected and to be erected in the Colony, and the Governor is commanded "to do and execute, in due manner, all things that shall belong to his said command". 23)

In the Colony there was to be an Executive Council consisting of such persons as are declared by law to be members of the Executive Council, alongside with such persons as the Governor may from time to time appoint under the public seal of the Colony to be members of the Executive Council. The Executive Council, therefore, was to be larger than the Cabinet, a theory which has been perpetuated by the South Africa Act, 1909. 24)

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23). A. 8-78. Preamble & [C-732] Kimberley to Barkly 24/8/72., inclosure (1) in No. 39.
24). S.A. Act., 1909; Sections 12 & 14.

The Governor was to be the keeper of the Public Seal of the Colony " for sealing all things whatsoever that shall pass the said public seal". 25). All lands that could be lawfully granted away and disposed of by the Crown, the Governor was empowered in name of the Crown "to make and execute under the said seal grants and dispositions of any (such) lands ....".26) Furthermore, the Governor was empowered to "constitute and appoint" in the name of the Crown Judges, Commissioners, Justices of the Peace and such officers and ministers as may be lawfully appointed by the Crown.27)

The Governor, with the advice and consent of the Legislative Council and House of Assembly, was empowered to make laws for "the peace, welfare and good government" of the Colony, subject, always, to disallowance by the Crown. 28)

Persons holding office by virtue of a Royal grant or commission, or by virtue of a grant or commission issued under Royal authority, could be removed or suspended from office by the Governor "upon sufficient cause to him appearing", provided that such removal or suspension could legally be executed. 29)

All powers and authorities lawfully belonging to the Crown with respect to the summoning, prorogation and dissolution of any Legislative body established, or to be established, within the Colony, could be exercised by the Governor. 30)

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25). A. 8-78: p.2., sect. 3 & [C-732] incl. (1) in No.39., sect. 2.
26). Ibid: p.2. sect. 4 & Ibid: sect. 3.
27). Ibid: p.2. sect. 6 & Ibid: sect. 5.
28). Ibid: p.2. sect. 7 & Ibid. sect. 6.
29). Ibid: p.3 sect . 9 & Ibid: sect. 8.
30). Ibid: p.3 sect.10 & Ibid: sect. 9. Compare Const. Ord. sections 60 & 74 and above.

In case of the death, incapacity, removal or absence of the Governor from the Colony, the Lieutenant-Governor [31] was to be the acting-Governor for the time being, or, failing such a lieutenant-governor, the senior officer for the time being, provided that they had taken the oaths of office. [32]

Whenever and so often as the Governor, in his capacity as High Commissioner, shall be absent from the Colony in execution of his duties as High Commissioner or if he be appointed governor of a territory or province adjacent or contiguous to the Cape Colony, he shall continue to exercise all the powers and authorities of Governor of the Cape Colony, as if he were residing in the Cape Colony. [33] The Governor could, however, during a temporary absence from the Colony, appoint a person to act as his deputy in the Colony, performing such functions and authorities as the Governor may assign to him, and during his pleasure. The appointment of such a deputy, however, was not to affect, abridge or alter the powers and authorities of the Governor within the Cape Colony "otherwise than we may at any time hereafter think proper to direct". [34] This provision does not appear in the Commission issued to Barkly in 1872, neither does the following:

> "And We do further authorize and empower Our said Governor in Our name and on Our behalf to appoint to or remove persons from any offices which are now or hereafter may be created or declared by the Legislature of Our said Colony to be tenable during Our pleasure and also in Our name and on Our behalf to assign to such persons, while holding such offices, such duties as to him in his discretion may seen fit: [35] Provided, nevertheless, and we do hereby reserve to Ourselves, Our Heirs and Successors, Our and Their undoubted right and authority to disallow any such appointments or removals, and any such assignments of duties in whole or in part" 36)

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31). For Commission appointing Lt.-Governor: A8-78, p.11 & 12.
32). A.8-78, p.3. sect.11 & [C-732] incl. (1) in No. 39, sect.10
33). Ibid: pp. 3 & 4. sect. 12 & Ibid: sect. 11.
34). A. 8-78: p.4. sect. 13.
35). Compare in this respect: Const. Ord. Amendment Act No. 1 of 1872, sect. 2.
36). A. 8-78, p.2, sect. 5.

This section refers to the Ministers of the Crown in the Colony. The significance of this section will be examined below. 37)

Now, while the Commission of 1872 as well as the Letters-Patent of 1877 authorized and empowered the Governor to grant pardons and remit fines, a further provision was introduced in the Letters Patent of 1877. 38) The proviso reads as follows:

> Provided always that Our said Governor shall in no case, except when the offence has been of a political nature, unaccompanied by any other grave crime, make it a condition of any pardon or remission of sentence that the offender shall be banished from or shall absent himself from Our said Colony" 38)

It is humbly submitted that this proviso was inserted as a result of the experience gained in the Langalibale affair, and to prevent any future violation of the Imperial " Colonial Prisoners Removal Act, 32 & 33 Victoria C. 10."

The power of revoking, altering or amending the Letters Patent at any time as may seem meet was reserved for the Crown, (39) and the Governor was enjoined to have the Letters Patent "read and proclaimed at such place or places" as he might think fit. 40)

The Instructions, as has been said, issued in 1872 and 1877 are identical as far as substance goes. The difference is that the Instructions of 1872 are addressed to Sir Henry Barkly, while those of 1877 are addressed to "our said Governor". 41) The different sections in both these sets of Instructions are in the same

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37). Vide Infra, pp. 26-27.
38). A 8-78: p. 3, sect. 3 and [C-732] incl. (1) in No. 39 sect. 7.
38). A 8-78: p,3, sect. 3.
39). A 8-78: p,4, sect. 15.
40). Ibid: sect. 16.
41). A 8-78, pp, 5-9 and [C-732] incl. (2) in No. 39.

order. Reference will therefore be given only to the Instructions of 1877.

The Governor was to cause his commission to be read in presence of the Chief Justice of the Colony, or some other Judge of the Supreme Court and the Executive Councillors of the Colony. He had to take the Oaths of Allegiance as prescribed by law, which had to be administered to him by the Chief Justice or the Senior Judge of the Supreme Court. Failing such Judges, the duty had to be performed by the Senior member of the Executive Council.[42] Either the Governor or some other person authorized by him, had to administer "to all and every person or persons, as he shall think fit, who shall hold any office or place of trust or profit, the said Oath of Allegiance, together with such other oaths as may, from time to time, be prescribed by any law in that behalf made and provided".[43]

The Instructions, and such others as may from time to time be issued, had to be communicated by the Governor to the Executive Council.[44] Two members of the Council, excepting the Governor or the presiding member, formed a quorum. Also, the Council could not proceed with the dispatch of business, unless formally convened by the Governor.[45] The Governor was to attend and preside at such meetings, and had to have a president appointed to preside in case of his absence; in case of the absence of both Governor and president, the senior member of the Council was to preside, seniorty being determined by the order of their respective appointments to the Council.[46]

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42). A 8-78 p.5, sect. 1.
43). Ibid: pp. 5-6, sect. 2.
44). Ibid: p. 6, sect. 3.
45). Ibid: sect. 4.
46). Ibid: sect. 5.

Formal minutes had to be kept of the acts, proceedings, votes and deliberations of the Council, and at each meeting the minutes were to be read and confirmed, or amended, before proceeding to the dispatch of business. [47] The Governor had to consult the Council in all cases relating to the exercise of the several powers and authorities vested in him by the Letters Patent. But, if in the Governor's judgement the Crown's service would "sustain material prejudice" by consulting the Council, or if the questions are of little significance, or if time does not permit it being consulted, then he could act without first obtaining their advice, "provided that in all such urgent cases he shall at the earliest practicable period", communicate to the Council the measures he had adopted, as well as the reasons for acting thus .[48] But, even when asking their advice, he was given the discretion of acting in opposition to their advice. In such cases, however, he had to report, at the first convenient opportunity "such proceeding with the grounds and reasons thereof." [49]

A number of rules were also laid down to guide "as far as may be practicable" the Governor in assenting to, dissenting from, or reserving Bills for the signification of Her Majesty's pleasure thereon. He was not to assent to laws wherein different subjects were mixed, each different subject requiring a different law. Neither were clauses to be introduced into a law foreign to what the title imported nor were these to be perpetual clauses in temporary laws. [50] These rules applied,

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47). Ibid: sect. 6.
48). Ibid: sect. 7.
49). Ibid:
50). Ibid: p.7 . sections 9 & 10.

of course, to all laws in general. The following types of Bills were not to be assented to by the Governor, unless they contained a clause suspending the operation thereof until the signification of the Royal pleasure had been obtained, or if the Bills are of an urgent nature, necessity requiring their immediate operation, viz.:

(1) Divorce Bills; (2) A Bill granting land, money or some other donation to the Governor; (3) A Bill declaring paper currency legal tender "except the coin of the realm or other gold or silver coin"; (4) Any Bill imposing differential duties; (5) Any Bill, the provisions whereof appear inconsistent with Treaty obligations of the Imperial Government; (6) A Bill interfering with the discipline of Her Majesty's armed forces in the Colony; (7) A Bill abridging the Royal prerogative as well as the property rights of non-resident British subjects and the trade and shipping of the United Kingdom and its dependencies; and (8) Any Bill containing provisions to which assent had already been refused, or which had been disallowed. 51)

We have seen above that under certain exceptional circumstances, the Governor could assent to such Bills. But, even if such circumstances existed, he could not assent thereto, if the Bills were "repugnant to the Law of England, or inconsistent with any obligations imposed upon us by treaty" 52) Now we have seen that the Governor was empowered by the Colonial Laws Validity Act to assent to Bills, even if they were repugnant to the

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51). Ibid: Sect. 11.
52). Ibid: (Italics mine)

Law of England, providing they were not repugnant to any statutory enactment extended to the Colony. [53] The provision in the Instructions is therefore out of place, in fact, obsolete. Doubtless, however, this section in the Instructions was meant to convey "statutory enactments extended to the Colony". In any case, if the Colonial Laws Validity Act be read alongside, the position is quite clear. He could therefore assent to Bills provided they complied with the Colonial Laws Validity Act.

All Bills assented to, or reserved for the Royal pleasure, were to be transmitted to England, [54] with abstracts in the margin. He could also make explanatory observations as to the circumstances that necessitated the passing of such a law. He was further required to transmit "fair copies of the Journals or Minutes of the proceedings of the Legislative Bodies", acquired from the clerks or other proper officers, and transmit them as well. [55] The reason why he had to acquire it from the "clerks or other proper officers" is obvious - they were to be correct and authentic.

The Governor had to obtain special permission to purchase Crown Lands. [56] Neither could he absent himself from the Colony, excepting after having obtained special permission. [57] He was further required to furnish the Secretary of State for the Colonies with Blue books and statistics, [58] promote religion and education amongst the natives and prevent any injustice attempted against them. [59] The Governor was to appoint

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53). 28 & 29 Victoria C. 63. sect. 3.
54). Compare Constitution Ordinance, sect. 83.
55). A. 8-78, p.7. sect. 12.
56). Ibid: pp. 7-8, sect. 13.
57). Ibid: p. 9, sect. 18.
58). Ibid: p. 8, sect. 17.
59). Ibid: sect. 15.

all Judges, Justices of the Peace and "other officers" who were to hold office during pleasure, unless otherwise provided for by law. 60)

On one very important point the discretion left to the Governor was very wide, i.e. he was given a very wide discretion as to pardons. The Governor was to acquire a report from the judge presiding at the trial of a person condemned to death , and such report he was then to lay before the Executive Council and take their advice thereon and, if it appeared to him expedient, grant a reprieve or pardon. But he could, upon his own deliberate judgement, decide to withhold or extend a reprieve or pardon even in opposition to the advice tendered by the Council. If he should decide in opposition to the Council, he was to enter his reasons "at length" in the Council Minutes. 61) Doubtlessly it was intended that the Governor should especially exercise this discretion in cases where natives were the offenders.

It is interesting to notice that in the eighteen-seventies and agitation was carried on in Canada to get the Governor-General always to act upon the advice of his Ministers in exercising the prerogative of pardon. In England , it was argued, the Queen's prerogative of pardon was really in the hands of the Home Secretary. Exception was also taken to the practice that the presiding judge at the trial of the condemned should send a report to the Governor-General, seeing that one was also sent to the Minister of Justice. The upshot of

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60). A: 8-78; sect. 16.
61). A: 8-78; p. 8, sect. 14.

the agitation was that, when new Instructions were issued to the Governor-General, his independent action in exercising the prerogative of pardon was limited to issues where Imperial interests were involved. Furthermore, the judge was no longer to send a report to the Governor-General.[62] At the first Colonial Conference a New Zealand delegate, backed by the Canadians, proposed that the Canadian system be extended to the other Colonies. He failed to carry the point "partly through lack of support"[63]

In South Africa, however, the independent action of the Governor, and later the Governor-General, has never been limited. It was retained in the Instructions issued to the first Governor-General in 1909,[64] and, in 1937, when the Governor-General's Instructions were issued with the counter-signature of the Union Prime Minister, it was again inserted.[65]

This discretion of the Governor, it is humbly submitted, was the most important of all the cases in which he was left to act upon discretion, and, it was doubtlessly intended that he should use it.

C. To argue that the Governor had invariably to act upon the advice of his Ministers, would be incorrect. Although it may be assumed that the Governor would always seek the advice of his Ministers, he was under no obligation to accept that advice, if, according to his judgment, Imperial interests would be materially damaged. But it is also certain that the Governor would not act autocratically. If he refused his Ministers' advice, they would resign, and he would be left with the unenviable task of finding new Ministers who would be willing to accept the responsibility for what he had done.

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62). Compare: Neuendorff: Studies in the evolution of Dominion Status, p. 81-86.
63). Ibid: p. 87.
64). See: Kennedy & Schlossberg: Law & Custom; App. VI.
65). For Instructions, 1937, see: Govt. Gazette Extraordinary; 16th March, 1937.

The Governor's actions would then become their actions and they would have to answer for it to Parliament.

Now the Governor may have acted unconstitutionally, and the Ministers would be assailed in Parliament for it. Parliament may, however, endorse their actions. Does this then imply that the actions become constitutionally correct? By no means. Parliament may be the guardian of the Constitution, yet, in my opinion, it is not the best judge as to when a breach of the constitution has taken place. Parliament does not consist of a body of constitutional lawyers always on the lookout for somebody that may violate the Constitution.

Furthermore, it may sometimes be in the interests of the County at large that Parliament closes its eyes to breaches of the Constitution. This, of course, would only occur in cases of exceptional importance, as, for instance, when the country is in danger of invasion, or some other national calamity threatens the County.

Bearing these remarks in mind, let us now examine how the Governors between 1872 and 1878 exercised these duties above described.

Sir Henry Barkly, who had come to the Colony with the definite instructions to introduce the system of Responsible Government,[66] was in all respects a model of a constitutional Governor. It appears from his own despatches, that he even refused to act in his capacity as High Commissioner without first obtaining the advice of his Ministers.[67] To such an extent did he act in

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66). De Kiewiet: Imperial Factor, p.12; Hofmeyr: Life of Hofmeyr, p.103; Molteno: Life of Molteno, Vol. I, pp. 159-160; C.H.B.E., p.437; Walker: History, p.347.
67). G.H. 31/13. No.33: Barkly to Carnarvon, 27th March, 1876.

harmony with his responsible advisers, that Carnarvon sharply advised him that "a Governor was the representative of the Queen and the Imperial Government, and owed the Secretary of State his whole-hearted support" [68]

All along Barkly preferred to act upon the advice of his own Ministers than to listen to views tendered by Carnarvon. Although the latter urged him to dissolve Parliament on the Confederation question, if necessary,[69] he never acted on this advice, and, in fact, dissented from this view of Carnarvon. [70]

Molteno's over-sympathetic son and biographer continually harps on Barkly's firm adhesion to the principles of constitutional government [71] and loudly rings the praises of his successful administration.[72] The Premier himself expounded his virtues,[73] and Solomon, in spite of his statement to the contrary, also sounded the Governor's praises.[74]

All this is true. From the colonial point of view he was a constitutional governor "par excellence". From the Colonial Office's point of view he was not such. It must be remembered that he had been appointed by the Liberals, and that, from 1874, the Conservatives had succeeded to office, with a vigorous colonial policy as the main-spring of their political programme. [75]

The trouble came because Barkly adhered to Lord Kimberley's instructions as to his line of action. [76] Barkly lost sight of the fact that he now had new masters with new intentions; intentions that differed widely from the Liberals "laissez-faire" colonial policy.

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68). De Kiewiet: Imperial Factor, p.79.
69). [C-1399] Carnarvon to Barkly, 22/10/1875, No. 24.
70). Ibid: Barkly to Carnarvon, 24/11/1875, No. 42.
71). Molteno: Life of Molteno: Vol II, pp.69-79, 110.
72). Ibid: pp. 154,155,160,202,212,306,407.
73). Ibid: p.152.
74). Ibid: p.153.
75). Ensor: England, p.30. Wilmot: Life of Southey, p.261.
76). G.H.31/13: Barkly to Carnarvon, 27/3/1876: No. 33 and De Kiewiet: Imperial Factor, p.78.

Barkly was succeeded by Sir Bartle Frere. During his administration the "vigorous colonial policy" of the Conservatives came into full operation. But before discussing his actions, we must shortly review the Instructions issued to the High Commissioner. It is a patent fact that Barkly let his special powers as High Commissioner fall into abeyance. [77] Frere, however, soon showed that he was going to use those powers.[78]

III.

In January, 1873 Brownlee, Secretary for Native Affairs, proceeded across the Kei to settle a dispute that had arisen between Kreli and Gangelizwe.[79] On the 29th of April Merriman, in the House of Assembly, wanted to know by whose authority Brownlee had proceeded over the Kei.[80] Upon Molteno answering that Brownlee had proceeded across the Kei on the Government's authority, Merriman attacked the Government, holding that the native affairs across the Kei fell in the High Commissioner's sphere, and that the Government should stand aloof. On the 1st of May Sprigg moved for the Commission issued to the High Commissioner since the introduction of Responsible Government.[81] Molteno replied that no fresh Commission had been issued. [82]

From the fact that no fresh Commission was issued by the Imperial Authorities after the introduction of Responsible Government, it can be deduced that the intro-

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77). G.H. 31/13. Barkly to Carnarvon, 27/3/1876, No. 33 De Kiewiet: Imperial Factor, p.78. Harding: Carnarvon: Vol. II pp. 185-186 and 299.
78). Frere to Carnarvon: 14/11/1877: quoted in Harding, Vol. II, p.299.
79). Wilmot: History, p. 105; De Kiewiet: Imperial Factor, p.78; C.A. 14/1/73. :History,
80). V & P. 1873, p.12 & C.A. 1/5/73; Wilmot, p.74.
81). V. & P.1873, p.26; De Kiewiet,p.78; C.A. 3/5/73.
82). C.A. 3/5/73.

duction of the system of Constitutional Government did not, in any way, alter the position of the High Commissioner. He remained as heretofore a kind of diplomatic agent of Her Majesty's Government, with powers extending beyond the Cape Frontier. [83]

In comparing the Commissions issued to Wodehouse,[84] Hay,[85] Barkly [86] and Frere[87], it will be found that, excepting verbal differences, they are all the same in substance.

The Commission begins by reciting the previous Commission issued to the previous Governor; it formally revokes it, and appoints the new Governor to the position of High Commissioner "for the territories of South Africa, adjacent to (the Cape Colony), or with which it may be expedient that we should have relations.....". He was further enjoined to obtain the co-operation of all the other states "towards the preservation of peace and safety in South Africa, and the general welfare and advancement of its territories and peoples". [88]

This section is vague and includes any and every diplomatic function south of the equator. It could be stretched at will to suit any circumstance. It is fairly clear that in exercising their functions he was to act upon Imperial advice, as it would primarily be Imperial interests that would be affected. The High Commissioner, therefore, was the diplomatic and administrative agent of sorts of the Imperial Government and not of the Cape Colony.

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83). De Kiewiet: Imperial Factor: pp.77-79; Harding, Carnarvon: Vol. II, p.162.
84). A. 13-65.
85). G.H. 1/17. Granville to Hay, 27th June, 1870.
86). G.H. 1/17. Kimberley to Barkly, 17th September, 1870
87). A. 8-78, pp. 10-11.
88). Quoted from A. 8-78, p. 10, sect.1.

