

**SELECT CONSTITUTIONAL
DOCUMENTS ILLUSTRATING
SOUTH AFRICAN HISTORY**

1795-1910

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SELECTED AND EDITED WITH AN INTRODUCTION

BY

G. W. EYBERS, M.A.

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PREFACE.

THIS volume is intended to supply the papers and documents necessary to the study of South African history from the year 1795. It fills a gap in the series of works by various compilers which have done so much towards the careful study of the constitutions of the United Kingdom and the outlying dominions. It is hoped also that at this time when so much thought is given to imperial relations it may serve as a handy book of reference for estimating the character of the various elements that have contributed towards the building up of the youngest of the three great British Dominions. The work is really more than a volume of select documents; for it contains nearly all the instruments necessary to follow the broad lines of the constitutional history of the four colonies that formed the Union. There will also be found some mention of practically every important step taken towards the extension of British rule and the placing of native territories under European control. Three documents which will form the basis of negotiation towards the end of the War or shortly afterwards have been included in Appendices. Under the heading "Natal" are now published several papers relating to the Great Trek which have probably never been seen by anybody now alive outside official circles except two or three historians. These are included with the kind permission of Mr. Secretary Bonar Law and after him Mr. Secretary Long. Most of the Free State laws given below are to be found nowhere in London except in one private collection of books, the fine South African library collected by the late Mr. Sidney Mendelssohn.

A few documents are given in their entirety as originally issued, the object being to show the exact form given at various times in the different countries to proclamations, ordinances, acts of the legislatures, imperial papers, and

so forth. Where a portion of a document has been summarised or abbreviated this is indicated by the customary marks. In a very few cases where I wished to draw attention to an Act only the title and the date are given.

As regards the plan of arrangement; it seemed desirable to adopt for the Cape of Good Hope and Natal a scheme that would have the advantage of maintaining the unity of interest with regard to the main groups of persons who performed the duties of government. There will therefore be found for each of these colonies three divisions—Central Government, Local Government, and Administration of Justice. In only a very few cases does a document deal to any extent with two or more of these. If the traditional division into Executive, Legislature, and Judiciary had been made, a more logical basis might be established, but then it would have been impossible to avoid splitting up a large number of Acts and giving the different parts under various heads. Such a course seemed undesirable. As the papers are here arranged, matters relating to the executive and the legislature will have to be sought for under the first heading, those relating to municipal and divisional councils under the second, and magistrate's courts, high courts, and native courts are included under the third. No distinction has been made with regard to the origin of the documents. Instruments issued by the Crown in Council, by the Governor, or by the colonial legislature may be found side by side under any of the three headings.

In the case of the Orange Free State and the South African Republic, the Grondwet or constitution of each contains provisions for every branch of government. Here again it would lead to chaos if the documents were to be subdivided, therefore a purely chronological arrangement has been made. When any particular subject is to be consulted, the Index at the end of the volume will serve as a guide. The laws of these two countries were drawn up in Dutch. With the originals an English translation has been given in every case. I have attempted to make the rendering as literal as possible. Where a portion of an Act in Dutch has been summarised I have adhered as much as possible to the spelling and grammatical forms of the original. Titles of dignity occurring in the Dutch text have as a rule been omitted in translating.

As there exists no work dealing specially with the constitutional history of the South African colonies the subject has been treated at considerable length in the Introduction. Though I have consulted nearly all the published records and the unpublished documents in the Public Record Office relating to South Africa up to 1860, I have often been greatly assisted also by the very thorough and reliable histories of Dr. G. McC. Theal.

Mr. Advocate Gregorowski of Pretoria has kindly sent me a good deal of information regarding the Free State laws passed between 1867 and 1891. I also wish to record my gratitude for ready assistance afforded me in my search for the documents in the Public Record Office, the British Museum, the Colonial Office Library, the Royal Colonial Institute, and the Office of the High Commissioner for South Africa. My best thanks are particularly due to those who by their lively interest in the progress of the work, by encouragement, and by expert advice have made my task a light one and a source of genuine pleasure. To the willing co-worker who has copied several of the documents and assisted in many other ways I desire to acknowledge my indebtedness.

G. W. EYBERS.

KING'S COLLEGE, LONDON,
13th October 1917.

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5. *O.V.S. Wetboek* : WETBOEK VAN DEN ORANJEVRIJSTAAT, 1854-91. Uitgegeven op gezag van den HEd. Volksraad. Bloemfontein, 1892.
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7. *P.R.O., C.O.* : Public Record Office, London ; Colonial Office Department. The papers for each Colony are divided into sections like "Original Correspondence," "Ordinances," "Government Gazettes," etc., and the volumes in each section are numbered. Thus 50/4 is the fourth volume of the Cape section, "Ordinances."
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INTRODUCTION.

SECTION I.

THE CAPE OF GOOD HOPE UNDER THE DUTCH, 1652-1795.

BRITAIN'S task in South Africa has probably been more difficult than in any other part of her extensive and widely scattered dominions. While her statesmen have had to cope with native problems in India and to a lesser extent in Australasia; while they have been faced in Canada by the delicate matter of governing an off-shoot of another highly civilised and intelligent nation; while in the West Indies there was the task of eradicating slavery and adjusting governmental institutions to the peculiar needs and weaknesses of a mixed population of Europeans and natives—she found in the southern corner of Africa all these elements combined. There were the Hottentots, who had been gradually taught to lead a settled life and engage in remunerative work; the Bushmen, still untamed and, as the event proved, for ever untamable by any of the artifices on which the white man prides himself; and the Kaffir, who in his southward and westward march had begun to touch the vanguard of the colonists as they moved towards the rising sun. Most serious of all, there was the white population, with its own ideas and traditions, its own ambitions and its own peculiar characteristics, formed and hardened by close on a century and a half of contact with the soil. The relation of the white men towards their slaves and the various native or non-European races would be a fruitful source of difficulty. To the formation of their national character various factors had contributed. If one would estimate and account for the value or success of the Constitution introduced in the nineteenth century it will be necessary to know beforehand not only the governmental arrangements that existed in 1795 when the Cape of Good Hope surrendered to the arms of George III., but also to understand something of the attitude towards the State of the people subdued.

THE CONSTITUTION OF THE CAPE OF GOOD HOPE TOWARDS
THE END OF THE RULE OF THE NETHERLANDS EAST INDIA
COMPANY.

At its establishment in 1652 the Cape settlement, consisting entirely of servants of the Netherlands East India Company, was managed exclusively by officials who followed the methods and the procedure that were universally adopted by the officers on board a fleet or vessel sailing between Holland and the East. While they acted both as a governing and a judicial body their proceedings were marked by promptitude and finality. The original intention was to have a half-way house to the East, where diseased persons could recuperate and fresh supplies be obtained, and it soon became obvious that this object could be best attained if the agriculturists were given land and cattle to farm on their own account. Thus there arose a class of men distinct from the employees of the Company. They were called free-men or burghers. Receiving land in 1657, some leagues from the immediate vicinity of the Fort in Table Valley, they shifted into the interior, becoming the outposts of Western civilisation and Christianity, and making from its southern extremity the first definite and fruitful move towards the reclaiming of the Dark Continent, a move the end of which is not yet in sight.

Very soon it became obvious that the interests of burghers and employees were by no means identical, and as a recognition of this fact the colonists were given representatives first in the courts of justice and later in other bodies as they were created. This privilege was granted the burghers by the rulers on their own initiative, for, as far as is known for certain, there were as yet no definite and clearly formulated demands on the part of the people for a share in the government.

This is not the place for describing with any minuteness the evolution of a political consciousness of the Cape burghers, but it must be remarked that the process commenced before the end of the seventeenth century and continued throughout the eighteenth with ever-increasing force and continuity. As a rising reef of rock near the seashore first shows above the surf a few isolated peaks at considerable distances apart, which then become closer and closer together till the entire chain emerges and finally, perhaps, grows to a mountain range filling the whole countryside, so there were from the earliest years of the eighteenth century apparently unconnected risings among the burghers, which at first merely took the form of prayers

for the redress of grievances, later of demands for a share in the government, and finally ended in the establishment of independent republics in the interior of the Colony.

The power against which this movement was directed was concentrated in the hands of a few officials. Subject to the *Governor's powers.* directorate of the Company, which had received its first Charter in 1602, there was about the year 1790 at the head of the Cape Colony a Governor with very extensive powers. He could convene the courts of justice, approve all judgments, call up the militia for active service, and direct the activities of all persons who exercised minor executive and administrative functions throughout the country.