The second section (there are only three sections in all these commissions) is also vague, but the duties assigned therein to the High Commissioner are more definite and to the point. The section is here quoted in extenso:

> "And we do hereby require and enjoin you as such Our High Commissioner, in Our name and on Our behalf, to take all such measures, and to do all such matters and things, as can and may lawfully and discreetly be done by you, for preventing the recurrence of any irruption into Our said Possessions of the tribes inhabiting the territories aforesaid, (adjacent and contiguous to the Cape Colony) and for maintaining Our said Possessions in peace and safety, and for promoting, as far as may be possible, the good order, civilization, and moral and religious instruction of the tribes aforesaid, and, with that view, for placing them under some settled form of Government". 89)

The third and last section commanded and required "all our Officers and Ministers, Civil and Military, and all the inhabitants of our said possessions, with their territories and dependencies, and all our loyal subjects in South Africa" to obey and assist the High Commissioner. 90)

What did the Governors think of these powers conferred upon them? Wodehouse was certain that it was impossible to separate the functions of the High Commissioner from those of the Governor. He writes to Buckingham:

> "that the extra-colonial policy is directed by a High Commissioner, appointed by the Crown, uncontrolled in any degree by the local legislature. That is practically a fallcy. The High Commissioner is merely the Governor under another name. All his Acts have reference to the interests of the Cape Colony. He has no funds at his disposal, except colonial funds, over which the Legislature can always exercise a supervision; and it is beyond denial that during their Sessions they constantly call for correspondence and information as to the policy and acts of the High Commissioner. It would not make the slightest difference in the administration of affairs if the office were abolished...." 91)

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89). A.8-78, p.11. sect. 2.
90). Ibid: sect. 3.
91). 181: Wodehouse to Buckingham, 16/7/1867. No.64.

According to Barkly, the High Commissioner could, under Responsible Government, not exercise the independent powers given to him, but had to act upon Ministerial advice.[92] It was left to Frere to take up a more spirited line of action. On November 14, 1877, he wrote as follows to Carnarvon:

> "The fact is, the office of High Commissioner had of late years fallen so much into abeyance that, when I first came, the Attorney-General described it to me as a kind of honorary obsolete office, which had little present meaning or practical utility. Soon after, the Chief Justice's remarks in the trial of Nehemiah Moshesh showed my Ministers that it was not easy to say what of their acts in the Transkei were legal, without the expressed concurrence af the High Commissioner; and since then I have had little trouble in making the Native Secretaries consult and inform me, as fully as in the days of Sir Phillip Wodehouse.."[93]

Barkly's doctrine was thus reversed by Frere; instead of consulting his Ministers when he wanted to exercise his authority, he laid down that they consult him if they wanted to act with reference to the natives in territories lying outside Colonial borders.

That there was much confused thinking as to the position occupied by the High Commissioner is clearly shown in the debates in the House of Assembly.

On the 29th of April, 1873,[94] when moving for the Instructions issued to Brownlee before proceeding across the Kei, Merriman said that he wanted the relations between the Government and the High Commissioner cleared up, and protested against the Government's intervention

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92) G.H. 31/13. Barkly to Carnarvon, 27/3/1876, No.33 "In point of fact therefore, although I have continued to use the title (of High Commissioner) for convenience sake and am perfectly ready to obey any special directions that may be issued to me in that capacity, I have ceased since the introduction of Responsible Government to exercise independent powers as High Commissioner".
Barkly did not adhere to this course: see Infra, ch.6 sect. II, p.81.

93). Quoted in Hardinge: Carnarvon: Vol II p.299 (Italics mine)

94). V.& P. 1873, p.12.

in the policy which was a "meddle and muddle".[95] Molteno, however, said that the duties of the High Commissioner could not be defined. On this, as on many other subjects, Molteno does not seem to have had any clear and consistent views.

When, on May the first, 1873, Sprigg called for the New Commission issued to the High Commissioner since the introduction of Responsible Government,[96] he said his object was "to arrive at a conclusion, if possible, as to where they were".[97] Porter, he said, had told them that the High Commissioner was only an office, and that, what he did and what the Governor did, was the same thing. If that was the case, then the office ought to be abolished for it would entail the saving of £1000 per annum. Such a course would then do away with all uncertainty as to who was responsible for certain acts. He seems to have been under the impression that the High Commissioner had to act only upon advice of the Cabinet.[98] Stigant feared that, as the post of High Commissioner was intimately associated with native policy, the Government might deny all responsibility for a line of policy, holding that it was not their policy.

Molteno on this occasion again showed vagueness. He told the Assembly that there were acts of the High Commissioner for which the Government could not be held responsible, as he acted in such cases on instructions from Her Majesty's Government. Where there was

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94). V. & P. 1873, p.12.
95). C.A. 1/5/73; D.A. 29/4/77. Wilmot:History, p.74.
96). V. & P. 1873, p.26.
97). C.A. 3/5/73 D.A. 1/5/73.
98). Ibid.

any co-operation between the Government and the High Commissioner, there the Government would accept responsibility. He refused, however, to draw a precise line of distinction between the duties of the Governor and those of the High Commissioner. This speech was not to the point; it lacked the usual roar of the Beaufortian Lion.

Merriman immediately "twisted the tail" of the Prime Minister. His speech was vague and unsatisfactory; he had not stated how far the Government would assume responsibility for the acts of the High Commissioner. What the House wanted was "to do away with the mystery surrounding the dealings of the High Commissioner."

William Porter, one time Attorney-General of the Cape Colony, [99] was of opinion that the responsible advisers of the Governor were to accept responsibility for all acts done by him whether in his capacity as High Commissioner or Governor. He denied that there was any difference between the two offices, and "I would see it (the High Commissionership) abolished to-morrow without the slightest possible regret" [100]. In his opinion, High Commissioner was synonomous with Governor.

It is indeed strange that a man of Porter's ability should propound such a false doctrine. Porter, however, was an old man at the time, and these incorrect views may thus be attributed to an intellect that was no longer as clear as it had been. According to his

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99). From Sept. 16, 1839 to March, 17, 1866.
100). C.A. 3/5/73 ~~D. 1/5/73~~ : For career of Porter, see: Putzel: William Porter and Constitutional issues. Miss Putzel makes no reference to the views of Porter on the High Commissionership.

own statement in the debate, also, he had not read the Commission issued to the High Commissioner recently. This, doubtlessly, also attributed to this erroneous doctrine.

The member for Queenstown, Mr. J.M. Orpen, was one of the few who really appreciated the office of High Commissioner according to its value. In his opinion it was particularly advisable that there should be an office of High Commissioner. The existence of such an office would enable Her Majesty, when she chose, to make use of a representative in the Colony who could act for her without reference to the Governor. In his opinion it would not be so difficult to define the duties of the High Commissioner.

This interpretation of the High Commissioner's position is doubtlessly correct and in conformity with the Instructions described above. Orpen, however, was ~~fairly~~ a new-comer to Parliament, being elected in 1872, so that his opinion would not have carried the same weight as that of Porter, for instance.[101] The facts are that the High Commissioner was entirely independent of the local Ministry; he was entrusted with powers of a diplomatic nature extending beyond the limits of the Colony. In exercising these powers he could act independently of them, and they would be in no way responsible for his actions.

The reason why members wanted a clear definition seems to be as follows. The Colony was jealous of its newly won powers of self-government and was afraid that the Imperial Government would interfere in their affairs

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101). All speeches to be found in C.A. 3/5/73.

by means of an instrument which they could not touch.

Such then were the "powers and authorities" with which the Cape Governor and Her Majesty's High Commissioner were armed. Of the two Governors that held office between December 1872 and February 1878, the first, Barkly, refrained from wielding his weapons, preferring to use them as his Ministers saw fit. Frere, however, realised what weapons were meant for, and successfully made use of them to bring about the downfall of the Molteno Ministry. In the interests of historical sequence we shall turn to these events in a later chapter. [102]

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102). See infra, chapter Eight.

CHAPTER THREE.

CONSTITUTIONAL REFORM.

I.

The Legislative Council, as provided for by the "Constitution Ordinance", was constituted on a kind of provincial basis [1]. This official recognition of the separation between East and West did much to keep the separationist agitation alive, and Molteno, when coming into power in 1872, decided to do away with this evil in official form.

In 1873 he introduced the Constitution Ordinance Amendment Act, 1873, better known as the "Seven Circles Bill" in the Assembly [2]. It passed that House and was sent to the Council. The Council, however, set it aside as a breach of privilege of that body, the President giving the deciding vote [3]. Molteno now asked for a dissolution of both Houses [4]. One writer attributes Molteno's action in this case to "characteristic sensitiveness in matters political", and that he looked upon the rejection of one of his pet schemes as a sign of lack of confidence [5]. This is strongly to be doubted. A dissolution was the only way to bring an Upper House, in a recalcitrant mood, on its knees.

In 1874, however, the Government, profiting by experience, introduced the Bill into the Council [6], where it was passed, at its Third Reading, by 11 votes to 8 [7]. In the Assembly it was passed by a substantial majority of 35 votes to 17 [8], not, however, before creating a ministerial crisis [9].

II.

The Constitution Ordinance Amendment Act No.18 of 1874 is the only piece of constitutional legislation proper,

1) Supra: Chapter 1, p.1..
2) Votes & Proceedings 1873, p.3.
3) Minutes 1873, p.140.
4) G.H. 31/12. Barkly to Kimberley, 2nd July, 1873.
5) De Kock: Confederation, p.84.
6) Minutes 1874, p.7.
7) Minutes 1874, p.72.
8) V. & P. 1874, p.240.
9) Ibid: p.204; Wilmot, p.116; See also chapter on "Relations between the Houses" infra (Chapter Five).

with exception of the Act hereinafter described, passed between 1873 and 1877. The implications of this Act are examined below; let us first examine the provisions of this Act.

The Act repealed sections 4 and 5 of the Constitution Ordinance, the whole of Act No. 6 of 1859 [10] as well as section 31 of Act No. 3 of 1865. The existing Legislative Councillors were to hold their seats for 5 years instead of 10, or until dissolved before the expiration of 5 years[11].

For the purpose of electing the 21 members of the Legislative Council, as provided for in section 21 of Act No. 3 of 1865, the Colony was to be divided into seven electoral provinces, each province consisting of certain electoral divisions, as enumerated, viz.:-

(a) The Western electoral province was to consist of the electoral divisions of Cape Town, Cape Division, Stellenbosch and Paarl; (b) the North Western province to consist of Worcester, Malmesbury, Piquetberg, Namaqualand and Clanwilliam; (c) the South Western province to consist of Swellendam, Caledon, Riversdale, Oudtshoorn and George; (d) the Midland province to consist of Graaff Reinet, Richmond, Beaufort West and Victoria West; (e) the South Eastern province to consist of Port Elizabeth, Uitenhage, Grahamstown, Albany and Victoria East; (f) the North Eastern province to consist of Somerset East, Fort Beaufort, Cradock, Colesberg and Albert; and (g) the Eastern electoral province to consist of King Williamstown, East London, Queenstown, Aliwal North and Wodehouse [12]. Each of these 7 divisions were entitled to 3 members, who held their seats for 7 years or until they vacated them before the

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10) Act provided that if number of candidates did not exceed number of vacancies, then no poll would be necessary.
11) Constitution Ordinance Amendment Act No.18 of 1874, Section 1.
12) Ibid: Section 2.

expiration of the 7 years, in which case they would be eligible for re-election 13). The election of members was to be run according to the lines laid down by the Constitution Ordinance, provided that there would be no poll if the number of candidates did not exceed the number of vacancies 14). Where the words Eastern and Western appear in Section 33 of the Constitution Ordinance, those words were to be omitted as if "they had been entirely omitted therefrom" 15). If any person were elected for more than one electoral province, he had, on being required by the Governor, to elect the province which he wanted to represent. After such election was declared, a fresh election had to be held where the vacancy occurred 16). The Governor could dissolve the Legislative Council before the expiration of the time limit alongside with the House of Assembly, according to Section 74 of the Constitution Ordinance 17). Members of either House, accepting offices of profit under the Crown, excepting one of the following offices, viz.: Colonial Secretary, Attorney-General, Treasurer, Commissioner of Crown Lands and Public Works and Secretary for Native Affairs, or if the estates of members were sequestrated as insolvent, they shall vacate their seats, and elections shall then be held to fill such vacancies 18). The second last Section provided for the filling of vacancies that occurred during the period after a general election and before the meeting of Parliament. This Section applied to both Houses 19).

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13) Constitution Ordinance Amendment Act No. 18 of 1874, Section 3. Members were re-eligible if they vacated their seats under this provision.
14) Ibid: Section 4.
15) Ibid: Section 5.
16) Ibid: Section 6.
17) Ibid: Section 7. Act No. 9 of 1897 empowered Governor to dissolve Council alone.
18) Ibid: Section 8.
19) Ibid: Section 9. Such vacancy implying also resignation. A member of the Assembly could address his resignation to the Colonial Secretary.

III.

Next to the Responsible Government Act [20] ranks this Act in importance. It swept away with a single stroke the old East-West division that had kept the separationist tradition, dating from the 1820's, alive. Again, the effect of the Act would be to localise elections for the Legislative Council, and thereby intensify the interest in them. On the whole, the composition of the Council, as provided for in this Act, would be more democratic. Small localities would be given a better chance of affecting elections one way or the other.

A glance at the number of voters in the different provinces[21] shows that, although the numbers of voters are by no means equal, the disparity is not so great as in the case of the electoral divisions for the House of Assembly. In comparing the largest electoral division for the Assembly in 1876 (Cape Town) with the smallest in the same year (East London), we find that East London had only about 18% of the total amount of voters in Cape Town. But if we compare the electoral province for the Legislative Council with the largest number of voters for the same year (the South Eastern Province) with the province with the smallest number of voters (the North Eastern Province), we find that the North Eastern province had about 65% of the number of voters that the South Eastern province had. In the case of the Assembly, therefore, we find a difference of roughly 82%, whilst in the Legislative Council the difference is only about 35%. The composition of the Council would therefore be more equal and therefore more democratic. Over-representation in the Legislative Council would therefore not be so marked as in the case of the

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20) Act No. 1 of 1872.
21) See Annexure B.

Assembly, and, it is submitted, the composition of the Council would be more in accord with the wishes and political outlook of the electorate as a body than would be the composition of the Assembly.

The retention of the cumulative vote for the elections to the Legislative Council safeguarded the interests of minorities, and guaranteed their representation.

With such a state of affairs it is hardly surprising to find the Council exercising its wide powers in matters financial more often after this Act came into force. In 1907 it made full use of its powers by entirely withholding supplies, thereby bringing about the fall of the Jameson Cabinet [22]. What is surprising is that the Council did not make wider claims, or developed in the direction of the Senate of the United States. Another surprising feature of colonial constitutional history is that no attempt was made at changing the mode of composition of the Assembly, so as to bring it more into accord with the electorate's wishes and political outlook.

An obvious defect of this Act, indeed of the constitution of the Legislative Council as a whole, was that the Chief Justice still continued to be the president of that chamber. Chief Justice de Villiers himself proposed that the presidency of the Legislative Council be placed in other hands than those of the Chief Justice [23]. Apart from the fact that the Chief Justice might be accused of dabbling in politics in the exercise of his presidential functions, there was always the inconvenience that he had to attend court while the Legislative Council was sitting, and would then inevitably be absent from its deliberations.

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22) Kilpin: Romance etc. pp.86-87.; Walker: de Villiers, p.423; Walker: History, p.528; Laurence: Merriman, p. 240; and C.H.B.E., Vol.8, p.630.
23) Walker: de Villiers, pp. 97 and 99.

A simple provision, inserted in this Act, would have brought about the election of a president for the Legislative Council on the same lines as the election of a Speaker for the Assembly.

IV.

In the same year another important piece of constitutional legislation was passed. This was an Act "To amend the law relating to the registration and qualification of Voters, and to the election of Members of Parliament, and for the more effectual prevention of the personation of Voters and for other purposes connected with elections" 24).

This Act repealed Sections 22 to 31 (both inclusive) 25) as well as Sections 42 and 52 26) of the Constitution Ordinance, and made elaborate provisions in lieu thereof.

In Cape Town the task of distributing registration forms was entrusted to the Municipality 27). These forms were to be filled in, collected by the municipal officer on that behalf appointed 28) and handed to the Town Council, who were to keep them "safely" until called for by the registering officer 29), as provided for in Section Two. The registering officer was then to draw up a provisional list 30), which was to be posted up at such necessary places as he might direct 31). All additional claims, or objections, were to be made in writing addressed to him 32). Such claims and objections were then to be

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24) Act No. 14 of 1874.
25) Ibid: Section 1.
26) Ibid: Section 37.
27) Ibid: Sections 3 and 4.
28) Ibid: Sections 5 and 6.
29) Ibid: Section 9.
30) Ibid: Section 10.
31) Ibid: Section 17.
32) Ibid: Sections 19 to 21.

dealt with by the resident magistrate of Cape Town(33), the onus of proof lying with the claimant or objector, as the case might be 34). The Magistrate could, if he deemed it necessary, summon anybody before him to give evidence, and was authorized to impose a fine, in event of non-attendance of such a summoned person without the latter showing lawful cause 35), and "to adjudge to any person objecting or objected to such reasonable costs against the adverse party as such Magistrate shall tax and allow" 36). After hearing all claims and objections, the magistrate was to cause the final list to be made out and safely kept in his office, advising the Colonial Secretary when it was completed 37).

Elaborate provisions were made for polling, and for the prevention of personation of voters at the polling station 38). If there were, or still were to be formed, in any electoral division, other than the Cape Town division, "a municipality or corporate town now forming, or hereafter to be formed into a district field-cornetcy" the above-described provisions could be extended to such municipality or corporate town by the Governor with such alterations and modifications as might suit the particular case, upon resolution and request by the commissioners or council of a municipality or by the council of a corporate town, provided also that Grahams Town could be brought under the provisions of this Act, as if it were a municipality or corporate town within an electoral division. The expenses would have to be borne by the municipality or corporate town 39).

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33) Act No. 14 of 1874, Section 23.
34) Ibid: Sections 26-27.
35) Ibid: Section 25.
36) Ibid: Section 28.
37) Ibid: Section 29.
38) Ibid: Sections 32 to 35.
39) Ibid: Section 36.

In the other electoral divisions a rough-and-ready way to detect personation was prescribed. The polling officer could ask the voter certain questions, as prescribed [40]. If a person wilfully made a false answer, he was liable to two years imprisonment, with or without hard labour [41]. In case of personation, the fine was fifty pounds, or six months imprisonment with or without hard labour, provided that a person prosecuted for giving a false answer would not thereafter be prosecuted for personation, or vice versa.[42] All persons apprehended for false declarations were to be kept in custody until tried, provided always that they could be let out on bail "by two sufficient sureties at £25, or such surety in £50" [43].

Elaborate provisions were furthermore made for the mode of procedure in case of the rejection of valid votes by the polling officer, or the acceptance of invalid votes, as well as in the case of equality of votes between elected members. These provisions applied to both the Legislative Council and the House of Assembly, and were to be observed in all electoral divisions in the Colony, Cape Town and Grahams Town included [44]. In the case of Cape Town and Grahams Town, such investigations were to be conducted by the Resident Magistrates of Cape Town and Grahams Town respectively, instead of by the Civil Commissioners, as in the case of the other electoral divisions [45]. The Civil Commissioners could, if they deemed necessary, submit the investigation to the Supreme Court, or, in the case of the Eastern province, to the Eastern Districts Court [46]. The decision and findings of the judge conducting the investigation would then be final [47]. These provisions, i.e.

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40) Act. No. 14 of 1874, Section 38.
41) Ibid: Section 42.
42) Ibid: Section 43.
43) Ibid: Section 44.
44) Ibid: Sections 47 to 56.
45) Ibid: Section 55.
46) Ibid: Section 53.
47) Ibid: Section 54.

submitting the case to Court for final investigation, applied to Cape Town and Grahams Town as well [48]. In the Schedule to this Act an abstract of the qualifications entitling to registration was set forth, as well as directions to be observed in "filling up" the registration forms.

V.

Such then was the output of constitutional legislation in the period 1872-1878. It is true that the Griqualand West Annexation Bill [49] also falls under the category of "constitutional legislation", but this Act only came into operation after the close of the period under discussion. It may be necessary to remark here, as reference will be made to it in the course of this description, that in 1875 an Act was passed "To provide for the more effectual Audit of the Public Accounts of this Colony" [50]

We have now reviewed the Constitution. Let us now turn to the men who guided its working during the first five years of Responsible Government.