Yet this last statement should be qualified, for there was associated with the Governor a Council which shared the task of *The Council.* making laws and seeing to it that these were carried into effect. The available records leave a considerable degree of doubt as to the question in how far the Governor was bound to act in accordance with the opinions of the majority of his Council. On one occasion at least instructions had been issued from Holland permitting the Governor to set aside the decision of a majority if he deemed such a step necessary; and as a general rule it was the Governor who was ultimately responsible to the managing body of the Company, though on a few notable occasions other officials were also called to account for acts done by the government. Yet it is not certain whether later governors were to be considered as bound by all instructions issued to their predecessors. It is even doubtful whether such later governors were always aware of the existence of instructions issued in earlier years. The directors in the Netherlands were often more concerned about their trade and the safety of their cargoes than about minute and definite points of law. They were traders first and legislators afterwards. This, however, may be stated with certainty, that the governors did act in opposition to the decisions of their Council and that such action was upheld by the directors. Yet this did not happen frequently, for when the Governor was a strong man he carried his Council with him, while a weak ruler generally adopted the views of his advisers. That there were not likely to be any grave differences between Governor and Council will be realised when it is stated that all the councillors were officials of the Company, whose cause they were always apt to espouse rather than that of the colonists whenever the interests of rulers and ruled came into conflict; for though no special emoluments were attached to the office of councillor, it was always filled, at the wish of the directorate, by salaried servants appointed by that body and liable to dismissal by it.

As a rule the high officials sitting in the Council of Government were seven or eight in number. They were generally men of fairly advanced age who had climbed step by step every rung in the ladder of advancement, and consequently were well acquainted with the policy and methods of their employers. Naturally they seldom showed any inclination to view matters sympathetically from the burghers' standpoint, especially when commercial privileges were asked for. This had the effect of causing the inhabitants to make demands for representation in the highest governing body, but they were met by the directors with a flat refusal. The desire for representation had grown out of concrete needs, the absence of trading rights which the Company reserved to itself, and grievances arising from the dependence of the Supreme Court of Justice on the Government, and the power of banishment held and exercised by the Governor. Can any explanation be found of the fact that the successive generations of colonists who remembered and handed down the experiences of their ancestors were so slow in their advance? Apart from the universally experienced difficulty of upsetting or even materially modifying an established order of things, however bad and undesirable, the Cape colonists laboured under the additional disadvantages of being too widely scattered to be able to co-operate, of being totally debarred from the advantages of a public press, of being very badly educated in history and politics, of being in their ordinary walks of life very easy-going and somewhat inclined to become indolent, and of having the ever-present danger of attacks by the natives to provide against. But the most direct if not the most potent cause of their prolonged quietness was to be found in the popularity of their lesser boards.

By 1795 the Colony had been divided into four districts: Cape Town, Stellenbosch, Swellendam, and Graaff Reinet. The *District Boards.* president of each of the district boards was appointed by Government and his salary was paid out of the public treasury. He received his instructions from the Governor and Council and was removable by them at pleasure. He was, as the civil commissioner is to-day, the representative of the central Government in his district. He bore the title of landdrost and had an official residence in the town where his board held its meetings. With him were associated six men, called heemraden. When such a board of landdrost and heemraden was first constituted it was the practice for the Government to appoint all the members, but when subsequent vacancies occurred, and regularly every two years, the board sent to Cape Town, the seat of Government, a double list of names from which the Council selected the necessary number

of heemraden to serve for the next two years. The heemraden had to be burghers and they had to possess land and reside in the district for which they were appointed. No servant of the Company, except the landdrost, could sit on the district board. Subject to the supervision and control of the Governor and Council which exercised executive and legislative functions the boards performed fiscal and municipal duties in their respective districts, seeing to the upkeep of public buildings, the making and repairing of streets and roads, and the letting of corn-mills where these existed. Each board had its own treasury out of which were defrayed the expenses arising from local works. Certain taxes were collected and paid into the district chests, but there were others which were gathered for the colonial treasury. Landdrost and heemraden were also entrusted with the duty of instituting inquiries and sending recommendations to the Government when application was made by burghers for grants of waste land, and it was always on such suggestions based on intimate acquaintance with local customs and conditions that grants were made.

Apart from their administrative functions the boards also met as courts of justice, possessing civil jurisdiction in cases involving 100 Rix-dollars or more. They were instructed to attempt to settle disputes among the inhabitants. This was done by amicable intervention as far as possible, and as courts of arbitration they rendered valuable services in difficulties relating to boundaries, rights to pasture-lands, running water, and matters of a similar nature. Their decisions were subject to appeal to a higher court of justice. They were not invested with any real jurisdiction in criminal cases, but they held inquests, obtained information at first hand with regard to crimes, and examined witnesses on oath. All the evidence collected was then placed in the hands of the landdrost, who acted as public prosecutor before the Court of Justice at Cape Town.

Each district was subdivided into a number of wards in each of which a burgher was appointed by the district board to supply it with items of information regarding the assessment of taxes and matters of a like nature. He had to preserve order in his ward and was instructed in some cases to make arrests. At first he bore the title of *veldwachter* or *veldwachtmeester*, but about the year 1795 he came to be called field-cornet. He was generally the most considerable farmer of his ward and a man of known integrity and ability. He drew no salary, but was excused the payment of certain dues. The office, like that of heemraad, was eagerly sought after for the honour it conferred on the holder in the estimation of his neighbours. As the old inhabitants of the

Colony, the Bushmen and the Hottentots, were often more or less hostile towards the white inhabitants, the field-cornets were empowered to call the burghers to arms in case of attack or other great urgency and to defend the farmers as best they could. As a further means of defence there was in each district a burgher militia managed by a board of officers with the landdrost as president. All burghers between the ages of sixteen and sixty were liable to be called up for active service and they exercised annually for a few days. The whole of these forces stood under the direction of the commander-in-chief of the Colony, but it was never possible to maintain strict discipline among the farmers or to enforce obedience to calling-up orders.

Very similar to these arrangements was the constitution of the board that did service for the capital, with these notable exceptions, firstly that in the Cape Town board there sat an equal number of burghers and officials of the Company, and secondly, that it had no judicial functions to perform. These were relegated to a Court of Petty Cases which consisted of six members, three burghers and three officials. They decided disputes of a less amount than 100 Rix-dollars. The Court was also a Matrimonial Board for the whole Colony, and its sessions had to be visited in person and its consent procured by all persons intending to marry. In both spheres of its duties it acted under the supervision of the Supreme Court of Justice.

In its origin and up to the year 1786 the latter body had consisted entirely of servants of the Company nominated by the Government, except that when a burgher was concerned in a case three other burghers had always been associated with the officials on the bench of judges. But in that year, in response to demands carried by delegates of the burghers to the Netherlands, the Court was reorganised so as to consist of twelve judges, half of whom were selected from the burgher class and half from the officials. The burghers too were made permanent members, sitting for the trial of all cases whether a colonist was concerned or not. It was a novel method of attempting to dissociate the judiciary as much as possible from the executive and the legislature, and if this first stride could be followed up by further progress on the part of the people—and everything pointed to the likelihood that the process would be continued—then the Cape Colony would soon have had a somewhat unique judicial body.

The members were appointed for life, except that when an official was removed from the Cape his post was filled by another of his own class. When a burgher judge had to be appointed a selection was made by the Government between two candidates proposed by the burgher judges already serving.

No salary was attached to the office of judge. The servants of the Company had to be content with their ordinary emoluments and the burghers, in order to remain entirely independent of the Government, accepted no payment whatever. The Court of Justice tried all civil cases lying beyond the jurisdiction of the local courts and all criminal cases arising in the whole Colony. It also heard appeals from the decisions of the lower courts, and its own judgments were in turn subject to appeals to the High Court of Batavia ; for in several respects, but particularly in matters of shipping and trade, the Cape of Good Hope was subject to the direction of the Dutch East Indian Government, which had its headquarters on the island of Java. In theory the Cape settlement was an out-station of the Indian administration, but its proximity to Europe left it much more to the guidance of the board of directors in the Netherlands than could be the case with any of the remote East Indian settlements.

The secretary, or, as he would be called to-day, the registrar of the Court of Justice, was entrusted with the arrangement and direction of the affairs of insolvent debtors according to instructions issued by the Court. After a sale of effects had been ordered and carried out the secretary saw to the distribution of the proceeds among the creditors according to fixed rules of preference. But by far the most important member of the Court was the fiscal, who occupied the position of a public prosecutor and sat on the bench of judges when civil cases were being tried. For more than a century the fiscal had held his office by direct appointment issued by the governing body of the Company and quite independent of the Colonial Government. His duty had been to see that the orders of the directorate were carried out and he corresponded with them immediately. In course of time, however, it was found that he himself needed some controlling influence and in 1793 he was placed under the direction of the Government ; but he continued to be responsible for safeguarding the authority and interests of the lords proprietors of the Colony. Besides being a member of some of the minor administrative boards the fiscal was also a leading member of the Council of Government.