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48) Act No. 14 of 1874, Section 55.
49) Act No. 39 of 1877.
50) Act No. 30 of 1875.

CHAPTER FOUR.

THE CABINET.

I.

The first Cape Ministry under Responsible Government consisted of five Ministers, at the head of five departments of state. These five departments were: The office of the Colonial Secretary, the office of the Attorney-General, the office of the Treasurer-General, the office of the Commissioner of Crown Lands and Public Works, and the office of the Secretary for Native Affairs. 1)

The Colonial Secretary was to be responsible for all political, ecclesiastical and educational matters, as well as postal services, town and border police, goals, convicts' hospitals, lunatic asylums, diplomatic correspondence, the budget, appointments and miscellaneous services.

The Treasurer-General had charge of revenue and expenditure as well as supervision over customs and all affairs connected with revenue.

The Attorney-General, apart from being the legal adviser of the Cabinet, was responsible for all legal public prosecutions, matters judicial and magisterial. He was furthermore burdened with the drafting of Government Bills.

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1) See: Act No. 1 of 1872, sections 1 & 3; Molteno: Life of Molteno, Vol. I, p. 192; Hofmeyr: Life of Hofmeyr, p. 121; Walker: De Villiers, p.57; see also: Constitution Ordinance: sect. 79; The auditor ceased to be a member of the political Executive as from the passing of Act No. 1 of 1872, and was not eligible for election as a member of either House.

Under the Commissioner of Crown Lands and Public Works was grouped the administration of leasing and sale of lands and general supervision over the survey and works department. The construction and maintainance of railways, telegraphs, roads and bridges were also entrusted to his care.

The Secretary for Native Affairs was entrusted with the management of native tribes through government agents and all questions connected with missionary institutions. He had also to intervene as referee in matters of dispute among aborigines within and beyond the boundaries of the Colony. 2)

The first criticism to be levelled against this allocation of departments is that the grouping is clumsy and illogical. The Treasurer should have been entrusted with the budget as it belongs more properly to the officer entrusted with the administration of financial matters. Again, "town and border police, goals and convicts" should have been entrusted to the Attorney-General, who was really a Minister of Justice, while the drafting of Bills should have been entrusted to a legal draftsman with no political ties.

Secondly,—

> "That any officer who goes in and out with the change of Ministry, whose own tenure of power is dependent on the popular voice, should be charged with the duties of public prosecutor, is an anomaly which has been pointed out by men of experience, and will therefore find an early remedy" 3)

The Judicial Commission that reported in 1875, recommended that the Attorney-General make way for a Minister of Justice. 4) Chief Justice de Villiers shared this view. 5) The hope expressed by "Delta" that the

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2). See: Cape Monthly Magazine. Vol. V. Dec. 1872: Article by "Delta": Polity not Party, pp. 338-342.
3). Ibid: p. 340.
4). G.27-75: Report of Judicial Commission: par.3.
5). Walker: De Villiers, pp. 97-99.

anomalous position of the Attorney-General would find an "early remedy" was not materialised inspite of the report of the Judicial Commission. The Attorney-General remained a member of the political Executive right down to 1910. [6]

Furthermore, it would have been more logical to have grouped "postal services" assigned to the Colonial Secretary, under the Commissioner of Crown Lands, who had already control of telegraphs. The department of the Colonial Secretary was overcrowded. As Molteno's biographer justly remarks:

> "It was so large a field that it was confidently expected that a new Minister would be appointed in order to deal with some of the work which seemed too much for any one man" [7]

When we bear in mind that Molteno combined the post of Premier with that of Colonial Secretary, it becomes all the more clear that the Colonial Secretary had really too much to be responsible for and could hardly have been expected to become thoroughly acquainted with all the business connected with his office.

In 1877 the Attorney-General was relieved of a part of his work, for on 2nd August a resolution was passed by the House of Assembly that a Parliamentary Draftsman be appointed, with a salary of £400 per annum. A person holding this post was to be ineligible for election to either House. [8] This resolution was not put into effect immediately, for it was only in 1885 that the office of Parliamentary Draftsman was transferred from the department of the Attorney-General. [9]

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6). Kilpin: Romance: Annexure G.
7). Molteno: Life of Molteno: Vol. I, p.193.
8). V. & P. 1877, pp. 417-418.
9). Kilpin: Cape House: p. 118; Kilpin: Romance; p.105.

II.

The first Colonial Cabinet consisted of J.C. Molteno, Colonial Secretary and Premier; J.H. de Villiers, Attorney-General; C. Abercrombie Smith, Commissioner of Crown Lands and Public Works; Dr. White, Treasurer-General; and Charles Brownlee, Secretary for Native Affairs.[10]

Critics have either been too severe on the Molteno Ministry, or too eloquent in its praises. A contemporary wrote, after the Ministry had been dismissed in 1878:

> ".....enough of this government and its follies. It has been dismissed for its incompetence, arrogance, obstinacy, and, for the sake of the Colony, I hope it may not again be heard of" [11].

No quotation is needed to show how loudly Molteno's biographer sounded the praises of the Ministry.

We shall now proceed with a description and criticism of the individual Ministers.

Molteno had been on the forefront in the battle for Responsible Government.[12] It would not be an overstatement to say he was the life, soul and inspiration of the movement in favour of Responsible Government. When the Responsible Government Act came into operation, the premiership was first offered to Southey, the retiring Colonial Secretary, who declined owing to the fact that he had strenuously opposed the introduction of Responsible Government.[13] Porter was then sent for, but he declined owing to "physical infirmities"[14]. He recommended Solomon, or, failing him, Molteno.[15]

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10). Molteno: Life of Molteno:Vol.I,p.192; Walker:History, p.349, N.2;Walker:de Villiers,p.57;[C.732],p.141....:
11). Cunynghame: My Command in South Africa,1874-78,p.105.
12). Walker:History,pp.310 &314-316;Walker:de Villiers, p.40,41,52; Molteno:Life of Molteno:Chapters,5-8,Vol.I; Hofmeyr:Life of Hofmeyr pp.96-97,101;C.H.B.E.Vol.8,p.487
13). [C.732],p.141....;Walker:History,p.349;Molteno:Life of Molteno,Vol.I,p.168,N.1; Wilmot:Southey:p.229-230; C.H.B.E. Vol.8,p.487.
14). Molteno:Life of Molteno,Vol.I,p.189;Walker:de Villiers,p.
15). Walker:de Villiers,p.56.

Solomon imposed impossible conditions.[16] Finally the task was entrusted to Molteno.[17]

"Delta", in the article above referred to, said that the first Ministry would inevitably be a coalition Ministry.[18] Walker tells us that Molteno's Ministry was a coalition in a double sense, "of East and West, of Liberals and Conservatives"[19]. Molteno, de Villiers and White were westerners and apparently they were Walker's "Liberals"[20]. The Kaffrarians were Brownlee and Smith, the latter being also a conservative.[21] The inclusion of Smith, who had strenuously opposed the introduction of Responsible Government, gave offence to some of Molteno's followers. Molteno, however, defended the appointment by saying the opposition to the system did not imply unwillingness to serve the country under the changed conditions.[22]

Molteno was a "good all-round leader with much of Lord Liverpool's capacity for holding a Ministry together"[23]. He was a strong-willed man and consequently irritated by opposition[24]. This characteristic doubtlessly was the cause for his making most of the questions upon which opposition was offered, questions of confidence.[25] The threat to resign became such an obsession with Molteno, that Sprigg and Paterson on various occasions when opposing a government motion or measure, expressed the hope that the Government would treat the House fairly and not threaten it with resignation.

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16). Molteno:Life of Molteno:Vol.I,p.189-190.
17). Ibid:p.190;C.H.B.E.Vol.8,p.487;Walker:de Villiers, p.56;Walker:History,p.349.
18). Cape Monthly Magazine,Dec. 1872,Vol.V,p.338-339.
19). Walker:de Villiers,p.57 and History,p.349. He here talks of a "federal cabinet". The term is not correct. It was a coalition cabinet.
20). Walker:de Villiers, p.57.
21). Ibid:p.57; Walker:History,p.349. N.2.
22). Molteno:Life of Molteno, Vol.I,p.199. N. 1.
23). Walker:de Villiers, p.57.
24). Ibid; and Kilpin:Romance,p.104.
25). Walker:de Villiers, p.57.

In Molteno's defence it must be remembered that the party system for most of the period 1873-78 was still very rudimentary. Moreover, he was at the head of a coalition ministry and would therefore have to be doubly careful of adverse votes.

When he came into office, the financial state of the Colony was in a better condition than it had ever been during the period of representative government [26]. Molteno was without doubt an economical financial administrator [27]. During his term of office Cape credit rose to a position second only to that of England [28]. The Colony reached its financial high-water mark in 1875. The estimated revenue for that year was £1,445,000. The actual yield proved to be £2,246,179.7s.1d. The latter amount, however, included a loan to the amount of £643,261.7s.6d. in aid of revenue, so that the actual revenue yield amounted to £1,602,917.19s.8d.[29]

The flourishing state of the Cape Colony was due to a large extent to the diamond fields, as well as transit dues, the Cape levying a 12% ad valorem rate[30] on transit goods. In 1875, for instance, customs dues made up the round figure of £735,379.15s.8d.[31] while in 1874 the amount was £733,513.5s.6d.[32]

> "His ambitions for the Cape were of an orthodox nature - railways, an untroubled Eastern Frontier, the success of Responsible institutions. To wider and more ambitious designs, to the design for example of an early confederation of the South African communities, his vision, like the weak sight he kept sheltered behind blue glasses, did not readily extend" [33]

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26). Walker:de Villiers,p.57;Molteno:Life of Molteno,Vol. I,p.214.
27). Walker:de Villiers,p.57. (p.63.
28). Molteno:Life of Molteno,Vol.I,p.215;Walker:de Villiers
29). G.59-76.
30). Cunynghame:My command in S.A.,p.101.
31). G.59-76.
32). G.36-75.
33). de Kiewiet:Imperial Factor, p.60.

All evidence bears out the passage quoted above. He was averse to shouldering the debts and difficulties of the other South African communities, and this prompted him to oppose Carnarvon's federation scheme[34]. From this it is to be deduced that he had little of the idealist in his political make-up. In political matters he was an out and out realist, preferring immediate profit to uncertain returns.[35].

During his administration the steel tracks, that were to bind South African communities closely together and later to prove a great impetus to Union, were pushed inland with vigour. The railway schemes of the Molteno Ministry is one of their greatest, if not the greatest monument.[36]

As he had been in the forefront in the battle for Responsible Government, it is obvious that he would consider it his first duty to see that these institutions functioned properly.[37] It is also obvious that he would guard the privileges extended to the Cape by the Responsible Government Act jealously.[38] His opposition to Carnarvon's federation scheme was not so much in defence of constitutional privileges; to Molteno confederation "promised little and threatened much"[39]. The finances of the Colony would be badly strained by confederation, and that would doubtless have reacted adversely on the working of Responsible Government; this would have increased Eastern discontent at being ruled from the "shank end"

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34). Vide infra, pp.82-83.
35). de Kiewiet:Imperial Factor, p.60.
36). Wilmot:History,Vol.I,p.117-118; Theal:History, Vol.I (p,12.
37). de Kiewiet:Imperial Factor,p.62.
38). Walker:de Villiers,p.57.
39). de Kiewiet: Op Cit.p.61.

of the Colony and would consequently give fresh impetus to separation, a thing which Molteno hoped he had obliterated with his Seven Circles Bill.

He was no great parliamentary tactician and the opponents of the Ministry succeeded in snatching small victories over the Government [40]. In truth, the only tactic he understood and used overmuch, was the threat to resign.

His choice of Cabinet colleagues on the whole was happier. Furthermore, his invitation to Merriman to join his Cabinet [41] was a masterstroke of political sagacity. By this action he got the "best read man in South Africa" into his Cabinet as well as changing a dangerous opponent into a supporter.

Hofmeyr tells us that the Cabinet was largely a "one-man Cabinet" [42]. The picture he paints is one in which Molteno dominates the scene, but admits that Merriman "possessed as much ability as Mr. Molteno" [43]. Laurence, however, tells us that Merriman was the "brain-carrier"of the Ministry and takes the view that his colleagues were a "weak lot" [44]. Now, if Laurence implies that they were bad administrators, then one cannot agree with him. Brownlee, for instance, was an excellent native administrator, though, as Sprigg pointed out, was too much inclined to use his personal influence with native chiefs in the management of native affairs.[45] Merriman was of opinion that there was a "sad want of vigour in this department" [46]. Be that as it might, The Government Blue books on native affairs clearly show that he was a conscientious administrator.

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40). Vide Infra. p 100
41). Laurence:Merriman,p.18.
42). Hofmeyr:Life of Hofmeyr,p.121.
43). Ibid.
44). Laurence:Life of Merriman, p.26
45). C.A. 30/6/77.
46). Laurence:Merriman, p.26.

But as a parliamentarian he was a hopeless failure. As Hofmeyr remarks, he "was better qualified to conduct an indaba across the Kei than to make an impression on the House" [47] Of his speeches it can be said that they possessed the virtue of brevity without, however, being concise. He was more suited for a permanent administrative job than for a post dependent upon the vagaries of political opinion. After the dismissal of the Molteno Ministry he was appointed to a permanent post as Chief Magistrate of Griqualand East and happily disappeared from the storm and stress of parliamentary life [48]. It should be borne in mind that Brownlee was the only one who entered the Cabinet with administrative knowledge [49].

The first Attorney-General under Responsible Government was an exceedingly capable man. John Henry de Villiers had entered Parliament as member for Worcester in 1867,[50] and by 1872 had established his reputation as a parliamentarian [51]. Unluckily he was shelved into political obscurity by being appointed Chief Justice,[52] and became, ex officio,[53] president of the Legislative Council. He did, however, on occasions make use of the right conferred upon him by the Constitution Ordinance[54] to descend from the Chair and address the Council [55].

His biographer tells us that on most points of policy he saw eye to eye with Molteno,[56] being especially wedded to his chiefs "cautious financial policy"[57]

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47). Hofmeyr:Life of Hofmeyr, p.121.
48). Theal:History, Vol.I,p.41.
49). Walker:de Villiers, p.57.
50). Ibid: p.39.
51). Ibid: p.59.
52). Ibid:p. 67.
53). In accordance with sects. 1 & 2 of the Constitution (Ordinance.
54). Constitution Ordinance,sect. 2. He could not vote. sect. 3.
55). Walker: de Villiers, p.99.
56). Ibid:p.57.
57). Ibid:p.62.

He was a hard worker while in the Cabinet, and besides drafting some 30 bills during the 1873 session, had to take charge of all the public prosecutions. In addition he had his own private practice, had to prepare indictments for the Western Circuit twice a year, advise his ministerial colleagues on legal points and attend Cabinet meetings - a full programme for a man who had only two clerks in his department. 58)

But he was no parliamentarian of the first order. His speeches were well reasoned, enriched by a wealth of political and legal knowledge. Interruptions worried him and his speeches lacked fire, doggedness, emotion and persuasiveness. Furthermore, he was respected without being loved and, as Walker points out, it is affection that wears better.59)

Now he was an ardent federationist, but it would be wrong to assume that he would have broken with Molteno on Carnarvon's federation scheme, for he favoured a strong union instead of a loose federation.60)

When he was appointed Chief Justice, he was succeeded but not replaced by Mr. Jacobs, who had been acting Attorney-General when Responsible Government replaced representative Government 61). This man was physically a weakling 62), but this did not stop him from inflicting long speeches on the Assembly. His speeches were unconvincing and lacked de Villiers's learnedness. He gave no proof of parliamentary ability and even his knowledge of law was not sound. He was, for instance,

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58). Walker: de Villiers, p.61.
59). Ibid: p.59.
60). Ibid: p.132.
61). Molteno:Life of Molteno, Vol.I,p.179; Hofmeyr: Life of Hofmeyr, p.121.
62). Hofmeyr:Life of Hofmeyr, p.121.

unaware of the existence of the Colonial Prisoners Removal Act, 1869.[63] But his cardinal virtue was that interruptions never worried him and there is an iciness about his speeches even in the most heated debates.

In August, 1877 Jacobs retired for reasons of health and was succeded by Mr. Stöckenstrom, for whom a seat was found in Albert. He never entered the Assembly in his capacity of Attorney-General, as the Molteno Ministry was dismissed from office before the 1878 session. His speech in the dismissal debate showed fire and conviction. We shall hear more of him when we discuss the dismissal of the Ministry.

Dr. White, the Treasurer-General, was an amiable individual with none of the attributes that go to make even a minister of ordinary capacity. But as he was lodged away in the Council, his presence in the Ministry was no great drawback. Hofmeyr rather sarcastically remarked that he became Minister because fate willed it.[64] His speeches in the Council were short, and at times, hopelessly confused. He seems to have done much to discredit the Ministry in that versatile and pugnacious Upper House.

The first Commissioner of Crown Lands and Public Works, Charles Abercrombie Smith, was a man who did not like to use his voice too much. Being a "mathematical wrangler" from Cambridge, he preferred the more serene atmosphere of his office to the over-heated air of the Assembly. His answers to questions were satisfactory

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63). Vide Supra, p.15.
64). Hofmeyr:Life of Hofmeyr, p. 121.

beyond expectation and showed that he had the affairs of his department at his fingertips.

Now then, with the exception of de Villiers, who passed out of parliamentary life in 1873 but refused to rest in peace, none of the Cabinet members had the makings of a leader, or had enough courage and conviction to go against Molteno. Up to 1875, therefore, the Ministry was largely dominated by the frame of John Charles Molteno.

In 1875, Smith was appointed Auditor and Controller-General,[65] and John Xavier Merriman was appointed to the vacant department.[66]

Merriman had been an opponent of Molteno when the latter was engaged in the battle for Responsible Government, and after its introduction, he proved himself to be a "thorn in Molteno's side"[67]. It is interesting to notice that at this time Merriman described himself as a political adventurer[68]. He was destined to become one again immediately upon the inaugaration of Union. Paterson and Sprigg could not forgive him for deserting to the ministerialist ranks.

Walker describes him as -

> ".....tall, pugnacious, silver-tongued, gifted with a wealth of imagination and endowed, if it cannot be said blessed, with a taste for epigram and the retort descriptive which made him many enemies ..."[69]

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65) Molteno: Life of Molteno, Vol.II, p.88. The Ministry was subjected to strong criticism for having appointed Smith while still a member of the Ministry. Sprigg moved a motion that gave the Government full credit for being actuated by motives of public interest, but at the same time expressed the opinion that such appointments without the sanction of the Assembly were inexpedient. The Government voted for the motion, which was carried by 28 votes to 14.(V.& P. 1876, p.70.)

66) Laurence: Life of Merriman, p.18.

67) Ibid: p.17.

68) Ibid: p.13.

69) Walker: de Villiers, p.43.

His speeches were fiery, at times almost libellous. When attacking an opponent, he spared neither himself nor his adversary. He was the only one in the Cabinet who showed parliamentary ability of the first order. But his sharp tongue and cutting replies endeared him to none but estranged him from most. He never seems to have had a personal following during the years he was a member of Molteno's Cabinet.

In the Cabinet he seems to have had a full-time job, which proved to be anything but a bed of roses [70]. Molteno trusted Merriman, and this is borne out by the fact that he delegated the functions of Minister of War and Police to Merriman and practically the entire conduct of the Kafir War (1877-78) in his hands.

Hofmeyr's statement, quoted above, thus needs modification. It would be correct to say that up to 1875 the Cabinet was largely a one-man Cabinet, but with Merriman's accession to office, Molteno relied more and more on him, and he became, without a doubt, the most prominent member of the Ministry.

III.

Now it is often said that Governments who submit their bills without much ado to Select Committees, are either weak or cynical. On this doctrine, therefore, the Molteno Ministry was either weak or cynical. It might have been cynical; its weakness, however, is not so apparent.

A great many bills were subjected to the limbo of a Select Committee each year. In 1877 two very important bills found their way thence, viz. The Griqualand West Annexation Bill [71] and the Burgher Force Bill [72]. Now why did the Government consent to refer so many important bills to Select Committees?

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70). Laurence:Merriman, pp.25-26.
71). V.& P. 1877, p.72. 72). Ibid:p.172.

First of all, the Ministry was a coalition Minsitry, and it can hardly be expected that they would be in full accord as to the principles and details of bills.

Then, also, the party system in Parliament was very rudimentary and consequently the Ministry would have to depend to a large degree upon Parliament [73] and would therefore be disinclined to bring a measure before the House and force it without being sure of parliamentary support. Hence it would have been unwise to refuse a Select Committee.

There is at least one occasion when the Government ought to have stood by its bill. Sprigg's no-confidence motion on the Burgher Force Bill and the Ministry was rejected by a substantial majority [74]. Scanlen then moved that the bill be referred to a Select Committee and the Government consented by voting for the motion [75]. Clearly, as Molteno was assured of a majority, he should never have consented to sending the bill to a Select Committee, which, incidentally never brought up a report. However, the Ministry's practice of referring bills to Select Committees is, on the whole, not a sign of their weakness; they merely did so in compliance with the wishes of Parliament and, also, because they could not always depend upon a definite backing, for something, approximating organised parties, only put in an appearance round about 1877. [76]

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73). De Kiewiet:Imperial Factor, p.62.
74). V.& P. 1877,p.156 and Infra, p.99
75). V.& P. 1877,p.172 and Infra, p.99
76). Vide Infra, p.93 et seq.

CHAPTER FIVE.

RELATIONS BETWEEN THE HOUSES.

"All our colonial experience goes to show that Upper Houses are either nuisances or nullities" was the view Merriman expressed to Bryce on second chambers in general [1].

The Legislative Council of the Cape Colony refused to be a nullity, and set about making a successful nuisance of itself; so successful indeed, that it succeeded in bringing the Jameson Ministry to a fall in 1907 [2].

More than one political theorist as well as constitutional historian have been faced with "Sieyès' dilemma". Many answers have been given; some favourable to second chambers, others hostile to it. In spite of all this academic quibbling "the modern world has, with a singular measure of unanimity, decided in favour of two legislative chambers" [3]. The advantages of bicameralism were not always self-evident; most bicameral constitutions are the result of "conscious imitation of the English Parliament" [4].

Marriot summarizes the position of a second chamber as follows :-

> "If majorities must rule, minorities need protection, and for the protection of minorities there is no more convenient guarantee than a strong Second Chamber. Moreover, the mere efficiency of legislation demands, at the lowest, a revising Committee, if not a second legislative Chamber endowed with co-ordinate authority." [5]

On the whole, the exclusive powers over matters financial are usually vested with the Lower House. In many cases the second chambers are even denied the right of amendment. This, however, was not the case in the Cape Colony, as we have seen.

As a reviewing House, the second chamber is supposed

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1) Laurence: Life of Merriman, p.386.
2) Supra: Chapter Three, section III.
3) Marriot: Mechanism of the Modern State, Vol.I, p.399.
4) Ibid.
5) Marriot: op cit., p.402.

to act as a brake to hasty legislation. Hence qualifications for members of an Upper House are usually fairly high. The theory again is that if property owners are elected, they will be more conservative and, as a minimum age is usually imposed, it is further supposed that they will not be revolutionary and rash.

Such are the arguments used to justify the existence of a second chamber. But in spite of all the sweet-ringing phrases, the more recent constitutions have all got "deadlock" provisions, i.e. provision is made in the constitution to bring the Upper House to its knees if it consistently opposes the Lower House [6]. This may be well and good if the Upper House is not popularly elected. But if it be popularly elected, it has just as good a claim that it represents the opinions of the electorate as has the Lower House.

Now the Constitution Ordinance had no deadlock provisions; the Legislative Council had wide powers in financial matters, and, from 1879, more truly represented the electorate than did the Assembly [7]. Now, deadlocks did occur, and the only way to overcome the opposition of the Council was to have both Houses dissolved and go to the country with the question. This happened in 1873, after the rejection of the Constitution Ordinance Amendment Bill (Seven Circles Bill). There were also a number of other occasions when both Houses were dissolved simultaneously. In 1883 both Houses were dissolved because the Council was out of sympathy with the Government; in 1903 it happened again, and in 1907, when the Council refused to pass the estimates of expenditure (See in this connection, Kilpin: The Old Cape House, Annexure G).

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6) Cf.: S.A.Act 1909, Section 63. For the most elaborate deadlock provisions up to date, see the present Irish Constitution.

7) Supra, Chapter Three, section III.

II.

It is well known that the Responsible Government Bill was thrown out by the Legislative Council in 1871, although it had passed the Assembly with a substantial majority [8]. In 1872, however, the Bill was passed by both Houses, Molteno became Prime Minister, and one of the items in his programme was to get the Upper House reformed so as to obliterate the East-West division [9].

Unfortunately the Bill was introduced in the Assembly [10]. In the Council Godlonton raised the cry of "Privilege" and the Bill was referred to the Committee of Privilege [11]. The Committee reported that there had been a breach of privilege; the matter was put to the vote. The result was 10 votes each way. The President then gave the deciding vote, adding his vote to the side holding that the introduction of the Bill in the Assembly was a breach of privilege of the Council [12].

On Molteno's advice, both Houses were dissolved after the session [13]. The Council had fought for its life, but Molteno beat it by appealing to the electorate. A dissolution was the only legitimate and constitutional course to overcome the Council's opposition. There can be no question here of lack of confidence [14]. The Bill had passed the Assembly at its third reading without a division [15]. Having, therefore, a substantial majority in the Assembly behind him, it is unjust and untrue to accuse him of "over-sensitiveness in matters political" [16] in this case.

The elections ran their course, and on May 27th, 1874, Parliament met. In his opening speech the Governor

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8) Walker: History, p.348; Molteno: Life of Molteno, Vol.I, p.174; Kilpin: Romance, p.91-92; Hofmeyr; Life of Hofmeyr, p.103; V. & P. 1871, pp.304-305; and Minutes 1871, p.76.
9) Molteno: Life of Molteno, Vol.I, p.206.
10) V. & P. 1873, p.3
11) Minutes 1873, pp.103-104.
12) Ibid: p.140.
13) G.H. 31/12, Barkly to Kimberley, 2nd July, 1873.
14) De Kock: Confederation, p.84, suggests that Molteno asked for a dissolution because he regarded the rejection of the Bill by the Council as a sign of want of confidence.
15) V. & P. 1873, p.213.
16) De Kock, Confederation, p.84.

informed the members assembled that a Bill for the reform of the Legislative Council, precisely similar to the one that had originated in the Assembly the previous year, would be introduced in the Legislative Council [17]. This was duly done [18].

It was by no means plain sailing in the Council. Godlonton moved for a general revision of the Constitution, but the motion was rejected by a majority of one [19]. During the debate on the second reading, De Smidt moved that the Bill be discharged in order to await the census returns. After that the Bill could again be introduced. The Colonial Secretary regarded the motion as an obstruction and moved the second reading, which was carried by 11 votes to 8 [20], De Smidt's motion being negatived by 8 votes to 11 [21]. The Bill passed the third reading in the Council by 11 to 8 votes [22].

In the Assembly trouble started ~~in~~ at the Committee stage. On July 6th Sprigg demanded that, instead of the Legislative Councillors holding their seats for 5 years, they should hold their seats for one year (i.e. the Councillors elected at the close of 1873). His argument was that the interests of the Colony could not be suffered to take second place to the self-interest of the members of the Legislative Council. Solomon supported Sprigg, holding that the clause providing that the sitting members hold their seats for 5 years was a "stain" on the Act. Hopley, member for Albert, was of opinion that if Sprigg's amendment were accepted, it would amount to the Legislative Council committing political suicide [23]. Eventually Sprigg's amendment was carried by 26 votes to 25 [24]. Moltano now moved that progress be reported, and upon Solomon asking the reason for this line of action, he retorted that it

17) A.1-'74, Section 24.
18) Minutes 1874, p.7.
19) Ibid: p.36.
20) Ibid: p.40.
21) Ibid. See C.A. 18/6/74 for debate on second reading.
22) Minutes 1874, p.72.
23) For debate in Committee, see De Zuid Afrikaan, 8/7/74.
24) V. & P. 1874, p.204; Wilmot: History, p. 116.

involved the resignation of the Ministry [25]. The following day (the 7th) Molteno moved that the House do adjourn until Thursday (the 9th) [26]. When the Assembly met on that day, Sprigg stated that he could no longer go all the way with the Ministry, as they had no clear and consistent policy [27]. On the 10th July the Colonial Secretary succeeded in re-introducing the 5 years' clause that had raised the storm, by 35 votes to 11 [28], and the Molteno Ministry had weathered its first crisis.

The "Zuid Afrikaan", with dignified indignance, explained to its readers that the crisis could easily have been averted, had Molteno explained to the Assembly that the Council would never accept the Sprigg amendment:

> "In plaats daarvan fabriceerde hij (Molteno) een crisis, uitte dreigementen van te zullen bedanken, offerde twee dagen op aan den storm in den theepot (sic) en joeg al de Parlementaire werk in de war" [29].

It is fairly certain that the Council would have regarded the Sprigg amendment as a breach of trust, and would never have agreed to it. Now it is true that the amendment did not violate the principle of the Bill; it only would have changed a detail. But this detail was important.

Although it is impossible to justify Molteno's peculiar action on this occasion, it must be borne in mind that "Whips" were non-existent [30], parties had not yet been formed, and above all, that the course he pursued was the only one open to force the House to accept his point of view.

On financial matters no crisis arose during the first five years of Responsible Government. The Legislative Council, however, seemed to realise that as the revenue of the Colony was in good condition, there was no necessity to show fight.

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25) De Zuid Afrikaan, 8/7/74; V. & P. 1874, p. 204.
26) V. & P. 1874, p.211.
27) De Zuid Afrikaan, 11/7/74.
28) V. & P. 1874, p.229; Wilmot: History, p.116.
29) De Zuid Afrikaan, 11/7/74. Translation of above quotation: "Instead thereof, he fabricated a crisis, uttered threats of resignation, sacrificed two days to the storm in tea cup, and threw all parliamentary work into confusion.
30) Wilmot: History, p.116.

In 1873, however, the Legislative Council showed that it realised that it could not originate Bills imposing taxation. An elaborate Bill was introduced in the Council, providing for the establishment of provincial governments in the Colony, as well as for certain taxes which the provincial governments could impose [31]. When the Bill came up for the second reading, De Korte moved that the order for leave to introduce the Bill, as well as the order for the first reading, be discharged [32]. The Bill, he said, was unconstitutional, for the Secretary of State for the Colonies had clearly stated that it was beyond the powers of the Colonial Legislature to divide the Colony into provinces; that a Bill imposing taxation could not be originated until leave from the Crown had been obtained, and that it was beyond the competence of the Legislative Council to originate a Bill containing taxation proposals [33]. The President pointed out that leave granted and acted upon could not be discharged, but that the order could be rescinded [34]. De Korte altered his motion accordingly and it was carried [35].

The Council therefore clearly endorsed the doctrine that it was beyond their powers to originate taxation proposals. This endorsement would therefore lend additional force to the custom of introducing such Bills in the Assembly.

On the Confederation question, however, the two Houses held different views and used different language.

Carnarvon's longa et verbosa epistola on Confederation, alongside with a Minute of Ministers thereon, were laid on the Tables of the House of Assembly and Legislative Council on June the 8th.[36] On Friday the 11th Sprigg

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31) Minutes 1873, p.6.
32) Ibid: p.14.
33) C.A.,6/5/73; ~~P.C., 5/5/73~~.
34) Minutes 1873, p.14.
35) Ibid. Wilmot: History, p.75. Wilmot says the Bill was discharged, instead of that the order granted for the first reading was rescinded.
36) V. & P. 1875, pp.317-318; Minutes 1875, p.99.

moved that --

> "this House ..... expresses its approval of the Minute of Ministers upon (the) despatch; and is of opinion that this Colony, being possessed of Responsible Government, it is desirable that any such proposal as that contained in the despatch should, so far as this Colony is concerned, come from its own Government, acting in harmony with the Legislature, who are the best able to judge the time and occasion on which such a proposal could be considered with most advantage to the people of this Colony" 37).

This motion was seconded by Mr. Solomon, and was finally carried by 32 votes to 23 38). The implication of this resolution is obvious; the Secretary of State for the Colonies had overstepped his proper limits in making such a proposal.

The Council passed a more polite resolution, thanking the Secretary of State for the Colonies for the "deep interest" he took in the "welfare and progress of the South African Colonies and states" as shown in his despatch, proposing confederation of these settlements under the British Crown 39). Thus, while the Assembly told Carnarvon to mind his own business and not to meddle with other people's liberties, the Council politely thanked him for the interest he took in South Africa.

Towards the end of June James Anthony Froude, Carnarvon's emissary elect, came to the Colony and, finding that the Government had set its face against Confederation, proceeded to rouse the country 40). He was so successful in his mission of raising opposition to the Government, that Molteno felt it advisable to summon Parliament to a special session in November 41).

Parliament was opened on Wednesday, November the 10th. The following day the Council took the Governor's speech into consideration, and Godlonton moved the following

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37) V. & P. 1875, p.352; no opinion was given as to the expediency of assembling a conference of delegates.
38) V. & P. 1875, p.352.
39) Minutes 1875, p.117; motion carried by 9 votes to 7. See also Newton: The Unification of S.A., Vol. I, p.21 for resolution.
40) For Froude's activities, see Paul: Life of Froude, pp. 263 - 269; and Histories & Studies, Jaargang I, Nos. 3-4.
41) Referred to in [c - 1399] No.26. Carnarvon to Barkly, 22nd Oct., 1875.

resolution :-

> "That the speech delivered yesterday (the 10th) by His Excellency the Governor, in so far as it has failed to convey any recommendation to the Legislature to agree to the Conference suggested by Her Majesty's Secretary of State for the Colonies in his Despatch No.39, is unsatisfactory, and that it is of the utmost importance to this Colony that it should be represented at such Conference, and that a copy of this resolution be transmitted to His Excellency the Governor, by respectful address, with a request that he will communicate the same to Her Majesty's Secretary of State for the Colonies, Earl of Carnarvon" 42).

Several members took exception to the raising of the question in the way it was done by Godlonton's motion, De Smidt appealing for an adjournment so as to enable members to study all the available evidence 43). The Council, after a discussion that lasted about one-and-three-quarters of an hour 44), called for a division under Rule 30 of the Standing Rules and Orders of the Council. The effect of this Rule was the same as the effect of the "guillotine", sometimes applied in the Union Parliament. It stifled all further discussion, and a division had immediately to be taken. The result was that Godlonton's motion was carried by 9 votes to 6 45). The Council, therefore, no longer politely thanked Carnarvon for his interest in South African affairs; it roundly stated that a Conference was desirable and that it would be in the interests of the Colony to be represented at such Conference.

In the Assembly several motions and amendments were moved 46), until finally Carnarvon's despatch arrived, cancelling the conference in South Africa, and intimating that it would meet in England. Solomon at once drew up an amendment stating that the Assembly was no longer called upon to express its opinion on the desirability of holding a conference. This motion was carried 47).

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42) Minutes, Special Session 1875, p.5.
43) For debate, see C.A. 13/11/75.
44) See De Smidt's protest, Minutes Special Session 1875, pp. 15-16.
45) Minutes, Special Session 1875, p.5.
46) V. & P., Special Session 1875, pp. 9, 10, 23 & 26.
47) Ibid: p.26.

But the matter did not end there. The Hon. Mr. De Smidt entered an elaborate protest against the procedure adopted by the Council [48]. The implication of this protest was that the action of the Council had been unconstitutional. Now it is true that the Council had rushed the motion and, by bringing the technical rule of procedure into operation, had stifled further discussion, thereby prventing , amongst others, the Colonial Secretary from addressing the Council; it is true that the precedent of referring the Governor's speech to a committee to frame and bring up a report on the speech was set aside. But it must be remembered that the proceedings in the Council were to be regulated by the Council itself [49]. The Council was entirely within its rights in proceeding as it did, and was merely making use of the powers accorded to it by the Constitution [50]. Whether it was advisable to use these powers in this instance is a matter that does not concern us.

The Assembly's resolution condemning Carnarvon's federation despatch as an unwarranted interference with the rights of a Colony still stood. No resolution to the contrary had yet been passed, or was ever to be passed. The Council, on the other hand, had expressed its opinion that a conference was desirable, and would be in the interests of the Colony to take part in it.

Now in the Amendment that Solomon had moved, the following lines appear :-

> "The House desires, however, to express its opinion that the Government and Parliament should, if it be desired by the Imperial Government, give it (the Imperial Government) their counsel and assistance in settling the difficulties which have arisen out of the extension of British jurisdiction to the territory known as Griqualand West " [51].

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48) Minutes, Special Session 1875, pp. 15-16.
49) Constitution Ordinance, Sections 78-79, and Constitution Ordinance Amendment Act No. 1 of 1872, Section 4.
50) Ibid.
51) V. & P., Special Session 1875, p.26.

Now the settlement of the Griqualand dispute had been one of the questions which Carnarvon wanted should be discussed at his proposed conference 52). As the Council had passed a resolution expressing the view that it was desirable and in the interests of the Colony to be represented at such a conference 53), it could be feasibly assumed that the Council would concur in the resolution of the House of Assembly in so far as it expressed willingness to give the Imperial Government "counsel and assistance" in solving the Griqualand problem.

This view Barkly expressed, saying that as the anti-Ministerialists in the Assembly had opposed Solomon's amendment, his Ministers thought it more prudent "instead of risking an adverse vote in the Upper House to rest content with the original resolution that, having already concurred in the major, it was logically committed to the minor proposition" 54).

The Council, however, was not going to allow anybody to assume anything about it. Shortly after the meeting of Parliament in 1876, the Hon. Mr. Geard moved the following resolution :-

> "That this Council having observed from a despatch of His Excellency the Governor of this Colony to the Right Honourable the Secretary of State for the Colonies, bearing date December 4, 1875, and published with other correspondence submitted to the Imperial Parliament, communicating to Lord Carnarvon the decision arrived at last session of Parliament, by the House of Assembly, in regard to the existing difficulties between Griqualand West and the Governments of the adjoining republics, this Council takes exception to the assumption contained therein, that its concurrence with the House of Assembly might be assumed, without being involved in a matter of such grave importance involving the pacification of the whole of British South Africa. This Council, therefore, representing as it does the entire Colony, deems itself imperatively called upon to record its disapproval of such assumption on the ground that to accept it as a precedent would be a dereliction of duty alike derogatory to its own self-respect as it would be antagonistic to that just equipoise of Legislative authority which is essential to

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52) [C - 1244] Carnarvon to Barkly, May 4, 1875, section 8.
53) Minutes, Special Session 1875, p.5, for resolution.
54) G. H. 31/13. Barkly to Carnarvon, Dec. 4, 1875.

the general Welfare; and this Council respectfully requests that His Excellency will be pleased to forward this resolution to the Right Honourable the Secretary of State for the Colonies for the information of Her Majesty's Government" 54A).

The mover indignantly asked the Council "of what value was that House (the Council) if, whenever any difference occurred between them and the other House, their opinion was to be treated as of little importance" 55). The motion, however, was a little too strong for the Hon. Mr. de Smidt, who moved that the words "involving the pacification of the whole of British South Africa" be omitted. Finally Geard's motion, as amended by De Smidt, was agreed to 56).

It is therefore clear that the Council was not going to submit tamely to either the Assembly or the Governor, as far as its views were concerned. The Council had its own opinion and would persist therein. It was an elected body, representing the Colony, and as such had a right to its views. Barkly's remarks in the despatch of the 4th December, 1875, are to be deprecated, all the more so as they came from a Governor who had a great respect for the Constitution. The Council, again, cannot be too loudly applauded for the spirited vindication of their rights and privileges. Had it allowed Barkly's remarks to go through unheeded, it would have acquiesced in the creation of an undesirable precedent, a precedent that would have gone a long way in making the Council a nullity.

Before drawing any conclusions, there remains but one more incident worth recording. The Assembly, towards the close of each session, flooded the Council with Bills that had gone through all the stages in the Lower House, and waited only for the concurrence of the Upper House before being presented to the Governor for the Royal Assent. Obviously with a great many Bills before the House, the

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54A) Minutes 1876, p.14.
55) For debate in Council see C.A., 20/5/76.
56) Minutes 1876, p.14.

Council could not fulfil its legitimate purpose as a reviewing chamber, as time for adequate discussion was cut short by the pending prorogation of Parliament.