The administration of intestate property and of goods left to persons not resident in the Colony was entrusted to a Board of Orphan-masters, which consisted of six members. As was the case with most of the other bodies, half its members were officials and the others were burghers. They determined the succession of heirs and administered the property of minors, providing for the education of their wards. The education of the young throughout

*The Board
of Orphan-
masters.*

the Colony was always on a precarious footing. In the country districts the local boards had instructions to assist in the matter, but the task really devolved on the ministers of religion at the various centres and their *kerkraden* or presbyteries. Where any schools existed at all they were either private undertakings or were supported by charity. At Cape Town, however, there was a Board of Directors of Public Schools consisting of a member of the Council of Government, three clergymen, and two elders, who superintended the public schools of the town and held inspections when they were minded to do so. Funds were raised by subscription and the various congregations assisted the work by contributing, but the Government very seldom made direct grants for educational purposes. It did, however, assist to pay the ministers who were employees of the Company.

There assembled at Cape Town another Council which did service for the whole country, but it is difficult to classify this body, for it fulfilled no duties of a legislative or an executive or a judicial nature, though indirectly it pertained of the nature of each of these functions. It may be called an advisory body. From before the close of the seventeenth century, two or three burgher representatives sitting in the Court of Justice had repeatedly been consulted by the Government on various matters affecting the colonists as a class and their suggestions had generally been adopted. This custom had become crystallised and extended. From being a party whose advice could be asked when it was needed the burgher judges had proceeded to submit burghers' petitions to the Governor and Council and presently they began to claim it as a right that they should speak for the whole body of burghers and that they should be heard. They had continued to be for so many years the channel for transmitting the grievances of the inhabitants that when at a later date the officials attempted to dispute the claim they had to submit to established custom. During the eighteenth century the burgher judges had begun to meet in private session and they were then regarded as constituting a separate board known as the Burgher Council. In 1793 the usage was formally recognised as the law of the land, when it was ordered that if the councillors wished to make representations to the Governor one or two of them could do so verbally in the first instance. If this did not produce the desired effect, they could address themselves in writing to the Government, who were commanded to supply them with an extract of the proceedings respecting the matter. If the members were not yet satisfied they could communicate the circumstances to the directors in Holland. They were to deliver such a communication to the

Governor in a sealed packet, at the same time informing him of the subjects to which it referred. He was bound to transmit it to the directors with other public papers at the first opportunity. Thus there was no risk of the burghers' complaints being squashed by the governing body without redress and before they could be laid before the supreme authorities in the Netherlands. By 1795 the Burgher Council consisted of the six burgher judges who sat in the Court of Justice.

The revenue was hopelessly inadequate to meet the expenditure incurred by the Company. The taxes were always remarkably low. This may be accounted for partly by the fact that the colonists were rather poor in convertible wealth and partly because in the matter of levying dues the Government consistently followed the advice and deferred to the objections of the burgher councillors. They were affording a temporary respite to the people, but unfortunately people must reap what their fathers have sown, and the unwillingness of the Dutch section of South Africa's white population to tax themselves to-day is very likely due to the effective representation of their ancestors' wishes before the Government in earlier times. The Cape was of great value to the Netherlands Company, but more for its importance as a strategic base and a port of call than for any direct profits which it yielded. As a settlement taken by itself it was a most unprofitable financial venture; and a continual drain on the Company's funds. It was, moreover, a very troublesome Colony, inasmuch as it had at an early date broken away from the ordinary rut of factories and out-stations owing to the presence of a large body of free settlers, who devoted themselves to pastoral and agricultural pursuits rather than to trade and barter.

After the middle of the eighteenth century the people made demands for governmental reform which became more and more far-reaching and insistent. The great bulk of the affairs in which the colonists were concerned was already being managed in the local courts and boards by men of their own class, selected from their midst and in sympathy with their wishes and requirements. It is possible, therefore, that they would have remained content for many years more with the established order of things, but there were mainly two circumstances which caused them to move. The Netherlands Company was a body trading for profit and it reserved to itself an almost exclusive right of trade at the Cape. This was a very old grievance with the inhabitants. The other source of trouble arose from the fact that during the last quarter of the eighteenth century the eastern border of the Colony began to be threatened by power-

*Expense and
troublesome-
ness of the
settlement.*

*Difficulties of
the colonists.*

ful and hard-fighting Kaffir tribes. In earlier years conflicts with the Hottentots, Bushmen, and bands of escaped slaves could be concluded successfully by a commando called together in a district or a ward without the Government's interference. But the Kaffirs were a new factor and far more difficult to dispose of. Yet it was just at that time that the Company was passing through its final period of decline. It did not afford its subjects the protection of which they stood in need.

During the last quarter of the century, too, the people were inspired first by the teachings of the American War of Independence and then by the French Revolution, *Attempts to win reforms.* and they began to think and talk about the constitution, about fundamental laws, and about the rights of man. Their difficulties were discussed in the light of their experience during previous years when they had found it impossible to obtain any guarantee for the permanent redress of their grievances. Arriving in Amsterdam, their delegates pleaded with the directors of the Company and with the States General for constitutional liberties. Some years were spent in discussion and negotiation. The Company was hastening to its fall, and the States General, realising that any weakening of the authority and prestige of the Company, which was a huge national concern in whose welfare the whole of the people was directly concerned, would be fatal at that time when the political situation in Europe was in a very disturbed state, were unwilling to coerce the directors. Commissioners were sent to the Cape, however, to try to allay the unrest, but the improvements which they brought about did not meet the chief needs of the burghers. Failing to obtain compliance with their demands, which included equal representation with the employees of the Company in the Council of Government and a considerable curtailment of the powers of the fiscal, the people rose in revolt. At Graaff Reinet and Swellendam the landdrosts were expelled and miniature republics set up in 1795. The Government was unable to reassert its authority. Stellenbosch was on the point of rising and Cape Town was expected to follow the example of the other centres. But meanwhile war had broken out between France and Great Britain, and the Netherlands had attached itself to the French and expelled its stadtholder, the Prince of Orange. Having fled to England, he sent with an English expedition intended to capture the Cape an order¹ instructing the Government to admit the British forces into the Colony. After some fighting Cape Town capitulated² and the South African republic was strangled at its birth.

¹ Document No. 2.

² No. 3.

SECTION II.

THE CAPE OF GOOD HOPE UNDER THE BRITISH
CROWN, 1795-1910.

Taking as a basis of division the three forms of colonial management, Crown Colony Government, Representative Government, and Responsible Government, the constitutional history of the Cape Colony falls naturally into the following periods :

- (1) 1795-1854.
- (2) 1854-1872.
- (3) 1872-1910.

§ I. THE CAPE OF GOOD HOPE, 1795-1854.

Up to the year 1824 the central government had no history worth recording, except during the period 1803 to 1806 when, under the Batavian Republic which received the *The Governor an absolute ruler till 1825.* country by the Treaty of Amiens, the Governor was assisted by a Council of four, of whom at least one had to be colonial born and no one could be a government official. In 1806 when the country was conquered a second time it reverted to the position that existed from 1795 till 1803. Every public act done derived its validity from the sole and undivided and unadvised authority of the Governor. He directed by proclamation, instructions, and commissions literally every matter, from the manner of drawing water on the Cape Town square to the quelling of rebellions on the eastern frontier. All the powers of government, as well civil as military, were vested in him by instructions issued in 1796 to the first civil Governor,¹ and he had the sole legislative power in the country, giving his own reading of the old laws, modifying them at pleasure, and enacting new ones. He increased the amount of old taxes and levied fresh imposts. He regulated the tenure of land by fixing or reducing the amount of perpetual quit-rent. The governors exercised a general control of the administration of justice, and with one or more assistants, whose opinions had no binding effect on any decision, the successive governors sat as courts of appeal to try civil and criminal cases of a serious nature.² The Governor appointed nearly all the officials except the very highest, and he could remove any one of them except the Lieutenant-Governor and the Secretary. He took away the power of initiating measures and enterprises from the local boards and made them the instruments of his own will, while the policy was adopted of appointing to the post of landdrost in the various centres military officers who had retired on half-

¹ No. 7.