This tendency on the part of the Assembly to send up a great number of Bills to the Council at the close of the session was not to the liking of several members of that House. The result was that on June 29th, 1875, Mr. Wood moved the following as an unopposed motion :-

> "That, in the opinion of this Council the system at present adopted of moving in this Honourable Council that the Council go into Committee so late and at the close of the session, as was done yesterday by the Government, is not only calculated to create great dissatisfaction in the minds of the colonists at large, but is likely to prove injurious to capitalists non-resident in the Colony, in consequence of such large amounts passing through Committee of Council as was witnessed yesterday 57), and that the Government be requested to lay before and go into Committee of Council on the Estimates not later than 30 days after meeting of Parliament" 58).

Upon the Treasurer-General objecting to the moving of this as an unopposed motion, Wood gave notice that he would move it the following day 59).

In moving the motion on the 30th, Wood pointed out that the estimates passed the second and third reading within half an hour. Doubtlessly this was an undesirable state of affairs.

Replying to the motion, the Treasurer-General stigmatised it as unjust and fallacious, inasmuch as the estimates had been on the Table of the House as from the first day of its meeting, and members therefore had had ample opportunity to minutely scrutinize them. Godlonton, who had seconded the motion, was of opinion that the hurried way in which the Appropriation Bill had been passed, was indecent. The Colonial Secretary expressed the hope that the motion would be withdrawn, because it would be impossible to comply with it, were it passed. He made the strange

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57) See Minutes 1875, pp 159-165.
58) Minutes 1875, p.170.
59) Ibid: p.171.

statement that, as the Council was a House of review, it need not examine details minutely. De Smidt was of opinion that the day when Parliament would be prorogued ought not to be made known until after the Appropriation Bill had passed both Houses 60). With leave of the House, Wood withdrew his motion 61).

III.

The Council, therefore, was extremely conscious of its own importance, and refused to bend its knee unconditionally to the Lower House. It was wide awake to any breach of its privileges, and constantly ready to assert them. It objected to being hurried along, but was powerless to do anything about it in face of a stubborn Ministry.

Relations between the Houses therefore, were on the whole harmonious between 1872 and 1878. The conflicts detailed above were not of a very violent nature, excepting of course, the rejection of the Seven Circles Bill, which was one of Molteno's main reforms in his political programme 62).

Between 1873 and 1910 the Council rejected or dropped no fewer than 107 Bills 63), an average of nearly 3 bills per year. The fact that the Council proved itself so versatile and pugnacious must have gone a long way in influencing the makers of the South Africa Act to subject the Senate to the Assembly by means of elaborate deadlock provisions. But that was not enough. In 1926 the Nationalist-Labour pact passed Act 54 of 1926; the Senate ceased to be a nuisance and became a nullity.

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60) For debate in Council see C.A., 3/7/75.
61) Minutes 1875, p.171.
62) Molteno: Life of Molteno, Vol.I, p.206.
63) Kilpin: Romance, p.97.

CHAPTER SIX.

No. 10 DOWNING STREET INTERVENES.

I.

If Carnarvon's attempt to federate the South African colonies and states can be described as an instance of Imperial intervention in colonial affairs, then the Cape Colony suffered only twice under Imperial intervention, viz. in the case of Langalibalele and with regard to federation.

The story of how Langalibalele and his son were arrested, tried and banished has so often been told that the barest outlines of the history of this unfortunate affair will be sufficient for our purposes 1).

Men of Langalibalele's clan had gone to work on the Diamond fields, and had obtained arms. Now Law No.5 of 1859 required all natives in possession of fire arms to have them registered, but, as De Kiewiet remarks "its operation was inconsistent, desultory and confusing"2). Magistrates had retained or returned guns brought for registration as they themselves saw fit. Langalibalele was now called upon to have his guns registered. When they were not registered, messengers were sent to bid him to the capital. He laid violent hands upon them. The Natal Government now decided that drastic steps were necessary, and so "with kennels ayelp, the colonists and loyal blacks of Natal set off in pursuit of the terrified and fleeing tribe" 3). There was a skirmish, in which a few men on either side were killed. Langalibalele was delivered to the authorities, tried by an anomalous tribunal, which owing to its irregular constitution, had no locus standi. This court banished him and his son -- Langalibalele for "the

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1) For fairly detailed description see Wilmot: History, Vol. I, pp.89 - 92, and Theal: History, Vol.I, pp.227-237.
2) De Kiewiet: Imperial Factor, p.36.
3) Ibid: p.37.

term of his natural life", his son for five years. The Natal Government made an agreement with the Cape, and the Parliament of the latter Colony passed an Act confining the prisoners to Robben Island [4].

In the Cape Parliament Solomon raised quite a storm when the "Natal Criminals Bill" came up for discussion at the second reading. He took exception to the personnel of the court, as well as to its irregular proceedings. It was called a Court of Enquiry, yet Langalibalele had stood before it on trial for his life. Furthermore witnesses were not required to give evidence on oath, while one of the Judges, Shepstone, was put in the box to give evidence against the chief. The Cape Parliament was now asked to pass an Act to imprison Langalibalele, yet an appeal to the Executive Council was pending. How could they then agree to imprison a man before it was known whether or not he was going to be convicted. This was true, but Solomon's statement that the Colony was poking its nose into business that was of no concern to it, rings hollow. Co-operation amongst the South African Colonies and states was essential, as Carnarvon realised, in so far as it touched native matters [5]. Nevertheless the Act was passed with a substantial majority, and Langalibalele and son were incarcerated on Robben Island.

It was now that Bishop Colenso, with a nice sense of abstract justice, came forward to agitate public opinion in England in order to get the sentence quashed and the Cape Act annulled. He was successful beyond expectation. Carnarvon recalled Pine, the Lieutenant-Governor of Natal, and persuaded the Cape Ministry to pass

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4) Act No. 3 of 1874.
5) For debate on second reading see C.A., 11/6/74.

an Act to incarcerate Langalibalele and son on the mainland.

If Solomon had raised a storm during the 1874 session, Carnarvon's intervention in this affair let loose a hurricane. Caucus meetings were held, and in the Assembly Solomon asked the Colonial Secretary if the Government would regard it as a vote of no-confidence if the Bill were rejected. Upon the Speaker pointing out that it was left at the Ministers' discretion to answer or decline to answer a question involving, as it were, an opinion on abstract points of policy, the Colonial Secretary declined to answer.

The subject was discussed from all angles. In the view of the Government the passing of the Act to imprison the chief on the mainland was merely carrying out a reasonable request of the Home Government. To refuse to pass the Act would entail Langalibalele being set free; the Ministry would then resign. Mr. Ross-Johnson advised the Government to adopt "the masterly policy of doing nothing", while Merriman was of opinion that if the Bill was passed, it would be "giving the Penny press of England a right to interfere with our affairs". Solomon supported the second reading on the ground that it was a compromise which seemed to satisfy all parties concerned. Sprigg objected that the Imperial Government listen to public opinion at home, when the public there was not acquainted with all the facts of the case [6]. The second reading was finally agreed to by 34 votes to 21. [7]

Molteno's biographer complains that "the decision (to ask the Cape Parliament to imprison Langalibalele on the mainland) of the Imperial Government on a most mementous question had been come to without the slightest consultation with the responsible authorities of the Colony;

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6) For debate on second reading see C.A., 8/5/75, 11/5/75, 13/5/75 and 15/5/75.
7) V. & P. 1875, p.112.

indeed, the Government had been entirely ignored" [8], and goes on to complain that Carnarvon's intervention was merely a sop to the Cerberus of public opinion in England [9]. Uys shares the latter view [10].

From the constitutional point of view, however, the Cape Act imprisoning Langalibalele on Robben Island was ultra vires ab initio. My reasons for coming to this conclusion are the following.

We have seen that the Colonial Laws Validity Act had extended to any Colony any Act of the British Parliament, intended for any such Colony. Such Act would then have full force of law in the said Colony [11].

In 1869 the Imperial Parliament had enacted the "Colonial Prisoners Removal Act" [12]. Section 4 of that Act, while empowering any two colonies to "agree for the removal of any prisoners under sentence or order of transportation, imprisonment, or penal servitude from one of such colonies to another" for the purposes of undergoing, in such colony to which they might be removed, the whole or part of their sentence, requires that such removal shall only take place "with the sanction of an order of Her Majesty-in-Council". Furthermore :-

> "The sanction of the order of Her Majesty-in-Council may be obtained, in the case of a colony having a legislative body, on an address of such body to Her Majesty, and in case of any colony not having a legislative body, on the address of the governor of such colony; and such sanction shall be in force as soon as such order in council has been published in the colony to which it relates.
>
> "The agreement of any one colony with another shall for the purposes of this Act be testified by a writing under the hand of the Governor of such colony".

Now the provisions of this section relating to the obtaining of "the sanction of the order of Her Majesty-in-Council" had not been complied with. The Law had therefore

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8) Molteno: Life of Molteno, Vol.I, p.263.
9) Ibid: p.268.
10) Uys: In the Era of Shepstone, p.96.
11) 28 & 29 Victoria, c.63, sect. 2.
12) 32 & 33 Victoria, c.10.

been evaded on this point and because the necessary arrangements for the banishment of the prisoners had not been made in accordance with section 4 of the Colonial Prisoners Removal Act, the Act giving effect to their banishment and imprisonment on Robben Island was therefore also illegal and hence ultra vires. The Cape Act would have been intra vires, had it not been for the fact that it gave effect to an illegal sentence.

The intervention by No. 10 Downing Street on this occasion, animated though it was by public opinion, amounted really to an enforcement of the Colonial Prisoners Removal Act, thereby preventing a breach of Imperial Constitutional Law.

Thus the disallowance of Act No. 3 of 1874 was not merely an interference with Colonial self-governing rights, or a sop to the Cerberus of public opinion, but an enforcement of the "Colonial Prisoners Removal Act" (32 & 33 Victoria, c.10) [13] read alongside with the "Colonial Laws Validity Act" (28 & 29 Victoria, c.63), on the grounds that the Cape Act gave effect to a sentence that was repugnant to the provisions of the "Colonial Prisoners Removal Act".

Incidentally, this whole affair supplies an excellent example of the non-sovereign character of the Cape Legislature. The sentence of transportation was illegal, as we have seen above. Yet the Act of the Cape Legislature could not legalise that sentence but became, as a result of its giving effect to the sentence, itself ultra vires.

Now therefore, since the Cape Act No. 3 of 1874 was ultra vires, and since the Cape Parliament was a non-sovereign Legislature, the intervention of Downing Street was justified, for, if this matter had been allowed to pass unnoticed, it would have created an insidious precedent.

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13) See Annexure A.

II.

In dozens of volumes Carnarvon's confederation scheme has either been loudly praised or condemned. To describe the whole affair here would be a waste of time [14]. We shall again give but the outline, and then examine more minutely the charge that this scheme of Carnarvon was an unconstitutional intervention and a breach of the self-governing rights of the Cape Colony. We shall then turn to an examination of the effect of this scheme upon the working of Constitutional Government at the Cape.

On May 4th, 1875, Carnarvon penned the longa et verbosa epistola on the expediency of holding a conference of the South African colonies and states, to discuss the possibilities of a uniform native policy, the trade in arms and ammunition, the extradition of criminals, and the settlement of minor territorial questions, particularly the condition of Griqualand West. All the South African colonies and states were to be represented. Here Carnarvon made the first blunder in the despatch by saying that the Eastern and Western Provinces of the Cape should be separately represented [15].

As to the constitution of the conference, either Sir Henry Barkly or the Deputy High Commissioner, Sir A. Cunynghame, was to preside. Froude was to represent England. As for the Western Province of the Cape "the name of Mr. Molteno obviously suggests itself" [16]; for the Eastern Province "an excellent representative will be found in Mr. Paterson" [17]. Carnarvon, no doubt aware of the sensitiveness of the Cape politicians to anything that appeared to look like dictation, went on to say: "I do not

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14) For the best account of Carnarvon's federation scheme, see: De Kock: Federation and Confederation ... in S.A. -- unpublished post-graduate thesis in the Library of the Cape Town University.

15) [C-1244] Carnarvon to Barkly, May 4, 1875, par. 9.

16) Ibid: paragraph 14 -- italics mine.

17) Ibid.

wish to seem to dictate their appointment to this Conference should for any reason other names be generally desired"

But as he desired "public men who will truly understand and express the opinions of those communities which they represented" he had indicated the names of Molteno and Paterson.

The Conference was to be deliberative, and no action was to be taken. The first fruits of this Conference he expected to be "some satisfactory understanding" as to Native policy --

> "but, if in the free exchange of communications between the representatives of the different states concerned, the all important question of a possible Union of South Africa in some form of confederation should arise, Her Majesty's Government will readily give their earnest and their favourable attention to any suggestions that may be made".

In the event of federation, the form of Government in each state need not necessarily be uniform. On one point there was to be no misapprehension --

> "that the action of all parties, whether the British Colonies or the Dutch states, must be spontaneous and uncontrolled. It is a question for them to decide whether it is for their interests to enter into such an Union, and I desire to place no pressure on that decision".

Such then is the contents of the Confederation despatch that was greeted "with ill-deserved laughter in the Cape House of Assembly" [18], and threw the Colony into two hostile camps.

The despatch is anything but dictatorial. It is mild in tone, and showed appreciation of local self-governing rights in that, although suggesting that Molteno and Paterson represent the Cape Colony, the choice of representatives was really left to the Colony. It is also impossible to point to a single paragraph which, directly or indirectly, forced any of the parties concerned into a scheme of federation.

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18) Walker: De Villiers, p.127.

What Carnarvon really wanted seems to have been an expression of opinion on these important questions. From the paragraphs relating to federation it is clear that, if the Colonies and states desired a federation, they were at liberty to discuss the matter, and Her Majesty's Government would then lend a helpful hand. Again, were the delegates of opinion that the time for federation had not yet come, nobody was going to force them to federate. Carnarvon, in fact, was only inviting the South African Colonies and States to a Conference in order to ascertain their views on certain important subjects.

In my opinion Carnarvon was entirely within his rights in inviting representatives to attend a proposed conference. Furthermore, it did not constitute a breach of colonial self-governing rights. It is an absurd and fastidious doctrine that the Secretary of State for the Colonies had no right to propose such a conference before he had obtained the consent of one of the states prior to making such a proposal [19].

How then is it possible to condemn Carnarvon's invitation as an unprecedented interference with the rights and privileges of the Cape Colony? How is it possible to deny the Imperial Government the right to ascertain local views on subjects of local interest?

Now, having analyzed the despatch and having shown that it was by no means a breach of the self-governning rights of the Colony, we must proceed to an examination of the effect the despatch had upon the working of Responsible Government in the Colony.

It was the fate of this despatch that it was launched "at a moment that no optimism could call propitious"[20]. The Republics were sore at the treatment they had received at the hands of the Imperial Government

19) [C - 1399] Carnarvon to Barkly, 15th July, 1875.
20) De Kiewiet: Imperial Factor, p.71.

as regards the Keate-award area, and the diamond fields dispute, while Carnarvon's intervention in the Langalibalele affair had made Mr. Molteno his "sworn enemy" 21).

Upon receiving the despatch, Barkly immediately placed it in Molteno's hands.22) Molteno acted with swiftness and resolution. Contrary to Carnarvon's emphatic instructions, the despatch was not to be published; if it was published, Ministers would resign 23). It is interesting to note that:--

> "The despatch of the 4th May (1875) was written to Sir H. Barkly in his capacity of High Commissioner. It dealt with matters beyond the competency of the Cape Government, which had no diplomatic relations with the Dutch Republics, no responsibility for Natal, and which had refused all responsibility for Griqualand West" 24).

According to his own declaration 25), he should have given immediate effect to the instructions. But he submitted to Molteno.

The Cabinet now drafted a minute couched in somewhat discourteous language. At Grahamstown Mr. Froude subsequently told his audience that had the minute been received from a foreign country, it would have been looked upon as tantamount to a declaration of war 26). The Despatch, with this Minute attached, was laid on the Tables of both Houses on June the 8th 27) and on June the 11th Sprigg moved :-

> "That this House, without giving any opinion as to the expediency of assembling a conference of delegates of the various Colonies and States of South Africa, for the purpose of considering the several questions mentioned in the despatch of the Right Honourable the Secretary of State for the Colonies, dated 4th May, 1875, desires to express its approval of the Minute of Ministers upon that despatch, and is of opinion that this Colony being possessed of Responsible Government, it is desirable that any such proposal as that contained in the despatch should, so far as this Colony is concerned, come from its own Government, acting in harmony with the Legislature, who are best able to

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21) Uys: In the Era of Shepstone, p.96.
22) Molteno: Life of Molteno, Vol.I, p.336.
23) De Kiewiet: Imperial Factor, p.75.
24) Harding: Carnarvon, Vol.II, p.182.
25) G.H. 31/13, No.33, Barkly to Carnarvon, 27th March, 1876; and Note 92, Chapter Two.
26) Molteno: Life of Molteno, Vol.I, p.344, Note 2.
27) V. & P. 1875, pp.317-318; and Minutes 1875, p.99.

judge the time and occasion on which such a proposal could be considered with most advantage to the people of this Colony"28).

This motion was merely a reproduction, in abridged form, of the Ministerial Minute on the despatch. Ministers were of opinion that the interests of the Colony would not be served "by pressing forward at the present time" a conference as proposed by Carnarvon. Even if the times were more propitious, Ministers would still deprecate the division of the Colony into 2 divisions for the purposes of representation at the conference. Furthermore, the proportionate number of colonial representatives, as well as the selection of them, were matters in which the Colony should be left a free hand. Ministers agreed to lay the despatch, accompanied by their minute, before both Houses of Parliament 29).

Sir Arthur Cunynghame remarks that those who oppose confederation --

> "... are each looking rather to the good of his own part of the country than to the welfare of the whole" 30).

Unfortunately this is only too true. An attitude of "Cape Colony first, South Africa last" marked the motives of those who opposed the conference scheme. This becomes clear upon reading the speeches delivered in debate on the federation despatch and the minute of Ministers. Sprigg, in the speech introducing the above-cited motion, said :-

> "Sir, I believe our strength is to sit still. We are not in difficulties. Let those States and Colonies that are in difficulties make advances to us, and we will then consider whether our interests would be promoted by acceding to their request for Union. Of all the Colonies and States in South Africa this Colony has the least to gain and the most to lose by Confederation; for a certain result would be to increase our responsibilities, to increase our expenditure and to lessen our revenue" 31).

It was not the much vaunted constitutional principle

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28) V. & P. 1875, p.352. Professor Walker erroneously states that the motion was moved by Molteno, with Sprigg, "the leader of the opposition" concurring. See Walker :History, p.365.

29) [c - 1399] Barkly to Carnarvon, June 14,1875, Enclosure No.1; See also Molteno: Life of Molteno, Vol.I, pp. 344-345, where Minute is printed in extenso.

30) Cunynghame: My Command in South Africa, p.101.

31) For Sprigg's speech and debate in general, see C.A.15/6/75. See also Molteno: Life of Molteno, Vol.I, pp.349-355, where extracts of speeches are printed.

that he was defending, but the financial interests of the Colony. Even in Solomon's scheme of things, the Cape Colony came before South Africa [32]. But it must be said to his credit that in his speech in the Assembly he clearly stated that Carnarvon's tamperings with the native policy in Natal, via Garnet Wolseley's "sherry and champagne policy" was not such as the Colony could view with equanimity [33]. Merriman saw in the proposed confederation an attempt on the part of the Imperial Government to shift the responsibility for Griqualand West and Natal, with all their debts and difficulties on to the shoulders of the Colony. Mr. Fairbridge approached the question from another angle; if Cape Town were bombarded by an enemy fleet, what assistance could the Free State and Transvaal give, he asked the Assembly. On the other hand , if the inland states got embroiled in native wars and difficulties, the Colony would have to send assistance [34]. Now we have seen above that the argument that the despatch was a breach of colonial self-governing rights holds no water. It becomes clear upon reading the speeches of those who opposed the conference scheme, that the constitutional objection was merely a cloak to obscure the real reason.

But those who were in favour of a conference were likewise animated by motives of self-centred interest. The Eastern members supported the conference scheme, for they thought if federation came about, they would see their cherished scheme of separation brought to fulfilment [35], while the Cape Dutch under Hofmeyr supported the scheme, thinking it entailed a "square deal" to the Republics [36]. The Kaffrarians under Sprigg opposed the confederation conference, being afraid that it would bring about

32) Drus: The Political Career of Saul Solomon, p.57.
33) See C.A., 15/6/75.
34) Ibid.
35) De Kiewiet: Imperial Factor, p.76.
36) Hofmeyr: Life of Hofmeyr, p.133.

separation, which would leave their port, East London, at the tender mercies of the Port Elizabeth merchants 37). Finally, after a hurried discussion, Sprigg's motion was passed by a majority of 9.38) In the Legislative Council a motion thanking Carnarvon for the interest he showed in South African affairs was passed by a majority of 2, Dr. White, the Treasurer, voting with the majority 39).

Before proceeding to the rôle of Froude, "son eminence grise of the Colonial Office" as De Kiewiet calls him 40), two points arising out of the conference despatch debate, need comment.

In the first place, it could be expected that Molteno would have moved the resolution that stood in Sprigg's name. Molteno was the leader of the House, as well as of the Government, and he was the one that would probably lose most in case of confederation.

Secondly, there is Dr. White, member of the Cabinet, voting for the motion of thanks to Carnarvon. Now, by bringing these two facts into relation with one another, the position appears to me as follows :-

Sprigg's motion was really only a kite to test the wind. If the majority voted against it, the Ministery would be under no obligation to resign, being not responsible for the motion. In that case Dr. White's vote in the Council would leave the way open for the ensuing "honourable retreat".

Froude was sent out in pursuit of the despatch, but arrived too late for the kill. Molteno and Sprigg had successfully dealt the deathblow at the conference scheme. Finding that the Cape Ministry was going to leave the dead alone, and make no attempt at resurrection 41), he undertook the task alone.

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37) De Kiewiet: Imperial Factor, p.76.
38) V. & P. 1875, p.352.
39) Minutes 1875, p.117; vide supra, Chapter Five, section II, p.66
40) De Kiewiet: Imperial Factor, p.74.
41) Froude to Molteno, 21/6/75, printed in Molteno: Life of Molteno, Vol.I, pp.358 and 359.

Froude's intervention gave a new complexion to the whole affair. In spite of Molteno's warnings that any communication which he (Froude) wanted to make --

> "as to the purport of Lord Carnarvon's despatch should not, from a constitutional point of view, apart from other reasons, be made otherwise than through the Colonial Government" 42) ...

he attended a dinner given in his honour at the Commercial Exchange building, and claiming the right to voice his views as an Englishman in a British Colony, addressed the assembled diners on the despatch.

Now as an Englishman he undoubtedly had the right to voice his views, but as the emissary elect and special confident of Lord Carnarvon, it was unwise of him to attend a dinner given by the opponents of Molteno. The fact that he spoke as the representative of Carnarvon, gave Molteno a powerful weapon to wield against the tide of public opinion which Froude was to raise 43).

In his appearances at several towns in the Western Province, starting at Stellenbosch on July 14th, he appealed largely to the Dutch population. It should be remembered that the Dutch of the Western Province were amongst Molteno's staunchest supporters 44). He succeeded in leaving behind in the Western Province "a bristling Afrikaner opposition to the Ministry" 45).

Now, in the federation despatch, Carnarvon had made the tactical blunder of nominating two persons to represent the Cape Colony, and had made things still worse in nominating one representative for the Western Province, Molteno, and another for the Eastern province, viz. John Paterson, "the high priest of Separation" 46).

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42) Molteno to Froude, 22/6/75 in Molteno: Life of Molteno, Vol.I. p.359.
43) See article by W. J. de Kock in Historiese Studies, Jaargang I, No.3. - Die Rol van J.A.Froude in S.A.,p.42.
44) De Kiewiet: Imperial Factor, p.61.
45) De Kock: Confederation, p.84.
46) Walker: History, p.365.

Froude now proceeded to the Eastern Province to meet the opponents of the Molteno Ministry in that disaffected quarter personally. As Mr. de Kock justly remarks :-

> "Hoewel manne soos Paterson en Hofmeyr buitengewone eensgesindheid teenoor die Regering aan die dag gelê het, was hulle dryfvere tot samewerking uiters verskillend. Die geringste taktloosheid kon die Afrikanervertroue wat hy in die veertiendaagse toer (through the Western Province) opgebou het, onherroeplik skok [47].

At Port Elizabeth he again refused to appear in public to make a speech, preferring to give interviews [48]. He proceeded to Natal, and when he returned to the Eastern Province, awaited the result of a discussion between Wolseley and Molteno [49]. After receiving a cypher message from Wolseley that confederation was impossible as long as Molteno was Premier, he decided that Molteno would have to be removed from office [50].

He now decided to make speeches, and at Port Elizabeth openly appealed to his audience against the Ministry [51]. He indicated that Paterson was his Premier-elect [52]. Carnarvon had decided to shift the conference to Natal [53], but Froude told his audience that he would suspend the conference for a few weeks, so as to ascertain the real wishes of the people of the Colony. His progress, in the words of Bulwer, was a triumphant success [54].

Nevertheless, Molteno hardened his heart, and in a Ministerial Minute of September 14 finally refused to have anything to do with a conference [55]. De Kiewiet describes this Minute as a "boycott of the Home Government's ideas and suggestions" [56]. Molteno complained that Froude's

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47) Historiese Studies, Jaargang I, No.3, p.45.
48) Ibid: No. 4, p.35.
49) Ibid: p.36.
50) Walker: History, p.365.
51) Historiese Studies, Jaargang I, No.4, pp.36-37; and The Port Elizabeth Telegraph 10/9/75.
52) Ibid: Jaargang I, No.4.
53) [C - 1399] Carnarvon to Barkly, 15/7/75.
54) De Kiewiet: Imperial Factor, p.80.
55) G.H. 31/13. Barkly to Carnarvon (annexure).
56) De Kiewiet: Imperial Factor, p.80.

actions rendered any giving way in the direction of a conference impossible 57), while Merriman described it as "an Imperial agitation by an Imperial agent ("he could scarcely have said less" his biographer justly remarks)" 58).

Barkly was in a quandary. He informed Molteno that he had to bow to the almost universal approval Carnarvon's policy was receiving, and called a special session of Parliament to reconsider its decision 59).

Parliament met in Special Session on October 10th. The Council, in a hurry, passed a motion condemning the Governor's speech because it contained no recommendation to Parliament to send delegates to attend the conference, and recommended that the Colony be represented at the proposed conference 60).

In the Assembly the debate started on a motion by Molteno, aimed mainly against Froude's agitation 61). In the course of his speech he asked the Assembly --

> " ...what is the use of Responsible Government if an Imperial agent is to come out here and arouse the whole country against the Ministry?" 62).

He made it clear that there was not a particle of ill-feeling with the Government towards the republics in their decision not to join the conference.

Philip Watermeyer looked upon the resolution as a vote of censure on the Imperial Government, and moved that it was desirable that the Colony be represented at the proposed conference 63).

It soon became evident that the opponents of the Government were not going to succeed in defeating the Ministry and Barkly sent information intimating this to Carnarvon 64).

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57) G.H. 31/13. Barkly to Carnarvon, 3/10/75.
58) Merriman to Molteno 25/10/75: M.P. 53 of 1875; and Laurence: Life of Merriman, p.24.
59) G.H. 31/13. Barkly to Carnarvon 18/9/75.
60) Minutes, Special Session 1875, p.5. Vide supra Chapter Five, p.66-67.
61) V. & P. Special Session 1875, p.3.
62) For debate see C.A. 16/11/75; and Molteno: Life of Molteno, Vol.II, Chapter I.
63) V. & P. Special Session 1875, p.10.
64) G.H. 31/13. Barkly to Carnarvon, 16/11/75.

Discussion was still going on, when another despatch from Carnarvon arrived 65). It appeared from this despatch that Carnarvon had withdrawn his suggestion for a conference in South Africa. Saul Solomon then moved a motion stating that, inasmuch as the proposal for a conference had been withdrawn, the House was no longer called upon to express an opinion upon the desirability of the Colony attending the conference, but that the Cape Government should, if it be desired, lend the Home Government its counsel and assistance in clearing up the difficulties that had resulted from the extension of British jurisdiction to Griqualand West. Molteno withdrew his motion in favour of Solomon's66), which was carried by 36 votes to 22 67). Froude, seeing that the dead remained so, left for England in a despondent mood 68).

Now, if Carnarvon's intervention cannot be described as unconstitutional when he wrote the despatch, the same cannot be said of Froude's agitation. That an Imperial agent could come and raise opposition to the Colonial Ministry was unprecedented in the annals of colonial constitutional history. This agitation was unasked and unconstitutional.

It is another of Carnarvon's blunders that he countenanced Froude's agitation, and, as he informed Barkly that Froude had had his full confidence and support throughout 69), he is also to be condemned for being privy to Froude's unconstitutional agitation.

The last words had, however, not been spoken on the conference question. Solomon's motion had left the Government under a definite obligation. So on the 8th June, 1876,

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65) [C - 1399] Carnarvon to Barkly, 22/10/75.
66) Historiese Studies: Jaargang I, No. 4, p.40.
67) V. & P. Special Session 1875, p.36. Walker erroneously states in his "History" that Molteno's motion was rejected by the Assembly (p.367), while De Kiewiet makes the same blunder in Imperial Factor, p.81.
68) Historiese Studies, Jaargang I, No.4, p.40; Paul: Life of Froude, pp.269-270.
69) G.H. 1/23. Carnarvon to Barkly, 24/1/76.

Molteno moved a long resolution, the gist of which was that the House approved that the Colonial Secretary proceed to London to give the Home Government counsel and assistance in settling the Griqualand West dispute and to discuss further matters that might be desirable, --

> "... and thus, among other advantages resulting therefrom, afford Her Majesty's Government the opportunity which Lord Carnarvon states that he considers expedient of explaining, more specially the general principles upon which they are of opinion that the native policy of the future should be based and the terms and conditions which they conceive that a confederation might be effectively organised"[70].

To this Mr. Maasdorp, member for Graaff Reinet and a supporter of the conference party moved an amendment stating that it was in the interests of the Colony that the Colonial Secretary be accompanied by two co-delegates [71].

On the 9th June Mr. Sauer, also a supporter of the conference party, sprang a surprise on the House. He moved that if the Colonial Secretary proceeded to England, he should only lend counsel and assistance in the settlement of the Griqualand dispute, but should not discuss any further matters with the Secretary of State for the Colonies [72].

Sauer's amendment was nothing more than what had been agreed to in November during the Special Session [73]. From Molteno's motion it appears that the Government had at last decided to get off its high horse, while Maasdorp's amendment amounted to a vote of want of confidence in the Colonial Secretary. Ultimately Sauer's amendment was adopted by a substantial majority [74].

This is where we leave the Conference question. It never again during Molteno's term of office became a burning question.

Now the Conference question, plus Froude's agitation, set the tide running strongly against the Molteno Ministry.

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70) V. & P. 1876, p.110.
71) Ibid.
72) Ibid: p.116.
73) V. & P. Special Session 1875, p.34.
74) V. & P. 1876, pp.116-118.

This is clearly seen in the motion passed by the Council during the Special Session in November 1875. It really amounted to a vote of want of confidence in the Government, inasmuch as the Government was responsible for the Governor's speech. The time was still to come, however, when the Ministry would be forced to resign because of an adverse vote in the Council, and then only after going to the country with the question, and being defeated at the polls[75].

Now I have remarked that the Sprigg motion in June, 1875, alongside with Dr. White voting for the motion of thanks to Carnarvon in the Council, seems to indicate that Molteno was really only finding out how the wind blew. This is borne out further by a despatch from Barkly to Carnarvon in which the Governor informed Carnarvon that Molteno was of opinion that Froude's agitation in the Colony made any giving way in favour of a conference out of the question [76]. Finally, there is then Molteno's conference motion [77]. It would seem, therefore, that Molteno was not adverse to the holding of a conference, but that circumstances thwarted him in beating an honourable retreat.

It is of great importance to note that this affair drew the opponents of the Government closer together. The opposition started to close its ranks, but it was still some time before it would succeed in being strong enough to hold the Government at bay.

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75) E.g. the Jameson Ministry in 1907.
76) G.H.31/13. Barkly to Carnarvon, 3/10/75.
77) V. & P. 1876, p.110 and above.

CHAPTER SEVEN.

"HER MAJESTY'S OPPOSITION"

Immediately prior to the passing of the Responsible Government Bill there existed two parties or groups in the Colony, i.e. the Responsible Government Party and the anti-Responsibles.

The anti-Responsibles consisted of the Western Province conservatives and the Eastern Province separationists of 1820 heritage. At one time the separationists seem to have viewed the introduction of Responsible Government with equanimity, on condition, however, that it be preceded by federation, which implied separation 1).

The introduction of Responsible Government brought the existence of the two parties to an end 2). The separationists made a few last attempts to have their pet scheme put into practice, but, as they failed, settled down to form an opposition 3).

But it was not an opposition in the sense that we know it to-day. There were no clearly defined parties, held together in a homogenous organization. Parties consisted of personal followings 4).

In 1875 John Paterson decided that the time had come to form an opposition. He wrote to Merriman to sound him and ascertain his views. The section of the letter relative to the formation of an opposition is quoted here in extenso :-

> "I wait to see (before going to Parliament) what the Ministry produce. If their programme is disappointing and a sham, I shall come down at once, and the first thing then to be done will be to call a meeting of members, and resolve upon organizing an opposition.
> "Choosing Leaders.- It is vain to hope to do anything without such organization, and it is worse than childish to put off any longer the day of organization. If the opposition should at first muster only a dozen names, it would be a power in the Parliament, and party discipline would be inaugurated. I have made up my

1) Molteno: Life of Molteno, Vol. 1, pp.178-179.
2) Walker: De Villiers, p.57.
3) Ibid: pp.61-62.
4) De Kock: Confederation, p.51.

mind, if members think I could be of any service to them in organizing such opposition to give my services to the party, and I know I can calculate on you to do the same. Now, in looking over names, the following strike me as likely to have followings: Solomon, Sprigg, Fairbridge, Manuel, Watermeyer in the Assembly, and De Korte, Hofmeyr and Godlonton in the Council. Can these be in any way induced to join an opposition whose policy shall be progressive, or <u>united</u> against a policy which is non-progressive or stagnant. You will be able to say, and I should like you to say. Of course there will be great shyness of joining an opposition at once, but it must come. Let me hear from you on the subject" 5).

Unfortunately Merriman's reply has not yet been found, if it still exists. However, from a subsequent letter to Merriman it appears that Sprigg did not fall into line with Paterson's suggestions 6). It is clear what Paterson was aiming at. He wanted to form a party with a closed organization, and controlled by a strict party discipline. This entailed of course, caucus meetings, whips, and such party necessities.

Now, caucus meetings were held prior to the second reading of the Natal Criminals Bill of 1875, and again prior to the debate on the conference question 7). The conference party, however, does not seem to have been controlled by a strict party discipline, such as Paterson envisaged, for in the conference debate on June 9th, 1876, Sauer, one of these members, moved an amendment to Molteno's conference motion diametrically opposed to the policy of the conference party 8). What is more, Sprigg, who in 1877 formally became the leader of the opposition, still went practically all the way with Molteno. It is clear that Sprigg, before 1877, never identified himself with any group. He doubtlessly had a following, as we see from Paterson's letter to Merriman, but he voted with his following to suit his own ends.

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5) Paterson to Merriman: 17/3/75 ; M.P. No. 12 in 1875.
6) Paterson to Merriman: 20/8/75 ; M.P. No. 53 in 1875.
7) See above, Chapter Six, and De Kock: Confederation, p.51.
8) See above, Chapter Six, p.89.

Why then was it that no definite opposition arose before 1877? The only explanation seems to be the following observations made by Cunynghame :-

> "The present political position of the colony requires some explanation. There has always been a conflict between the interests of East and West, and the Eastern half itself is divided as to political views into three sections: Port Elizabeth with its port at Algoa Bay; Grahamstown with Port Alfred at the mouth of the Kowie, and Queenstown and King Williamstown, with their port at East London. There is quite as much local antagonism between these sections as there is between east and west of the colony"9).

It would seem, therefore, that local jealousies stood in the way of the formation of a strong opposition party founded on provincial lines.

It is a profitless task to compare the various division lists up to 1877 in order to find the nucleus of some opposition party. There was a considerable amount of cross voting, and even men like Sprigg, Solomon and Scanlen did not consistently vote on one or the other side.

Paterson is amongst the few members who consistently opposed the Ministry. Merriman, before joining the Ministry, filled the rôle of a "free lance" in politics, and voted, it would seem, according to the dictates of his conscience, although it would seem that he was at one time a trusted lieutenant of Paterson 10). To talk therefore, as Professor Walker does 11), of Sprigg as the leader of the opposition, is a misstatement, inasmuch as each of these local groups had its own leaders, supporting or opposing Molteno as would benefit their specific locality.

In the 1877 session, however, we find the first signs of a strong and consolidated opposition arising, which held together right through the session.

This opposition opposed the Government's main measures in the 1877 session. We shall now turn to a consideration of these measures, so as to show the strength as well as the temper of the opposition.

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9) Cunynghame: My Command in S.A., pp. 102-103.
10) Paterson to Merriman: 20/8/75; M.P. No.53 in 1875.
11) Walker: History, p.365.

The first measure on which the opposition put the Ministerial party through its paces was the Griqualand West Annexation Bill.

When Molteno visited London in 1876, he pledged himself to get the Cape Parliament to pass a Bill to annex Griqualand West.[12]

The Bill that came before the House for the second reading on June 6th, 1877, was largely the embodiment of a report by a commission that had sat earlier in that year. Molteno introduced the Bill [13] and Southey, who had been elected member for Grahamstown in 1877, moved that the order for the second reading be discharged, and the Bill referred to a Select Committee with power to take evidence and call for papers [14]. Merriman replied that the House was merely called upon to assent to the principle of annexing Griqualand West. He indulged in a high-flight of fancy by expressing the opinion that he "expected in a few years to see a European population stretching from the Diamond fields to Walwich Bay"[15] (sic!). Molteno said he regarded the amendment as a party move, and that the Ministry would resign if it were carried [16]. Most members, amongst others Paterson, were of opinion that the House was pledged to accept the Bill, and that they would consequently vote for the principle, but did not pledge themselves to support the details. The Bill was read a second time.

On the 8th, Southey moved that if his motion for the discharge of the Bill be carried, the Select Committee consist of the Colonial Secretary, Messrs. Manuel, Paterson, Probart, J. A. de Wet and himself [17]. He was not so sure that the population of Griqualand West desired to be

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12) Molteno: Life of Molteno, Vol.II, p.103.
13) V. & P. 1877, p.51.
14) Ibid.
15) For debate, see C.A. 7/6/77.
16) Ibid.
17) V. &. P. 1877, p.67.

annexed, and furthermore, that the evidence before the House was inadequate. The House should have information as to the state of the country, its finances, its population and property [18].

The Government, seeing the temper of the opposition, decided to temporise, and Merriman announced that the Government did not desire to press the Bill unduly [19].

On Monday the 11th, the opposition, seeing that the Government was getting jittery, also decided to temporise. Maasdorp consequently moved a "rider" to the motion of Southey in the following words :-

> "That it be an instruction to the Select Committee to restrict its enquiry to the number and description of the population, the extent and value of the land and its cultivation and other resources, the revenue and expenditure and general financial condition of the province, and to report within 14 days from the date of nomination of such committee[20].

The Attorney-General, in name of the Ministry, announced that the Government would not object to the course proposed by Maasdorp [21] and the Bill was referred to a Select Committee [22].

The opposition was therefore strong enough to force the hand of the Government. The opposition on this occasion was but a foretaste of what was to come. Sprigg, now formally leader of the opposition, was going to show the House exactly how strong the opposition was.

Now, Sprigg had been chairman of the defence committee that had been appointed the previous year. This committee had brought up a report that cannot be described as practicable, inasmuch as it divided the Colony into East and West for purposes of defence of the frontier. The West was to contribute taxation, while the East was to

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18) Debate: C.A. 9/6/77.
19) Ibid.
20) V. & P. 1877, p.72.
21) C.A. 12/6/77.
22) V. & P. 1877, p.72.

carry arms [23]. The Bill that the Government brought up did not contain this recognition of separation, and was set down for the second reading on June, 25th.

On June 14th the Colonial Secretary delivered his budget speech and moved that the House go into committee of supply on estimates the following Monday [24]. Molteno pointed out that the Government had supplies only up to the end of June, and that it was therefore necessary to pass the estimates through both Houses before the beginning of July [25]. He said he was aware that the Government was going to be called to account for unnecessarily pressing on the estimates. Such obstruction would be a serious matter [26].