² Nos. 65 and 66.

pay, and who were but very slightly acquainted with the language and customs of the people or with the laws which they had to administer. In many notable instances these extensive powers were employed to the distinct advantage of good government. Arrears of oppressive taxes were remitted, torture as a means of eliciting evidence or punishing crime was abolished on a Governor's recommendation, judges were sent on circuit to try cases in all the districts,¹ judicial proceedings were ordered to be held in public,² and criminal jurisdiction was granted to the district courts,³ thus obviating the tedious necessity of referring trivial cases to Cape Town. It is a curious fact that all these measures, which probably no one will regard otherwise than as eminently wise and statesmanlike, were adopted while the Governor was the supreme and sole ruler, whereas subsequent legislation which was most seriously complained of as short-sighted and oppressive was passed by Councils which were established in 1825, and later with the object of assisting the Governor and limiting his power.

A despotism is not necessarily bad for a country : at times it is the only chance of salvation. But certainly the large body of British settlers who arrived in the Colony in 1820 and subsequent years did not think so. For the rest of the century these men were to have a bracing effect on the thorough but slow-moving Dutch burghers. As soon as their immediate material needs were satisfied they commenced to agitate for a share in the government, for the freedom of the press, and for the right to hold public meetings. The second of these privileges they soon gained—for the others they had to wait more than twenty years. Being for the greater part men of intelligence and sterling merit, and having influential friends in Great Britain to plead their cause in Parliament and before the country, they were hopeful that a speedy change in the form of government would be effected ; but the imperial authorities knew that it would take some time before they could establish a firm hold on the old inhabitants, and therefore while engaged in establishing the English language, English law, and British institutions they realised that it was necessary to have in the Colony a government wholly responsible to themselves. The Dutch inhabitants asked for elective district government on more than one occasion. The essential characteristics of their class were a strong localism and a marked individualism developed on the veld in semi-independent districts. They did not yet realise that under British rule their cherished land did not lie along those paths, for they were as yet quite unfamiliar with the British Constitution.

¹ No. 67.² No. 68.³ No. 70.

They would have to make a complete break with their past history, going in a direction opposite to the one along which they had come. Instead of gaining liberties in separate areas, and freedom from unnecessary interference on the part of the British Government, they would have to realise that British sovereignty was firmly established, and that it had become necessary to look at the pivot and get the government into their own hands. That was the great constitutional lesson which the British settlers had to teach the Dutch burghers; for the latter, when they came under British rule, had fallen back into their early groove of localism, out of which they had been toiling laboriously during the eighteenth century. They were hardly aware how nearly their halting footsteps had brought them to the promised land of self-government in 1795.

The teachers were able and determined, and the example they set would have been plain if their pupils had been able to read their newspapers or associate with them regularly; but being unable to command the English language, and residing at considerable distances from the newcomers, the burghers can hardly be

blamed for failing to master the lesson rapidly. No nation can unlearn all the lessons of its past history and acquire a new set of political ideals within the space of ten years. And there was the grave complication that the people were under a foreign rule and that they were intensely conscious of the fact. Nor did the Government give a distinct lead. It was never clearly and authoritatively stated in a manner that could be understood by the bulk of the inhabitants that there was a real intention to grant them at some future period the management of their own affairs. On the contrary, the Council

The Council of 1825. as set up in 1825¹ denied all hope, for it consisted only of officials over whom the Governor had up to that time exercised the most complete control, and who were not in any way expected to represent the wishes of the people. The members were to discuss and vote on measures proposed by the Governor, but any member might request him in writing to bring up for consideration any matter. It rested with him to decide whether this would be expedient. He could act without the concurrence of a majority of his Council, but he was not authorised to act in important measures without a previous communication with them. If after such communication he took upon himself to act in opposition to their opinions he incurred a responsibility which it might be quite necessary to take, but with regard to which he was then bound to satisfy the Secretary of State for the Colonies. The Governor could suspend any member on grave issues demanded by the public

¹ No. 18.

interest, but here again the step had to be fully explained and justified.¹ Here was a first step preliminary to the introduction of representative government. No one yet thought of self-government. That was to be first invented in Canada. But the intention was to establish a legislative assembly as soon as the older inhabitants should acquire a command of the English language, and measures for the amelioration of the slave population should place the slaves beyond the reach of colonial legislative control. The burghers were not attached to the institution of slavery. Before the close of the eighteenth century, and during the early years of the nineteenth, they had several times been on the point of stating in so many words that the whole system was bad, and should be swept away. This was one of the chief items of the policy of the Batavian Government during the years 1803-6, but by 1830 it was the earnest wish of the inhabitants of the Cape in all walks of life.

In June 1828 there was started the Cape of Good Hope Philanthropic Society,² for aiding deserving slaves and slave children to purchase their freedom. The aim was to manumit as many female slave children as possible between the ages of 3 and 12, but without causing grave pecuniary loss to their masters. The Governor was the patron, and subscriptions were collected for accomplishing the object of the society. The whole number of female slaves born annually did not exceed 600. A number of slave children were actually freed in this way at an average price of less than £20, so that £12,000 per year would be needed to prevent the increase of female slaves. Many owners of slaves were zealous supporters of the society. If the funds could be regularly procured not a single slave would be born after 30 years and very few after 20. Slaves of a certain age became free by an old law of the Colony. If in addition to the work done by the society the Cape revenue could be charged with twenty or thirty thousand pounds per annum towards this worthy object, every slave would be liberated in less than ten years' time without any cost to the British taxpayer. Petitions and addresses asking that such a scheme should be adopted were all futile, though they were warmly supported by the Governor. And if the further colonial programme embodied in resolutions passed in various parts of the country which offered to declare every slave free at birth³ were also worked out, there would not have been a slave to set free by the end of 1838; but the intentions of the Colony were distrusted in political, missionary, and philanthropic circles in England, so that the emancipation was eventually effected by an Act of the Imperial Parliament.

¹ *Rec. XX.* 5-6. ² *P.R.O.*, MSS and pamphlets in *C.O.* 48/131 and 48/141.

³ *Theal, Prog. of S.A. in the Cent.*, pp. 185-6.

Another item of Batavian policy that was carried out by the new Council was the consolidation and extension of Hottentot liberties.¹

In 1827, when the old jurisdictions of the local boards were about to be removed,² two burghers were appointed to the Council, but they were pensioners of the Government and were not looked upon by the colonists as representing their interests. Six years later a new constitution came into being. There was to be an Executive Council of five officials of the Government and a Legislative Council consisting of the same five officials, together with five, six, or seven unofficial members selected by the Governor from among the most considerable merchants and landowners of the Colony.³ The unofficial members could be dismissed by the Crown within two years of their appointment, but if not so dismissed they were to retain their membership during good behaviour. The public were now allowed to attend the Council's meetings. Within eight months of the first meeting of the new legislature the colonists began to draw up another of their numerous petitions for representative government, but without gaining any further concessions. The Legislative Council was not in existence many years when the Great Trek⁴ commenced. It was not in any way responsible for that movement. On the contrary, it did what lay in its power to check the emigration by restoring to the people a fraction of their old local liberties,⁵ while one of its members went out of his way to plead the cause of the burghers as regards their district boards, which he stated was also the cause of progress and wise government.⁶

Meantime the old Court of Justice was abolished and by a Royal Charter of 1827 a bench was created consisting of four judges. That instrument was superseded by another Charter of Justice in 1834.⁷ Up to this time the Governor had appointed and removed the judges at pleasure, but when the first Charter was issued the judges held office during good behaviour, and it was pointed out by the Secretary of State that the Governor's interference in the administration of justice between individuals would entirely cease.⁸ It was thought that the immediate substitution of English Law for the Roman-Dutch Law then in existence would be too sudden a change and would give rise to much confusion. The assimilation of the law of the Colony to the law of England was therefore to be gradual. To carry out

¹ No. 20. ² Nos. 54 and 73. ³ *Cape Town Gazette*, Jan. 1834.

⁴ As the Great Trek of 1836 led to the settlement of Natal and the two Republics the matter will be discussed under those headings.

⁵ No. 55.

⁶ *Colonel John Bell to R. W. Hay*, 7 June 1834. *P.R.O.*, MS. in *C.O.* 48/159.