Sprigg immediately denied that the opposition was out to cause unnecessary delay. They first wanted to discuss the Burgher Force Bill before proceeding into Committee of Supply on the estimates. The Burgher Bill was intimately connected with the estimates, and the opposition wanted to see larger means provided for frontier defence. He said that the opposition was going to obstruct the passing of the estimates, and referred to the doctrine of redress of grievances before supplies are granted. He moved that the House go into Committee of Supply on the estimates on Friday, the 29th June [27]. If, however, the opposition happened to be in a minority, they would --

> "continue to offer every constitutional opposition to the passing of the estimates until we are satisfied that a good defence measure is to be provided for the future safety of the colony" [28].

Paterson then proceeded to attack the Government's financial policy, and held that the revenue had been over-estimated. It was the duty of the Government to reconsider and bring up a new set of estimates.

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23) G.1 - '77, p.10.
24) V. & P. 1877, p.98.
25) The financial year was from July to June.
26) For Molteno's budget speech, see C.A. 16/6/77.
27) V. & P. 1877, p.98.
28) For Sprigg's speech, see C.A. 16/6/77.

The opposition proved to be as good as their threat. Member after member got up to talk. On the 22nd, Paterson again attacked the financial policy of the Government. This was too much for Molteno's patience. With the proverbial roar of the lion of Beaufort he expostulated against Paterson:--

> "the Ministry cannot sit here and be tormented by the insulting remarks of the honourable member for Port Elizabeth".

Let the House decide between the opposition and the Government. If Paterson's accusations were true, then --

> "the sooner the country is relieved of the Government, the better" 29).

The opposition therefore had succeeded in obstructing the passage of the estimates. Sprigg now announced that the opposition had attained its object and would not press the matter to a division 30).

The first phase of the battle against the Government had been successfully carried; the opposition had succeeded in holding up essential business for 8 days.

So successful was Sprigg's opposition, that even the "Argus" got nervy about the Government's prospects, and warned its readers that a change of Ministry was not unlikely (31). As early as the 9th June it had announced a probable new Ministry, with Southey as Premier and Colonial Secretary 32), but on the 14th it started to put its money on Sprigg as the new Prime Minister 31). With a sigh of relief it announced after the conclusion of the debate to go into Committee of Supply on the estimates that --

> "Neither the House nor the country wants a change in Government" 33).

The second phase of the opposition's struggle against the Ministry commenced on Monday, the 25th June, when the

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29) C.A., 26/6/77.
30) Ibid.
31) C.A., 14/6/77, sub-leader.
32) C.A., 9/6/77, sub-leader.
33) C.A., 26/6/77, Leader.

Attorney-General moved the second reading of the Burgher Force Bill [34]. After explaining why he took charge of the Bill, he went on to deprecate the fact that a defence measure should partake of the nature of a party question. He said that the Government would entertain any reasonable amendment and would not take up the attitude of "take it as it stands and we will admit of no alterations". The Act provided for the necessary machinery to put the Force into action. Although they were to hold themselves ready, they ought to be moderate and do nothing that would provoke an attack[35].

Sprigg immediately answered the Attorney-General's speech :-

> "Public attention" he said, "during the past twelve months has been earnestly directed to the present session of Parliament with the full expectation that it would produce a real defence measure for the country. That expectation, I need hardly say, is most grievously disappointed by the Bill now before the House".

He described the Bill as one "to provide for the numbering of the male inhabitants of the Colony between the ages of 20 and 50 years". To be of any use, the Bill needed a taxing clause to raise about £60,000, yet the Government had announced that they were going to impose no new taxation that year. The opposition regarded the Bill as a sham and as a dishonest Bill. He explained that the principle underlying the recommendation of the commission to have one half contribute in taxes while the other half carried arms was "that every man shall contribute to the defence of the country in the way in which that contribution shall be of the most service"[36]. He moved the following amendment :-

> "That this House, regarding the proposals submitted to it by the Government for a large increase of the Frontier Armed and Mounted Police, and also a Bill to

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34) V. & P. 1877, p.153.
35) C.A., 28/6/77.
36) C.A., 28/6/77 (Supplement)

organize the entire Burgher Force of the Colony as an indication that the Government with the very best means of information, accepts the conclusions of the Colonial Defence Commission, respecting the magnitude of the danger from a native outbreak to which the Colony in its present defenceless position is exposed, cannot accept the Burgher Force Bill, introduced by the Government, read by the light of the estimates of revenue and expenditure now before the House, as an earnest attempt on the part of the Government to provide an efficient defence for the country, and therefore resolves that the order for the second reading be discharged" 37).

This no-confidence motion in the Government was defeated by 32 votes to 25 38).

Scanlen now moved that the Bill be referred to a Select Committee with power to take evidence and call for papers 39). The Attorney-General then announced that the Government would vote for Scanlen's amendment. Scanlen's amendment was carried by 32 against 25 votes 40).

In comparing the lists of members who voted against Sprigg's motion and for Scanlen's amendment, it appears that Mr. Manuel and Mr. Shawe did not vote when a division was called for on Sprigg's motion. When Scanlen's motion came up for division, it was Mr. Fairbridge and Mr. Gird who abstained from voting. It seems therefore that Molteno could rely on at least 34 members to support him.

The opposition lists show that Mr. Frost did not vote in the division on Scanlen's amendment. It would, therefore, seem that Sprigg could count on at least 26 members, for Laing voted in the Scanlen division, but not in the division resulting from Sprigg's no-confidence motion.

On July 3rd Sprigg took exception to the composition of the Select Committee, and the opposition actually succeeded in forcing the Government to change its composition 41). The reason why the Government was defeated on this occasion

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37) V. & P. 1877, p.154.
38) Ibid: p.156.
39) Ibid: p.156. Scanlen had voted against Sprigg's no-confidence amendment.
40) Ibid: p.172.
41) Ibid: pp.208-209.

was because the opposition caught it unawares. This defeat came on the same day that the "Argus" wrote as follows about Molteno:-

> "Mr. Molteno is a good Minister but a bad tactician. He administers the country with great sagacity, but he displays little foresight in the control of Parliamentary proceedings. On great occasions the rank of his party are (is?) full, but his side is seldom ready to meet emergencies. There is no such officer as a Government whip, and the supporters of the Ministry are not kept prepared to meet sudden attacks from the opposition" 42).

In 1877 therefore a strong opposition sat in Parliament, ready to snatch victories from the Government when the occasion arose, fairly disciplined, and ready to oppose the Government on major points of policy.

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42) C.A., 3/7/77 (Leader).

CHAPTER EIGHT.

THE DISMISSAL OF THE MINISTRY.

I.

We have already seen what the powers of the Governor and High Commissioner were [1]. As Governor, he was the personal representative of the Crown in the Colony; as High Commissioner he was a kind of liaison officer to the British Government in South Africa, with powers, functions and authorities extending beyond the borders of the Cape Colony.

Legally and technically the Governor could make or unmake a Ministry [2]. But it is obvious that he should make use of this power only under extenuating circumstances, because it is not the proper function of a Governor to determine the composition of a Ministry; that power belongs to Parliament [3]. For, if he acts thus, the Crown definitely takes sides in party politics, a thing which is to be deprecated [4].

Before pronouncing upon the constitutionality, or otherwise, of Frere's action, let us briefly review the nature of the differences between the Governor and the Ministry that gave rise to the dismissal.

II.

In August 1877 the Ninth and last Kafir War in the Cape Colony started as result of a drunken brawl [5]. Frere and Merriman were on the drought-scarred and war-

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1). Vide Supra: Chapter 2.
2). De Kiewiet:Imperial Factor, p.173.
3). Inasmuch as and insofar as it can support or withdraw its support from the Ministry.
4). It should, however, be remembered that it was only in 1926 that the parallel between the King and the Governor-General was drawn.
5). Theal:History, Vol.I,p.53 following ; Wilmot:History, Vol.I,p.216.

scared frontier when the storm broke [6].

It was only towards the middle of October that operations against the Galekas started on something like a large scale and by the end of October the war seemed to be over. The operations in the Transkei had been conducted by Commandant Griffith, who had been promoted to the temporary rank of Colonel in Her Majesty's Army [7]. In December, however, the Galekas, who had been driven towards the Natal border, returned to the attack. This was followed by a general rising of the Rarabe clans in and outside the Colony [8]. The war had thus taken on the character of a rebellion.

Meanwhile Sir Arthur Cunynghame, the Lieutenant-Governor and Officer Commanding the Imperial Forces in South Africa, had been appointed Commander over all Colonial Forces, including, of course, the Imperial Forces [9]. The appointment was signed by Merriman "for the Colonial Secretary". This clearly indicates that the appointment was made with the full concurrence of the Cabinet. This appointment was never revoked [10]. In the dismissal debate Merriman stated that there had been an understanding to the effect that Cunynghame's command was to be merely nominal [11]. Cunynghame emphatically denies this statement, stating that he would never have accepted the command if his hands were to be "so fettered" [12]. As there is no evidence to bear Merriman out, it seems to me that the appointment of Cunynghame intended that he

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6). Laurence:Life of Merriman, p.28.
7). Govt. Gazette,5/10/77: Govt. Notice No. 657.
8). Theal:History, Vol.I,p.74 - following; Martineau: Frere, Vol.II,p.202.
9). Govt. Gazette,5/10/77: Govt. Notice No. 656.
10). A.2-78, p.20. Memo. for Ministers, 26/1/78.
11). For debate on Ministerial dismissal: C.A.27/5/78-4/6/78.
12). Cunynghame: My Command in S.A. p.312.

should exercise the powers, functions and authorities of Commander over all Colonial Forces.

On 11th January, 1878, Molteno, who had just arrived in Kingwilliamstown, informed Frere that the Cabinet wished to entrust the suppression of the rebellion in the Ciskei (colonial-territory proper) to Colonial Troops, "unfettered by any co-operation or control from Her Majesty's Officers and Forces" [13]. Operations in the Transkei, extra-colonial territory, were to be conducted by Imperial Troops under their own Commanders [14]. The Colonial Troops, to be used in the Ciskei, were to be under an officer known as the Commandant-General. Molteno proposed to invest Commandant Griffith with the powers, functions and authorities appertaining to that office, the appointment to take effect as from 15th January. [15] The appointment was gazetted on 18th January; henceforward:

> "All returns and reports connected with the Forces of the Colony will be made to him accordingly " [16].

Now, up to this time Griffith had been a subordinate to Cunynghame. Now he was elevated to a position of Commander of Colonial Forces. Cunynghame, in his capacity as Commander of Colonial Forces, had attended the meetings of the Executive Council [17]. This seems to be the only instance between 1872-78 that a Governor made use of the power given him by his Commission [18] to invite anybody whom he may deem fit to attend the meetings of the Executive Council.

By elevating Griffith to the position of Commandant-General, a dual command in a double sense was created.

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13). A. 2-78, pp. 9 & 12.
14). Ibid: p.12.
15). Ibid: p.18.
16). Govt. Gazette, 18/1/78, Govt. Notice No.53.
17). A.8-78, p.55. Frere to Cunynghame, 1/10/77.
18). A.5-78, p.2. sect.2 and Supra: Chapter 2, p.17

First of all, a dual command had been created inasmuch and insofar two persons had been invested with the same powers, functions and authorities. Secondly, the Colonial Forces were to be separated from the Imperial Forces who were to operate side by side without any co-operation or dependence upon each other.

Legally Griffith's position was hopeless. Colonial law knew no such officer as a Commandant-General [19]. It only knew an officer called "Commandant and Inspector-General of Auxiliary Forces" [20]. Frere immediately asked for a definition of the duties of the Commandant-General [21] and then told Molteno that his proposed changes were "far too violent, impractical and unconstitutional", [22] and proceeded to submit a host of questions to Molteno for the Attorney-General's legal opinion. First of all, he wanted to know if the appointment of the Commandant-General, absolved from all control by the Governor, as Commander-in-Chief or any other civil or military officer acting under the Governor's orders, was in accordance with the terms of the Governor's Commission or of any Act of Parliament. Secondly, if an act of indemnity would cover the acts of men acting as military without lawful warrant and without or in opposition to the orders of any lawfully constituted military authority. Thirdly,

> "What members or officers of the Colonial Government are competent to give such warrant for acts done in districts where Martial Law has been proclaimed, as shall justify those acts as military proceedings" [23]

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19). A. 2-78, paragraph, 16.
20). Ibid: p.18.
21). Ibid: p.18. It seems from the available evidence that the Cabinet never gave this definition Frere asked for.
22). A. 2-78, p.19. Memorandum.
23). A. 2-78, p.22. sect.33 ; Laurence:Life of Merriman,p.32.

To Frere the whole position was clear. The command of all forces in the field "legally and by the constitution" rested with the general Officer Commanding Her Majesty's Forces, if he were empowered by the Governor and Commander-in-Chief to assume the command of the Colonial Forces. Hence, the appointment of a Commandant-General to act independently of the general Officer Commanding was illegal and unconstitutional. Hence the Commandant-General's acts, and the acts of all those who obey him , would be illegal and would not be covered by an act of indemnity. The only legal and constitutional course would be that Griffith act under the general control of the General commanding the Forces [24].

These questions, with Frere's views, were submitted on the 26th January. When the Governor dismissed Molteno on the 2nd February, no reply had yet been received. On 4th February, the Governor telegraphed to Mills, the Under-Colonial Secretary, for an immediate reply [25]. The answer was received after Sprigg had succeeded to office, that is on 6th February.

The opinion was to the effect that the Governor's Commission as Commander-in-Chief placed Her Majesty's Forces in the Colony under his control, but gave him no authority over the Colonial Forces. All authority which he has over them is such as is vested in him by the various Acts of Parliament under which the Forces are embodied. These powers he could only constitutionally exercise by and with the advice of his Ministers. Furthermore, as every person in the Colony is empowered to arrest any person guilty of serious crime, being bound to do so

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24). A. 2-78, p.22. sect. 34.
25). A. 4-78, p.13. Telegram: Frere to Mills.

under certain circumstances, and able to kill such malefactor in case of resistance or attempt to flee, therefore a body of men could act together to arrest and kill malefactors.

> "They may, in my opinion, act under the direction of a leader chosen by themselves, and therefore they legally act under a police officer, magistrate or other person appointed by the Government" .....

Therefore,

> "in my opinion the appointment of a Commandant-General to direct the action of volunteers and police engaged in the Colony in the suppression of the rebellion is not illegal".

> "In answer to the second and third questions, I consider that persons who have arrested or killed criminals under the circumstances before indicated, need no act of indemnity or warrant" [26].

From this opinion of the Attorney-General it is to be deduced that there was to be a Commandant-General only in time of war and under the circumstances detailed by him. It is interesting to notice that this was recognised by the Constitution of the Orange Free State [27]

We must now detail the quarrel over Merriman's "assumed" position as Minister of War and Police.

From the outbreak of the war Merriman had taken charge of the Department of Defence and made Kingwilliamstown his head-quarters [28]. Now the functions appertaining to the Department of War and Police fell under the Department of the Colonial Secretary [29]. But Merriman had been entrusted with these functions by the Cabinet [30]. Frere himself admitted that Merriman performed the duties well, but at the same time stated that the functions he performed ought to receive the attention of a separate ....

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26). A.4-78,p.14: Telegram: Attorney-General to Governor.
27). See articles 51 & 52 Printed in Eybers: Select Documents, p.295.
28). Laurence:Life of Merriman, p.28.
29). Vide Supra, p. 46.
30). A. 2-78, p.30: Minute 2/2/78; Laurence:Life of Merriman, pp.34-35. ; Molteno: Life of Molteno, Vol.II p.338.

Minister, or be in the hands of an Under-Secretary of State, after the English fashion [31]. Molteno's biographer takes this to imply that Frere assented to Merriman acting as "virtual War Minister" [32]. From the available evidence it seems that Frere did not originally object to Merriman exercising these functions, for on 1st October, 1877, Frere wrote to Cunynghame as follows:

> "Your Excellency is aware that since the present disturbances came to a head the Honourable the Commissioner of Crown Lands has, with my full concurrence, and with, I have every reason to believe, the full consent of the whole Cabinet, taken the principal share of all duties which would devolve on a Minister or War and Internal Police....." [33].

In January, 1878, Frere suddenly objected to Merriman's "assumed" position and pointed out, on the 26th of that month, that there was no Minister of War or Police [34]. The functions of the War and Police Department belonged to the Colonial Secretary " but in no

> case as far as I am aware either before or since the introduction of Responsible Government have the large ministerial duties combined in that important office, been considered to include either the personal command of troops in the field or the independent power to direct military operations in the field without reference to or control by either the Commander-in-Chief or the General-Officer commanding in the Field" [35]

Frere's objection seems to have been more against the military operations that Merriman was carrying on without reference either to him or Cunynghame [36]. He was of opinion that all persons acting under Merriman's orders would be liable to prosecution, inasmuch as Merriman possessed no independent authority [37] and requested his Ministers definitely to state:

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31). A.2-78, p.7. Minute, 26/12/77
32). Molteno: Life of Molteno, Vol.II, p.338, N.1.
33). A. 7-78, p.55. Frere to Cunynghame, 1/10/77.
34). A. 2-78, p.19. sect. 8.
35). Ibid.
36). Ibid. p.24, sect. 4. Minute, 31/1/78.
37). Ibid: p.24, sect. 6.

"whether they intend the Governor and Commander-in-Chief or the Commissioner of Crown Lands to exercise command over the Military Forces raised in the Colony and now engaged in what are, beyond all doubt, military operations on a large scale, in the Colony and its neighbourhood.

I request an early answer on this subject ...[38]"

Cunynghame, for his part, absolutely refused to have anything to do with the illegal military operations conducted by Merriman [39].

Things now rapidly came to a head. Frere summoned the Executive Council, on his own initiative, to meet on 1st February. At the meeting Molteno immediately protested that since the introduction of Responsible Government the Executive Council had never been summoned by the Governor on his own initiative, but that it had always been done on the advice of the Cabinet. Furthermore, he had had no intimation as to what was going to be discussed; the Cabinet, as a whole, was ignorant as to the business on the Agenda [40]. Cunynghame, at the request of the Governor, protested against the operations which had been carried on without reference to him "as an infringement of his position and command as laid down in the Queen's Regulations and his commission as General Commanding in the Colony". [41]

As Molteno and his colleagues (Merriman and Brownlee) were unable to discuss the business on the Agenda [42], Frere summoned the Executive Council to meet at 4 o'clock the following day (2nd February).

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38). A.2-78, p.24, sections 15 & 16.
39). Ibid: p.25. Cunynghame to Frere, 30/1/78.
40). A. 2-78, pp.27-28. Minute by J.C. Molteno 1/2/78.
41). A. 2-78, p.26. Minutes of meeting of Executive Council 1/2/78.
42). The business was the discussing of a Minute by Bellairs, D.A.G. - for Minute see A.2-78, p.22.....

When the Executive Council met on the 2nd, Molteno handed in a Minute drawn up by the Ministers, which was a reply to Frere's Minute of 31st January. Molteno at the same time stated that the Governor's Minute of 26th January had been referred to the Attorney-General, as the Governor had desired, but no reply had yet been received. [43]

The Minute agrees with the opinion the Attorney-General expressed on the 6th February, [44] that the Governor has no special authority over the Colonial Forces. The position occupied by the Commissioner of Crown Lands and Public Works was not assumed by him, but was assigned to him by the Colonial Secretary with the concurrence of his colleagues. Also, as Ministers were responsible to Parliament, they would have to answer to that body for all the acts of the Cabinet. This was all the more so because responsibility was collective, the act of any one Minister being the act of the Cabinet as a body. Hence they saw no reason why they should change the advice already given to the Governor as to the conduct of operations [45].

Frere deprecated the fact that they had not waited for the Attorney-General's opinion. Molteno, he said, had offered his resignation when he (Frere) had intimated to him, on reading a preliminary memorandum advocating the appointment of a Commandant-General, that he could not accept such advice, which, in his opinion, was illegal. He, Frere, was now ready to accept Molteno's resignation, and such of his colleagues as agreed with him. Molteno answered that the

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43). A.2-78, p.28. Minutes of meeting of Executive Council, 2/2/78.
44). Vide Supra, p. 105-106
45). A. 2-78, pp.30-31. Minute of Ministers 2/2/78.

resignation had been withdrawn, but that the Governor could dismiss his advisers. Frere consequently dismissed Molteno, Merriman and Brownlee, but told them to carry on the business of governing the Colony until their successors had been appointed [46]. On 5th February they were relieved from the seals of office and the Sprigg Ministry took over the task of governing the Country.

Parliament gave Sprigg its support by passing a motion by Measdorp that the dismissal of the Molteno Ministry was unavoidable, by 37 votes to 22. [47]

III.

Todd hailed Frere's action "as indicating the proper steps which should be taken 'to uphold the authority of the Crown as constitutional head of all armed forces' in a British Colony " [48]. But, as Laurence quite correctly points out -

> "He (Todd) apparently sees no objection to the Governor's claim to direct the operations of forces raised and paid by the Colony, without consent of his Ministry, and does not criticize the Governor's objection to the conduct of his advisers in assigning to one of their colleagues the work of a Minister of Defence" [49].

There seem to be two weak points in Frere's argument. First of all, his view that Colonial Troops were under his command by virtue of his Commission, is untenable. The Attorney-General quite rightly stated that he was Commander-in-Chief of Her Majesty's Forces in the Colony, but that he had no authority over

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46). A. 2-78, p.28. Minutes of Executive Council 2/2/78.
47). V.& P. 1878, p. 95 ; Molteno:Life of Molteno, Vol.II,p.384 : For Measdorp's amendment to Merriman's motion - see V.& P. 1878, p.70. See also: Wilmot:History, Vol.I, pp. 258-261.
48). Todd: Parliamentary Government, pp.292-293.
49). Laurence: Life of Merriman, p.39.

Colonial Troops, other than that vested in him by the various acts embodying the Colonial Forces [50]. Keith is of the same opinion [51].

Again, the Governor's argument that Merriman had no legal or constitutional right to act as Minister of War is entirely without foundation. In the 1912 edition of "Responsible Government in the Dominions", Keith justly remarked that no exception could be taken to the constitutional position occupied by Mr. Merriman [52].

As to the dismissal itself. It was unique in the annals of Responsible Government [53]. The action was legal, but, in the light of subsequent developments of Responsible Government, unconstitutional.

Frere, in fact, by ~~discussing~~ dismissing the Ministry, posed as guardian of the Constitution. Now it is clear that a Governor is not the guardian of the Constitution where Responsible Government is in operation. The guardian of the Colonial Constitution was Parliament itself, and it would have been more proper to have left the issue to Parliament.

Frere's action, however, doubtlessly influenced Parliament's decision. Furthermore, the party organizations of 1877 could not stand so rude a shock; they went to pieces and members flocked to Sprigg's support.

De Kiewiet is of opinion that the fact that the Press and Parliament supported Sprigg is of constitutional significance [54]. I cannot share this view.

The fact that Parliament decided to support Sprigg does not entail that the Governor's action was thereby

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50). Vide Supra, p.105
51). Keith:Responsible Government in the Dominions,pp.972-973.
52). Ibid: 1912 Ed.p,1260.
53). Walker:History, p.375. ; De Kiewiet:Imperial Factor, pp. 172-173.
54). De Kiewiet:Imperial Factor, p.173.

rendered constitutional, for an unconstitutional action cannot become constitutional by the Act of a non-sovereign Parliament. It is of significance that no Governor has ever referred to Frere's action as establishing a precedent.

By dismissing the Ministry, the Governor had greatly endangered the prestige of the Crown, as well as his personal standing. There was always the risk that Parliament would not support Sprigg. In that case the position of the Crown, and its representative in the Colony, would have been greatly reduced in the eyes of the Colonials.

My conclusion therefore is that Frere's action was legal - he had the right by virtue of his Commission and the Constitution, - but it was unconstitutional; unconstitutional because the Ministry still had a working majority in Parliament the previous session and because the action was entirely unprecedented.

CONCLUSION.

In the preceding pages we have traced certain aspects of the operation of the constitutional mechanism of the Colony. The interlocked Governmental machinery of the pre-Responsible Government stage, rustily creaked into action in 1873, and by 1878, the machinery was running smoothly. Sir Bartle Frere's action in dismissing the Molteno Ministry temporarily threw the machinery out of gear, but nevertheless it soon began to function smoothly again.

Apart from the smooth functioning of the mechanism of state, we clearly see the beginnings of a new era in the constitutional history of the Colony. The Molteno Cabinet's flat refusal to fall into line with the schemes of Carnarvon, though animated by self-interest, must be looked upon as the first overt claim made in South Africa in the direction of sovereign independence and national self-determination.

But the Colonial Parliament was still a long way from becoming a sovereign Legislature, as is clearly illustrated by the Langalibalele affair. Sovereign independence only came with the passing of the Statute of Westminster 1) by the Imperial Parliament in 1931, and was illustrated in South Africa by the passing of the "Status of the Union Act" 2) and the "Royal Executive Functions and Seals Act" 3) by the Union Parliament in 1934.

Also in this period, the process of making a nullity out of the Upper House was started. The process was finally completed in 1926, when the Union Parliament passed the "Senate Act" 4).

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1) 22 George V, c.4.
2) Act No. 69 of 1934.
3) Act No. 70 of 1934.
4) Act No. 54 of 1926.

ANNEXURE A.

32 & 33 Victoria, A.D.1869 c.10.

An Act for authorizing the Removal of Prisoners from one Colony to another for the purposes of Punishment.

(13th May, 1869).

(Preamble)

1. This Act may be cited for all purposes as "The Colonial Prisoners Removal Act, 1869".

2. For the purposes of this Act -

The term "colony" shall not include any place within the United Kingdom, the Isle of Man, or the Channel Islands, or within such territories as may for the time being be vested in Her Majesty by virtue of any Act of Parliament for the Government of India, but shall include any plantation, territory, or settlement situate elsewhere within Her Majesty's dominions, and subject to the same local government; and for the purposes of this Act all plantations, territories,and settlements under a central legislature shall be deemed to be one colony under the same local government:

The term "governor" shall include the officer for the time being administering the government of any colony:

The term "legislative body" shall mean any house of assembly or any other body of persons having legislative powers in the colony, and where such body of persons consists of two separate houses it shall include both houses, and when there are local legislative bodies as well as a central legislative body shall mean the central legislative body only.

(S.3 rep.46 & 47 Vict.c.30 (S.L.R))

4. Any two colonies may, with the sanction of an order of Her Majesty in Council, agree for the removal of any prisoners under sentence or order of transportation, im-

prisonment, or penal servitude from one of such colonies to the other for the purposes of their undergoing in such other colony the whole or may be part of their punishment, and for the return of such prisoners to the former colony at the expiration of their punishment, or at such other period as may be agreed upon, upon such terms and subject to such conditions as may seem good to the said colonies.

The sanction of the order of Her Majesty in Council may be obtained, in the case of a colony having a legislative body, on an address of such body to Her Majesty, and in the case of any colony not having a legislative body, on an address of the governor of such colony; and such sanction shall be in force as soon as such order in council has been published in the colony to which it relates.

The agreement of any one colony with another shall for the purposes of this Act be testified by a writing under the hand of the governor of such colony.

5. Where the sanction of Her Majesty has been given to any such agreement as aforesaid relating to the removal of prisoners from one colony to another for the purpose of undergoing their punishment, any prisoners under sentence or order of transportation, imprisonment, or penal servitude may be removed from such one colony to the other under the authority of a warrant signed by the governor, and addressed to the master of any ship, or any other person or persons; and the person or persons to whom such warrant is addressed shall have power to convey the prisoner therein named to such other colony, and to deliver him when there into the custody of any authority designated in such warrant, or empowered by the governor of such last-mentioned colony to receive such prisoner.

6. Every prisoner shall, from the time of his leaving his prison in one colony to the time of his reaching his prison in the other colony, be deemed to be in the legal

custody of the person or persons empowered to remove him, and to be subject to the same restraint, and, in the event of misbehaviour, to the same punishment, as if he had continued in prison, and as if the person or persons empowered to remove him were the goaler or goalers of such prison; and if he escape or attempt to escape from such custody, such prisoner and every person aiding or attempting to aid him in such escape, shall be subject to the same punishment as if such escape or attempt to escape were an escape or attempt to escape from prison.

A prison shall mean any place of confinement or any place where the prisoners undergo punishment.

Any person punishable under this section may be tried and punished either in the colony from which the prisoner is being removed, or in the colony to which he is being removed; and the law applicable to such person shall be the law of the colony in which he is tried.

7. Every prisoner shall, upon his delivery to the person having lawful authority to receive him in the colony to which he is removed, be subject within such to the same laws and regulations, and shall be dealt with in all respects in the same manner, as if he had been tried and received the same sentence in such colony as the sentence which has been passed on him in the colony from which he is removed.

(S.8 rep.46 & 47 Vict. c.39. (S.L.R.)).

ANNEXURE B.

COMPARATIVE TABLES OF VOTERS' LISTS.

Legislative Assembly.

WEST.				EAST.			
Division:	1872	1874	1876	Division:	1872	1874	1876
Cape Town [1]	4310	3370	2830	Uitenhage	2138	2191	2202
Cape Division	1594	1884	2027	Port Elizabeth	2915	2115	2407
Stellenbosch	896	1253	1332	Grahamstown	1629	1614	1203
Paarl	1133	1329	1316	Albany	915	1036	1096
Malmesbury	1465	2014	1751	Victoria East	365	490	723
Piquetberg	483	517	525	Fort Beaufort	1125	1117	1059
Clanwilliam	1175	1271	1391	Somerset East	814	927	1094
Namaqualand	924	1071	1107	Cradock	801	1277	1271
Worcester	1815	2095	2340	Graaff-Reinet	1477	1637	1945
Victoria West	796	1349	1399	Richmond	505	688	825
Beaufort	724	913	949	Colesberg	840	754	836
Caledon	1593	1755	1979	Albert	631	630	655
Swellendam	1452	1742	1748	Wodehouse	511	589	711
Riversdale	1275	1323	1409	Aliwal North	550	631	742
George	938	1109	1359	Queens Town	930	982	1322
Oudtshoorn	859	985	1106	King Williams Town	1651	1825	1878
				East London	329	465	509
Totals	21,432	23,985	24,622		18,126	18,998	20,481

	1872	1874	1876
Total East and West	39,558	42,983	45,103

1) Returned 4 members.

Legislative Council.

(Figures according to Voters' Lists of 1876)

Western Province	Cape Town	2830	7505
	Cape Division	2027	
	Stellenbosch	1332	
	Paarl	1316	
North-Western Province	Worcester	2340	7114
	Malmesbury	1751	
	Piquetsberg	525	
	Namaqualand	1107	
	Clanwilliam	1391	
South-Western Province	Swellendam	1748	7601
	Caledon	1979	
	Riversdale	1409	
	Oudtshoorn	1106	
	George	1359	
Midland Province	Graaff-Reinet	1945	5118
	Richmond	825	
	Beaufort West	949	
	Victoria West	1399	
South-Eastern Province	Port Elizabeth	2407	7631
	Uitenhage	2202	
	Grahamstown	1203	
	Albany	1096	
	Victoria East	1723	
North-Eastern Province	Somerset East	1094	4915
	Fort Beaufort	1059	
	Cradock	1271	
	Colesberg	836	
	Albert	655	
Eastern Province	King Williams Town	1878	5162
	East London	509	
	Queens Town	1322	
	Aliwal North	742	
	Wodehouse	711	

B I B L I O G R A P H Y.

PUBLISHED PRIMARY SOURCES:

Acts of the Cape Parliament: 1872 - 78.

Statutes of the Cape of Good Hope: Sessions 1869-1875: (Printed by Saul Solomon & Co., Cape Town, 1879)

Statutes of the Cape of Good Hope: Sessions 1874-1878: (Printed by Saul Solomon & Co., Cape Town, 1878)

(Note: These volumes are to be found in the Library of Parliament, Cape Town.)

Cape Parliamentary Papers:

All papers printed by order of the Government, 1872-1878.

All papers printed by order of the Legislative Assembly, 1872-1878.

All papers printed by order of the Legislative Council, 1872-1878.

(Note: These papers are to be found in the "Annexures" to the Votes and Proceedings, printed in Octavo volumes)

Eybers, G.W.: Select Constitutional Documents illustrating South African History, 1795-1910. 1918.

The Government Gazette: 1872-1878.

Imperial Bluebooks:

181 Correspondence re establishment of Responsible Government at the Cape of Good Hope and the withdrawal of troops from that Colony.

181-I Further Correspondence re establishment of Responsible Government at the Cape of Good Hope and the withdrawal of troops from that Colony.

181-II Further Correspondence re establishment of Responsible Government at the Cape of Good Hope and the withdrawal of troops from that Colony.

Imperial Bluebooks: (contd.)

[C-459] Correspondence re affairs of the Cape of Good Hope.

[C-732] Further Correspondence re affairs of the Cape of Good Hope.

[C-1025] Papers re the late Kafir outbreak in Natal.

[C-1119] Further papers re the late Kafir outbreak in Natal.

[C-1121] do do do do do

[C-1158] do do do do do

[C-1244] Proposal for a conference of delegates from the Colonies and States of South Africa.

[C-1399] Correspondence re the proposed conference of delegates on Affairs of South Africa.

Newspapers: (Containing the debates in Parliament)

The Cape Argus: 1872-1878.

The Cape Times: 1876-1878.

De Zuid Afrikaan: 1872-1878.

Proceedings in Parliament:

Votes and Proceedings of the Legislative Assembly, 1872-1878.

Votes and Proceedings of the Legislative Council, 1872-1878.

Reports of Select Committees:

Reports of all Select Committees appointed by the Legislative Assembly, 1872-1878.

Reports of all Select Committees appointed by the Legislative Council, 1872-1878.

(Note: The Reports of Select Committees, as well as the proceedings thereof, are printed in quarto volumes. The reports and proceedings of the more important Select Committees are also printed amongst the Government Papers.)

UNPUBLISHED PRIMARY SOURCES:

Government House Records:

Letters Received:

G.H. 1/-	Secretary of State - Despatches.
G.H. 1/18	1871.
G.H. 1/19	1872.
G.H. 1/20	1873.
G.H. 1/21	1874.
G.H. 1/22	1875.
G.H. 1/23	Jan.-July 1876.
G.H. 1/24	Aug.-Dec. 1876.
G.H. 1/25	1877.
G.H. 1/26	Jan.-April 1878.

G.H. 2/-	Secretary of State - Confidential Despatches.
G.H. 2/1	Nov. 1870 - Nov. 1877.
G.H. 2/2	1878.

Letters Despatched:

G.H. 31/-	Despatches to Secretary of State.
G.H. 31/11	3/1/1870 - 23/8/1872.
G.H. 31/12	23/8/1872 - 25/3/1875.
G.H. 31/13	5/4/1875 - 30/3/1877.
G.H. 31/14	10/4/1877 - 30/9/1878.

The Merriman Papers:

From.	To.	No.	Date & Year.
J.X. Merriman	Aunt	2	11th Jan. 1870.
Lewis Vintcent	Agnes Vintcent	26	? 1870.
Peter Vintcent	do	12	9th July, 1872.
Joseph Vincent	do	15	22nd June, 1873.
do	do	16	4th July, 1873.
do	do	40	25th Aug, 1873.
do	do	75	3rd Oct., 1873.
do	do	86	18th Oct., 1873.
R. Southey	J.X. Merriman	39	8th Sept., 1874.
Julia Merriman	do	64	29th Dec., 1874.
John Peterson	do	12	17th Mar., 1875.
do	do	14	30th Mar., 1875.
J.D. Berry	do	18	24th May, 1875.
do	do	21	13th June, 1875.
J.C. Molteno	do	25	3rd July, 1875.
Charles Mills	do	34	17th July, 1875.
J.H. Beck	do	37	21st July, 1875.
J.G. Sprigg	do	43	12th Aug., 1875.
John Paterson	do	45	20th Aug., 1875.
J.X. Merriman	J.C. Molteno	53	25th Oct., 1875.
Gilbert Faure	J.X. Merriman	10	1st July, 1876.
J.C. Molteno	do	13	5th Sept., 1876.
N.J. Merriman	do	14	21st Oct., 1876.
Julia Merriman	Agnes Merriman	1	17th Jan., 1877.
N.J. Merriman	J.X. Merriman	31	8th Aug., 1877.
Sir B. Frere	do	59	5th Oct., 1877.
Mrs. Joseph Vintcent	Agnes Merriman	88	29th Nov., 1877.
Sir B. Frere	J.X. Merriman	7	15th Jan., 1878.
do	do	11	6th Feb., 1878.
J.X. Merriman	N.J. Merriman	22	19th Feb., 1878.
Julia Merriman	J.X. and Agnes Merriman	24	20th Feb., 1878.
Julia Merriman	Agnes Merriman	27	21st Mar., 1878.
J.X. Merriman	N.J. Merriman	30	26th Mar., 1878.

PUBLISHED SECONDARY SOURCES:

Biographies:

Hardinge, Sir A.H.: Henry Howard Molyneux Herbert, Fourth Earl of Carnarvon, Vol.2. 1925.

Hofmeyr, J.H. and Reitz, Senator F.W.: The Life of Jan Hendrik Hofmeyr. 1913.

Laurence, Sir P.M.: The Life of John Xavier Merriman. 1930.

Martineau, J.: The Life and Correspondence of Sir Bartle Frere. Vol.2. 1895.

Molteno, P.A.: The Life and Times of Sir John Charles Molteno. 2 vols. 1900.

Paul, H.: The Life of Froude 1905.

Walker, E.A.: Lord de Villiers and his Times: South Africa 1842-1914 1925.

Wilmot, Count A.: The Life and Times of Sir Richard Southey. 1904.

Worsfold, W.B.: Sir Bartle Frere. 1923.

Contemporary Works:

Cunynghame, General Sir A.T.: My Command in South Africa, 1874-1878. 1879.

Froude, J.A.: Short Studies on Great Subjects, Vol. 3 (containing "Leaves from my South African Note Book") 1883.

Froude, J.A.: Oceana, or England and her Colonies. 1886.

Froude, J.A.: Two Lectures on South Africa. 1880.

Murray, R.W.:(Pseudonym : "Limner") Pen and Ink Sketches in Parliament 1864.

von Weber, E.: Vier Jahre in Afrika, 1871-1875. 1878.

General Historical Works:

Cambridge History of the British Empire, Vol. 8, South Africa. 1936.

Cana, F.: South Africa from the Great Trek to Union. 1909.

de Kiewiet, C.W.: The Imperial Factor in South Africa. 1937.

Ensor, R.C.K.: England, 1870-1914. 1936.

General Historical Works: (contd.)

Gie, S.F.N.: Geskiedenis vir Suid-Afrika, deel 2. 1932.

Theal, G.M.: History of South Africa, 1873-1884, Vol. I. 1935.

Uys, C.J.: In the era of Shepstone. 1933.

Walker, E.A.: A History of South Africa. 1935.

Wilmot, Count A.: The History of our own Times in South Africa. Vol.I. 1897.

Other Works:

Dicey, A.V.: The Law of the Constitution, 9th Ed. 1939.

Jennings, W.I.: Cabinet Government. 1937.

Keith, A.B.: Responsible Government in the Dominions, 2nd Ed. 2 vols. 1928.

Keith, A.B.: Responsible Government in the Dominions, 1st Ed. 3 vols. 1912.

Kennedy, W.P.M. and Schlosberg, H.J.: The Law and Customs of the South African Constitution. 1935.

Kilpin, Ralph: The Old Cape House. 1918.

Kilpin, Ralph: The Romance of a Colonial Parliament. 1930.

Neuendorff, Gwen: Studies in the Evolution of Dominion Status. 1942.

Silburn, P.A.: The Governance of Empire. 1910.

Todd, A.: Parliamentary Government in the British Colonies. 1880.

Periodicals and Newspapers, etc.:

Cape Monthly Magazine, 1872-1878.

Die Huisgenoot, 25 Desember 1942. Artikel: Die Eerste Kaapse Kabinet, deur W.J. de Kock.

Histories Studies, jaargang I Nos. 3 en 4. Artikels: Die Rol van J.A. Froude in Suid Afrika, deur W.J. de Kock.

UNPUBLISHED SECONDARY SOURCES:

Unpublished post-graduate these.

de Kock, W.J.: Federation and Confederation in South Africa, 1870-1880, with special reference to the Cape Colony. U.C.T.1938.

Drus, (Miss) E.: The Political Career of Saul Solomon. U.C.T.1939.

Putzel, (Miss) J.R.: William Porter and Constitutional Issues at the Cape, 1839-1873. U.C.T.1942.