⁷ No. 76. ⁸ *Rec.* XXXII. 254 ff.

this plan smoothly the judges were ordered to submit drafts of laws to the Governor as occasion offered for amending the existing civil and criminal code. In this way commenced a process by which the best elements of the two systems of law were gradually amalgamated. The establishment of trial by jury in criminal cases was one of the features of the 1827 Charter. Under Dutch rule the institution had been quite unknown, but its absence had been compensated for by the presence as judges or magistrates of several members of the burgher class in each of the courts of justice. It was in terms of the Charter of Justice, too, that Resident Magistrates were appointed to the various districts.¹

Between 1840 and 1850 the demands on the part of the colonists for representative government became very insistent and they kept pace with the growth in Great Britain of a liberal spirit which manifested itself during this decade. With the growth of the free trade movement which came to a head in 1846 and 1849 and of liberalism in general came a ready willingness to allow the colonies to manage their own internal affairs. Not that people were indifferent towards the colonial empire or believed that in any case the fruit would drop from the tree when ripe, for some of the most fervid advocates of colonial self-rule, like Lord Durham and his circle, were the staunchest of imperialists. Rather, it was felt that the colonies were outgrowing the systems of the later eighteenth and the early nineteenth century, and that the true way to maintain the interests of the Empire intact was not—as was believed for a long time after the American Revolution—by keeping the various sections under paternal guardianship. With regard to the Cape Colony imperial statesmen believed that this was particularly the case. All that could be done to discourage the Dutch burghers from joining their countrymen across the Orange and the Vaal should be done; and in 1849, when the Secretary of State sent a number of convicts to the Cape against the wishes of the inhabitants, the opposition which his scheme encountered came as a revelation, the chief feature being the perfect co-operation of the British and Dutch colonists in the stand they made. In attempting to carry out the policy of the British Government the majority of the Cape Council completely lost the confidence of the bulk of the inhabitants.

As soon as this became clear in England it was decided to modify the resolution, already taken, to establish a bicameral legislature with a nominated upper chamber, as requested by the colonists in their petitions, and to erect instead an elective upper house. Another reason given for the change

¹ No. 73.

was that it was feared that some of the most eligible men who could be elected to the lower house would be unwilling to serve if the upper consisted of nominees.¹ After the convict agitation there was no longer any room for a nominated body in the Colony. Reference was also made to the British colonies generally and to Canada in particular, and it was pointed out that the nominee house had proved to be the weak spot in all the constitutions where it existed. Thus, by the decision of the home Government the Cape received a constitution² far more liberal than that of any other colony except Canada—where the principle of responsible government had been introduced in 1846³—and of a more thoroughly representative type than that which the inhabitants had asked for. Not for several years to come was any of the colonies of Natal or the Australian settlements to win such liberal forms of government, though at the middle of the century changes in colonial constitutions were the order of the day.

An elective second chamber was not the only remarkable feature about the new constitution. The franchise was in effect quite low: male persons of any colour who occupied property to the value of £25, or drew a salary of £50 per annum or of £25 per annum with board and lodging, could vote. There had been some difference between the British and the colonial authorities on this point, the Cape Council having desired to fix a property qualification; but the Government in England insisted on an occupancy qualification only, in the hope of placing the more advanced section of the native population in possession of the franchise. Something was certainly gained in the direction desired, but the bulk of the coloured people was hardly benefited at all.

Another difficulty was how to prevent the upper chamber, the Legislative Council, from being a mere duplicate of the lower. The old plan of having an upper house of nominees to safeguard the interests of the Crown having been abandoned, what function remained for this Council to perform? As a matter of fact, it probably was throughout its existence next to useless; but it was intended to represent the landed class which constituted the bulk of the population, and to prevent legislation arising from panic or any other temporary force from being effected without deliberate consideration and discussion. Both houses were elected on the same franchise, but while members of the Legislative Assembly were to possess only the qualifications of an ordinary elector, those of the second chamber were to have a high property qualification

¹ Hansard, 3 S., vol. 118, pp. 725-6.

² No. 29.

³ Merivale, *Lect. on Col.*, p. 636.

and to have reached the age of thirty years. By further provisions which had the same object in view, the forty-six members of the Assembly were to be elected by twenty-two constituencies, while those of the Council were chosen by only two constituencies, the Eastern Districts and the Western Districts, in which the electors could distribute their votes exactly as they pleased. If wisely worked this last arrangement could provide for the representation of minorities.

The division of the Colony into Eastern and Western Provinces for electoral purposes was significant, for it arose *East v. West in the Colony.* from a desire on the part of the eastern inhabitants either to have a government of their own, or to have the seat of government in the east. They were mainly of British descent, and feared that if they were represented in a legislature sitting at Cape Town they would be at the mercy of the inhabitants of Dutch descent who were in the majority. Besides, they were near the Kaffir tribes and had often had to bear the brunt of a Kaffir invasion while troops were being hurried from Cape Town over the six or seven hundred miles of road to their assistance. If a government were situated at Grahamstown it could direct the management of the eastern border more satisfactorily. For these and other reasons the majority of the people of the Eastern Districts had been agitating for a division of the Colony, but ultimately the decision of the matter lay with the imperial authorities, and the people who had only lately united the two Canadas could hardly be expected to retrace their steps in South Africa where somewhat similar conditions prevailed. The firm attitude they adopted probably no one regrets to-day. In 1850 the interests of the Colony as a whole and those of Great Britain were really identical, for the Eastern Province standing alone could not have coped with the pressing troubles incidental to the presence of powerful native tribes on its borders, and would have had to rely on the assistance of the Government in London. This would have meant the continued presence of strong forces paid out of the imperial treasury and consequently an extended period of paternal rule; for, when once separated from the rest of the Cape Colony, the Eastern Districts would probably not have looked for aid to the Western Province any more than they would have looked to New Zealand or Jamaica. Moreover, in the Western Districts was a minority of burghers of British descent, while in the Eastern Districts there was a strong minority of Dutch extraction. It would have been a temptation difficult to resist for the majorities in each half to ignore the interests of their respective minorities, but as matters remained neither party was so overwhelmingly powerful in the common Parliament

as to be able to neglect the interests of the other. On the other hand, if the parties continued to stand on national lines and emphasise national aims, they were none the less made to see the necessity of co-operating, to acquire the frame of mind which recognised that mutual respect and goodwill were indispensable, and in course of time the lines of cleavage were bound to become less and less pronounced. Had the British Government not benefited by the Canadian object-lesson, had they been swayed by the exigencies of the moment instead of looking ahead, co-operation and union in South Africa would undoubtedly have been more difficult of accomplishment than has been the case. As it was, they practically placed the power to legislate for the country into the hands of a majority of Dutch-speaking colonists, fully knowing that they were doing so, and fully aware that this would be the situation for many years to come. Indeed, no other course was open, for numerically and economically the older inhabitants were incomparably the stronger. Yet, not to deny the request of the British settlers absolutely and irrevocably, they empowered the Governor to call the new legislature at any place which he might consider best, and permitted that body to make any alterations that might seem desirable. The first meeting of the first Parliament held on African soil came together in Cape Town on the 30th of June 1854.

§ 2. THE CAPE OF GOOD HOPE, 1854-72.

Though the legislature was wholly elective except for the presidency of the Legislative Council, which was occupied by the Chief Justice in virtue of his office, the executive power remained in the hands of a body of high officials, the chief of whom occupied seats in either house though without the right to vote. The Colony had thus reached a stage similar to that at which England stood during the early years of the eighteenth century, before Sir Robert Walpole became the chief Minister. The legislature was an elective and representative body, but the Ministers were still appointed by and responsible to the Crown. But in Great Britain there was an upper house which was for the greater part non-elective and non-representative, so that in this respect the colonial legislature was from the very start ahead of the Mother of Parliaments. There was, too, another point of importance. In 1775 Edmund Burke made it clear to his electors at Bristol that in every question brought before Parliament it was he as member who was to decide, and not they as constituents. This principle, it has been said by a

What representative government means.

distinguished author¹ who ought to know, is still the guiding principle of most members in Great Britain to-day. At the Cape this principle was denied from the very start. Members, when elected, were instructed—there is no other word to use—to act on broad issues in a certain way. Had they not signified their intention to act in such a way they would not have been elected; and having signified such an intention, and having been consequently elected, they were bound to adhere to their undertakings or to resign their seats. If it were not so, democracy would not be anything real, and party government would be an oligarchic rule. So many thousand men selected one man to represent their views on certain matters and to do his utmost to get those views enforced. If at any time he found that he could not continue to support those views, it was his duty to make place for some one who could, though nowhere in the Empire has a law yet been passed compelling him to do so. Occasionally a member would be sent to Parliament on the understanding that he would act at his own discretion; then the case was different. And there were always numberless matters on which a constituency could not, or at any rate did not, make up its mind. In every such case the member would act as seemed best to him. Of course the system could not have been worked out with ease but for the advent of railways and telegraphs; but even as matters stood in 1854 the responsibility of members to their constituents, which was admitted on all sides, was preparing the way for party government with all its advantages and drawbacks. The difficulties that stood in the way of making the executive responsible to the legislature seem very trivial to-day.

Less than two months after the first session of Parliament commenced, a motion was brought before the Legislative Assembly stating that the experience of the session showed that hitches in the free-and-easy action of the legislature had occurred through the absence of responsible Ministers. This opinion was to be laid before the Secretary of State with the request that he might be pleased to convey to the Colonial Government the conditions on which responsible government could be conceded to the Cape.² Early in the next year a motion to this effect which also provided for the appointment of a select committee to consider the question was carried by 23 votes to 9. A month later a similar motion came before the Council which declared "That in the opinion of this Council the principal officers of government should be appointed by the Governor, from among the members

*The Colony
desires
further
power.*

¹ Sir Courtenay Ilbert, *Parliament*, pp. 159-60.

² *C. of G. Hope Votes and Proceedings* (No. 132), p. 152.

of both Houses, and that they should hold office only so long as they possess the confidence and can ensure the co-operation of the legislature." ¹ On the part of many men in Parliament and in the country there was a strong desire to proceed to the further step as soon as possible. Select committees appointed by both houses recommended the change, but the Government in London naturally wished to see first how the new institution would work. Besides, there were other pressing matters enough to consider. One of the first measures adopted provided for the introduction of trial by jury in civil cases. ² The country had got over its early objection to the jury system. Then came the creation of Divisional Councils to manage the several districts much on the same lines as the old boards of landdrost and heemraden had done, except that the members of the councils were now made not only to be representative of the people but actually elected by them. ³

There were certain issues before the country on which the electors and the members of Parliament gradually ranged themselves into two main parties. On the question of the introduction of convicts the population had been all but unanimous. There had been a small section centring round the editor of the *Grahamstown Journal* which supported the scheme, but it was not strong. On the question of granting representative government there had been a party, small but able and determined, which desired to reject the scheme of an elected upper chamber, and some of whose supporters had also favoured the introduction of convicts. These men had a paper too, the *Cape Monitor*, which may be described as the government organ of those early days. Directing its efforts towards the postponement of the representative government plan had been a strong party which voiced their opinions in the former of these journals. After 1854 this section continued its efforts to obtain either a division of the Colony into two parts or the transference of the seat of government to Grahamstown. They fought the first and the second election mainly on this issue, and when the matter was brought up for discussion in the Assembly it gave rise to some of the most dramatic scenes witnessed in the Cape Houses. ⁴ But the majority of the people were opposed to separation, and the plan was badly defeated in 1861. The desire to separate was entertained mainly by the burghers of British stock residing in the south-eastern parts of the Colony. It was in the main the same people who opposed the grant of responsible government for the same reasons as they had

¹ Minute XL. of the C. of C. Hope Legisl. Council, p. 3.

² No. 79.

³ No. 57.

⁴ J. H. Hofmeyr, *Het Leven van J. H. Hofmeyr*, p. 104.

opposed the establishment of representative institutions, though there were throughout the Colony men who wished to see self-government postponed, but for different reasons. It was feared by the conservative element in the country that a leap taken too soon would fail to reach the mark, for, they argued, the men who were to take responsibility for the performance of ministerial functions had still to be trained. This view was defended by one of the Dutch journals, *De Volksvriend*. On a third question the issue was not so clear, though it was roughly the same leaders of public opinion who stood for a united Colony, for responsible government, and for the voluntary principle in the churches. By the last phrase they indicated that State assistance to a few favoured denominations like the Dutch Reformed Church and the Anglican Church should cease. It may be argued that these issues were of temporary interest only and could not have divided the country permanently on party lines. That is true, but the fact is that they were not so much issues in themselves as manifestations of party feeling which had existed all along, but which came definitely to the surface in connection with discussions relating to the constitution. The attempts made from the early years of the century to change the language of the Dutch burghers had not been successful, the removal of their old institutions had given them a grievance, and the recent annexation of the Orange River Territory to the British Empire had caused much ill-feeling towards the British Government and towards their fellow-burghers who supported it. In the country itself the chances of co-operation between the British and Dutch colonists had been so few that national divisions had not yet had a chance of being obliterated. What was needed was some firm common ground on which they could meet, and this had not yet shown itself, so that political parties were also national parties. Yet it should be understood that during the period of representative government the parties were by no means well organised or even so clearly defined as they afterwards became. One incident that helped to keep English and Dutch apart was when in 1865 the Cape legislature was made to annex Kaffraria in response to the wishes of the eastern inhabitants after it had refused to do so.¹

The question of responsible government was intimately connected with the questions of expansion and defence. Up to about the year 1833 the burghers had been largely responsible for the defence of their own frontiers against the natives, but on philanthropic grounds the commando system which was in vogue was objected to in England, though in 1852 it was advocated for re-adoption in

¹ Corresp. rel. to the Annexation of Br. Kaff., presented 10 Feb. 1865. Cf. No. 32.

the House of Commons.¹ Then imperial troops had been employed to assist with the Kaffir wars. By 1850 the military expenditure supplied from the imperial treasury was amounting to about £3,000,000 per annum for all the colonies. This sum amounted to less than 9s. in the pound on British exports to the colonies. This state of affairs had improved the chances of colonial self-government, for it had forced colonial statesmen in England to lay down the thesis that "if these colonies were governed as they ought to be governed, no troops ought to be maintained in them at the expense of the United Kingdom, except for strictly imperial purposes, and that the expenses of all troops required for local purposes ought to be paid by the colonies."² Therefore the local government should be given the direction of the officers who managed relations with the frontier tribes. It had been adopted, then, as a standing rule of the Empire that when responsible government is given to a colony it must provide for its own internal order and for its defence against savage peoples on its borders.³ At the Cape this caused some of the people to waver in their desire to possess full self-government, but the real opposition to the scheme came from the men from the East, who believed they would see as a result of the withdrawal of paternal government a neglect of their special interests. It became known in 1867 that the imperial authorities, desirous of establishing government by responsible Ministers, intended to withdraw the troops in any case. By that time it had become abundantly obvious that the activities of the executive and the legislature were bound to end in a deadlock, the former having repeatedly spent much more money than had been authorised by the latter. Finally, the Governor began to make proposals which, if carried out, would place all control in the hands of the Executive Council. Under these circumstances the party opposed to responsible government lost ground, and after some difference on the subject between the Legislative Council and the Assembly a Responsible Government Bill⁴ was passed in 1872 and, after being reserved by the Governor, received the royal sanction before the end of the year.

§ 3. THE CAPE OF GOOD HOPE, 1872-1910.

During the responsible government period of the Cape of Good Hope there is a good deal of parliamentary history, but little constitutional history. The Colony was now *Political training of the colonists.* two hundred and twenty years old, and two hundred years before the grant of responsible government the burghers had been given the direction of

¹ Hansard, 3 S., vol. 120, p. 736.

² Cf. [C.-3280], pp. 1-15.

³ *Ibid.* vol. 115, p. 1372.

⁴ No. 34.

their everyday life in their local courts and boards. Though that privilege had been gradually removed during the years 1806 to 1828, the arrival of the British settlers from 1820 onwards had caused them to cultivate an interest in the activities of the central government which had been too often lacking during the first quarter of the nineteenth century. The justices of the peace¹ and the field-cornets throughout the country had been passing through a period of apprenticeship in the art of government. The training and experience gained in the municipal boards and the road boards² was also valuable, whilst the civil commissioners and resident magistrates were a valuable class of public officials on whom the Ministers were to rely in years to come for information on matters of the most varied nature pertaining to their respective districts. Perhaps there was no other class of civil servant which contributed so much to the success of legislation or the smooth working of the administration as these officials. The experience which an important body of men had been gaining in Parliament since 1854, and the education which the whole of the population had undergone during the election contests and through the English and the Dutch press, prepared for the smooth working of the new form of government. After the Bill of 1872 had been adopted by both houses of the legislature the Eastern Province party again moved for a division of the Colony; but as the local aspirations of Grahams-town, Port Elizabeth, and King William's Town could not be accommodated, and as the midland districts included in the Eastern Province were opposed to separation, the scheme was eventually abandoned.

Indeed a movement in the opposite direction had set in. Instead of the two constituencies into which the country had been divided for the election of members of the upper chamber, which had done so much to keep the separatist spirit active, it was proposed to form seven electoral divisions. The number of elective members was now twenty-one, so three members could be given to each constituency, and electors could be allowed to give all their three votes to one candidate or to distribute them as they pleased, thus extending to definite small areas the principle of the representation of minorities within those areas. The measure was adopted in 1874,³ and constituted in a mild way a victory of the farming community over the townspeople, while it obviously made the Legislative Council more representative of the Colony as a whole than it had been before. The members now held their seats for seven years instead of ten, and consequently were more under the control of the electorate than

¹ No. 72.² No. 56.³ No. 35.

they had been before. Another measure that bore clear evidence of the rising influence of the country people was the first Act passed in 1882 which permitted the use of the Dutch language in both houses of Parliament.¹ And this privilege was soon extended to the courts of law.² During the last thirty years of the century various native territories were annexed to the Colony, thus adding a considerable number to the native population. It was considered desirable, therefore, to require a slight education test of all new applicants for registration as voters, and at the same time other qualifications of electors were also raised.³ The next great constitutional step that affected the Cape of Good Hope was the Union of the South African colonies. A word must now be said about the High Commissionership, an office which contributed a good deal towards the achievement of that end.

SECTION III.

THE HIGH COMMISSIONERSHIP FOR SOUTH AFRICA.

On the 10th day of October 1846 the Governor of the Cape was appointed "Her Majesty's High Commissioner at the Cape of Good Hope for certain purposes."⁴ In part this was intended to give a more formal recognition to the authority which the Governor had exercised till that time, in part it was laying duties till then performed by the Lieutenant-Governor of the Eastern Districts on the supreme authority at Cape Town; but it was also a measure intended to meet the growing complexity of South African affairs.

Firstly, the Governor had from the commencement of British rule managed the relations of the Colony with adjoining native tribes subject to the direction and control of the Government in London. These powers were exercised by him alone till on the appointment of a Lieutenant-Governor for the Eastern Districts in 1836,⁵ the second phase opened. The Governor's authority began to be shared in this respect by the new official. During the next ten years treaties with natives were concluded by both men, but the acts of the Lieutenant-Governor had to be ratified by his superior. In 1845 the office in the east began to fall into abeyance, though it survived in a tentative sort of way for a few years longer. In the third place there had arisen other European communities in Natal, in the Orange River territory

¹ No. 38.

² No. 86.

³ No. 48.

⁴ *Parl. Papers, C. of G. Hope, Kaffir Tribes*; Feb. 1848, p. 5.

⁵ No. 25.

and across the 'Vaal, creating a diversity of problems which seemed to call for a special delegation of powers by the imperial authorities.

The commission of 1846 did not yet employ the phrase "High Commissioner for South Africa," but this was a mere detail. That official was appointed "for the settling and adjustment of the affairs of the territories in Southern Africa adjacent or contiguous to the eastern and north-eastern frontier" of the Cape Colony, and he was to take measures to prevent attacks of the native tribes inhabiting those territories and to place them under some settled form of government. Subsequent commissions conferred similar powers, though the manner of exercising these was prescribed in greater detail as time went on. In 1849, after assuming authority over the Orange River Territory, the High Commissioner solicited and obtained a commission appointing him Governor of the new dependency. A similar procedure was adopted at the end of the South African War with regard to the Orange River Colony and the Transvaal. The High Commissioner came to hold a multiplicity of offices. At various times he became the supreme head of such territories as Griqualand West, Basutoland, Bechuanaland, Rhodesia, etc., receiving instructions as to the functions he was to perform in each.¹ He was the representative of the Crown in the sub-continent, the link uniting all the varying conditions of the various peoples, the unifier of policies, the Empire's agent.

But he became all that only because he was as a rule the Governor of the Cape Colony. Till about the year 1890 South Africa's mother-colony surpassed all the other territories put together in wealth and importance. In extending her South African empire the home country was wise enough to employ as a stepping-stone the foothold she had won. The High Commissioner was Britain's right hand, the Cape Colony was her lever. Sometimes the Colony grumbled and occasionally she maintained an attitude of passive opposition, but in the end, with perhaps one or two exceptions, she always adopted the desired course. From the outset the governorship and the high commissionership were inextricably interwoven. The High Commissioner employed the public seal of the Colony for his formal official acts. His legal adviser was the Attorney-General of the Cape Government, and when he proposed to take an important step he consulted at first his Executive Council in an informal manner, and after responsible government was introduced, his Ministers. As most of the native territories

¹ See, e.g., *Parl. Papers, S.A.*, 130, 14 Ap. 1905.

were made dependencies of the Cape of Good Hope any other course would have been open to serious objections. We are fortunate enough to possess an authoritative statement on the practice that came to govern the relations between the High Commissioner and the Cape Ministry. In 1888, in reply to a question put in the Legislative Council, the Treasurer-General stated: "It is not the duty of the Ministry of this Colony to advise the High Commissioner. Their duty as Ministers is to advise the Governor of the Colony. And the High Commissioner has powers which he exercises as High Commissioner, with which powers the Government of this Colony have no constitutional right to interfere. At the same time he (the Treasurer-General) wished it to be understood that the relations between the Ministry of this Colony and the High Commissioner are as good as can be desired. And although it is not the duty of the Ministry to advise the High Commissioner, nor is it the duty of the High Commissioner to inform the Ministry of this Colony what he is doing as High Commissioner, yet the relations between the two authorities are of that character that whenever the High Commissioner is acquainted with anything going on that may have a relation to, or some effect upon, the interests of this Colony, he does not fail to communicate with the Ministry upon that subject. At all times he is ready to confer with the Ministry on any subject that may have any relation whatever to the interests of this Colony."¹ So far had constitutional practice outstripped the written law that when the Secretary of State's attention was drawn to this statement he had no criticism to offer. It would be difficult to think of any important subject whatever on which the High Commissioner was called upon to decide, which had no relation whatever to the interests of the Cape Colony, so that as a rule the High Commissioner conferred with the Cape Ministry on steps he was about to take. But like most other rules this one had exceptions, both before 1888 and thereafter.

SECTION IV.

NATAL, 1885-1910.

For the sake of clearness of treatment it is convenient to divide the constitutional history of Natal into five well-marked periods:

(1) 1835-38.

(3) 1844-56.

(2) 1838-44.

(4) 1856-93.

(5) 1893-1910.

¹[C-5488], pp. 21-2.

§ I. NATAL, 1835-38.

By the year 1835 a small number of British settlers had congregated round Port Natal for the purposes of hunting, trading with the natives of the neighbourhood, and engaging in adventures of various kinds. They were quite unconnected with the British Government or with the Government of the Cape Colony. In that year they first formed the semblance of a government by appointing a committee of management of their affairs whom they authorised to levy certain taxes and to perform some public duties, mainly for the purpose of granting and distributing land in freehold among themselves, for from the start these immigrants had been occupying waste land round the Bay, and they desired to show some form of legal right to the tracts on which they had settled. Under the authority of the committee they proceeded to make grants along the coast, restricting the size of their farms to 3000 acres. The boundaries of these farms were never measured or clearly defined, an approximate estimate was all that could be made and care was taken not to encroach on their neighbours' lands. The town of Durban was already growing up, and from that port as well as from Cape Town requests were sent to England asking that British authority might be established over the district, one of the chief reasons given being that the United States was likely to found a colony in the territory. Colour was given to the statement by mentioning that a number of American missionaries had arrived in the country. The Colonial Office, however, took no steps, so that the small community had to plod along as best they could. Some of the white men gathered round themselves a number of native retainers, thereby gaining the status of petty chiefs in the country,¹ and presently they got involved in native disputes. In the year 1838 an unwise attack was made by a large portion of the British settlers at the head of a number of natives upon Dingaan, the Zulu King, when they were destroyed almost to a man. Most of the properties were thus left unoccupied, and when a British Commissioner² visited Natal in 1843 he found that only two farms had been regularly occupied for any length of time. While Dingaan was destroying the white inhabitants from the Bay, Natal was being entered by Europeans from another quarter.

¹ Cf. No. 91.

² H. Cloete's Report on Lands in Natal, addressed to Secretary John Montagu, Cape Town, 30th May 1844. P.R.O., MS. in C.O. 48/247.

§ 2. NATAL, 1838-44.

The causes of the emigration of Dutch farmers from the Cape Colony in 1836 and subsequent years were of various kinds with different individuals. They arose mainly from an unwillingness to be ruled over by a foreign power, from the absolutism of the rule, the loss of their local governing bodies, the refusal to grant them representative institutions, the many harsh laws made for the better treatment of slaves, the absence of adequate compensation when their slaves were set free, the lack of protection against native attacks. Most important of all the factors was the desire for independence, the republican spirit, which had grown strong by a slow but steady process during the eighteenth century, the spirit which has always been revealed in course of time by colonies planted in every age and in all latitudes, and which at the Cape had been cultivated by the liberal district government arrangements, by the vast distances of the country, and by the looseness of the government of the Netherlands Company. The chief circumstances leading up to the Great Trek which were uppermost in men's minds at various periods are indicated in the documents,¹ but of course there were some factors which operated subconsciously and others which could not be openly talked about when addressing an English governor, and these can only be gleaned by a careful study of the character of the Dutch burghers, of their previous history and of their subsequent enterprises. If it is the historian's task to *interpret* events as well as to chronicle them, he will seek for the connection of the Great Trek with the history of the seventeenth and eighteenth century as well as the early nineteenth, and he will further consult the story of the trekkers in the later nineteenth and the twentieth century.

Having been advised by the Attorney-General that there was no convenient power by which the thousands of departing emigrants could be prevented from leaving the Cape Colony,² and having been informed by the Lieutenant-Governor of the Eastern Districts that it was impossible to employ force to keep them in the country, the Colonial Government adopted two outstanding lines of policy with regard to the expatriated burghers. In the first place, they laid down the theory that the emigrants continued to be British subjects and liable to be dealt with according to British laws no matter where they went.³ Secondly, they acknowledged the authority of some native chief or other over tracts of territory in which the emigrants

¹ Nos. 92, 100, 106, and 107.² No. 93.³ Nos. 94 and 104.

*Causes of
the Great
Trek from
the Cape.*

*British policy
towards the
emigrants.*

had settled or seemed about to settle. This was done either explicitly by means of a formal treaty or by negotiations of a more or less confidential nature, or implicitly by siding with the tribes with whom the emigrants came into conflict. As an aid to this second line of policy they prevented, as far as lay in their power, the sending of fresh supplies of ammunition with a view to making it impossible for the emigrants to commit acts of aggression against any of the native tribes. Great Britain was the paramount power in South Africa. She was bound to grow progressively stronger. For better or for worse she believed that she had the advancement and well-being of hundreds of thousands of natives in her keeping. If her policy has been at times tentative and uncertain in many respects, her representatives have steadily attempted to maintain the welfare of the coloured people when they were at issue with the white men. As the farmers trekked eastward and north-eastward in various parties they gradually formed themselves in the course of several years into three main groups, settling in the territories now called Natal, the Orange Free State, and the Transvaal. It is with the first of these groups that this section of the work has to deal.

Securing the cession of a large tract of land in Natal from the Zulu king for services rendered in 1837,¹ this group of emigrants became firmly established in the country in the course of the next two years, deposing Dingaan who acted treacherously and setting up another in his stead. A British force had lately been stationed at Port Natal, but it did not interfere much with the emigrant community which had settled further inland. As to the form of government established by the farmers, each party elected a leader, whose orders they generally obeyed while trekking. He was generally styled the Commandant. It was his task to see that the members of his party performed such duties as they were familiar with according to the old Cape burgher laws. Some time before the negotiations with Dingaan, one of the most able leaders, Pieter Retief by name, was elected a sort of commandant-general. Curiously enough he received the title of "governor," intended to signify, no doubt, that he was to exercise authority over all the farmers of the neighbourhood. Towards the end of the year 1838 there was a Volksraad, *i.e.* a legislative body chosen by the people. The members seem to have belonged to one of the largest parties then in Natal. Gradually matters shaped themselves as the danger of fresh attacks from the Zulus became less menacing. From a letter written by Captain Jervis, the commander of the British garrison at

*Settlement
of the
emigrants
in Natal—
their con-
stitution.*

¹ No. 95.

the Port, and dated 27th March 1839,¹ it is plain that a large body of emigrants had by that time concentrated at the Bushman's Rand, the present site of Pietermaritzburg, with the intention of laying out a town there. They had already elected a Volksraad of 24 members, one of whom they had appointed President. Judicial functions were exercised by magistrates called landdrosts, each of whom was assisted by six heemraden, elected annually. The landdrosts tried summarily all criminal cases in which fines could be imposed amounting to 20 Rix-dollars. Sentences inflicting heavier fines were subject to appeal to the Volksraad. In case of murder or other very serious charges the magistrate was at liberty to swear in a jury of twelve who found the verdict. In such cases the landdrost and the heemraden merely investigated the charges. The constitution of the Republic embodied every principle of government that the people had been striving to establish during the previous seventy years, and the peculiarly English institution of trial by jury with which they had become acquainted in the old Colony suited their democratic ideals entirely, hence its adoption.

Negotiations with foreign powers were carried on and letters were signed by the Volksraad as a body. In practice drafts of laws were submitted to the people for their endorsement or rejection. The State was small and its smallness made the procedure quite easy.

Was it a State at all, and is it correct to speak of the Republic in Natal? A constitutional lawyer would probably answer the question in the negative. The emigrants ^{Status of the emigrants.} were claimed as British subjects, and an Act of the Imperial Parliament had referred to them as such.² Parliament could undoubtedly legislate ex-territorially for British subjects, if they *were* British subjects. Did they remain British subjects merely because they were regarded as such? Was it possible for them to discard their status as subjects if they chose to become subjects of another state, but impossible to lay aside that status when they moved into unoccupied regions? The Republic was never recognised by any Power, and international usage seems to demand that states newly created should be recognised by other civilised states. Had the problem been brought before an impartial arbitration court it would have made one of the most interesting test cases in the history of the world. *De jure* there may never have been a republic in Natal; that such a state existed in fact is obvious. It provided for its government, administered justice, levied taxes, waged war, and concluded treaties without reference to any other power. When the troops were

¹ P.R.O., MS. in C.O. 48/200.

² No. 94.

withdrawn from the Port in 1839 the British subjects remaining there readily submitted to the Volksraad.

The interests of the British Empire could not permit an independent state to grow up on the south-eastern seaboard of Africa. A proclamation was issued in 1841 by the Cape Governor¹ and military possession was taken of Natal. Protracted negotiations followed and a good deal of fighting, till towards the end of 1843 a portion of the emigrant community capitulated and the rest trekked northward to join their comrades beyond the Drakensberg. Those who intended to remain behind made certain demands² which if conceded would have placed them in the situation of an average British colony possessing representative institutions but without responsible government. No notice was taken of the document embodying their requests. The next year Natal was annexed to the Cape Colony³ and the infant Republic ceased to exist.

§ 3. NATAL, 1844-56.

Intimately connected with the problem whether or not Natal was a Republic prior to the year 1844 is the further question whether after its annexation it was to be regarded as a Colony acquired by conquest or by cession or by settlement. Up to the year 1887, when an Imperial statute gave full power to the Crown to legislate for all newly acquired colonies where there is no existing civilised government, British constitutional theory said that colonies acquired by settlement were not subject to the legislative power of the Crown in Council, unless they were made to be so by an Act of the Imperial Parliament. Colonies acquired by conquest or cession, on the other hand, fell directly under the legislative power of the Crown. Cession is often a formal recognition of conquest. Now for a good many years the Crown did in fact issue laws for Natal, so that the conclusion must be, that the imperial authorities in 1844 and subsequent years regarded the new territory as having been acquired either by conquest or by cession. No formal deed of cession was ever shown, only a general statement by the Volksraad that they would not oppose the annexation by forceful means. But this took place only after the emigrant community had actually been fighting to oppose British occupation and when they had become convinced of their inability to carry the struggle to a successful issue. Natal then was acquired by conquest, and the instruments

¹ No. 104.

² No. 107.

³ No. 109.

regulating its government down to the year 1856 were issued on the authority of the Crown in Council.

For one year Natal formed an integral part of the Cape Colony, but the Cape legislature had to pass special laws for the new district and could not apply any old laws or institutions to it without such specific enactment. This arrangement continued even after provision was made in 1845 for a separate government in Natal with a Lieutenant-Governor at its head.¹ Till 1847 the Governor and Council legislated for Natal, setting up municipal boards,² field-cornets, justices of the peace, and resident magistrates in imitation of the Cape models. A district court³ consisting of one judge appointed by the Crown and holding office during good behaviour was also erected, and the Roman-Dutch Law was established.⁴

Naturally this arrangement, by which their country was honoured with no worthier title than that of a *District* and was subject to a few individuals holding session at a considerable distance, was not expected to satisfy the inhabitants, and it did not. Before submitting to the new order of things the Dutch burghers had particularly desired that Natal should be constituted a separate colony, and from the start the British settlers wished to possess a legislative body consisting of elected members. One step forward was taken in 1847 when Letters Patent⁵ were issued providing for a separate legislative body for Natal consisting of three or more members appointed by the Crown and holding office during pleasure. General executive powers were vested in the same body, but the Lieutenant-Governor was instructed to act without the concurrence of his Council whenever he felt convinced that this was necessary.

The establishment of a Legislative Council on the spot came none too soon, for Natal already stood face to face with the great native problem. How could the Zulus be governed? Should they remain under the authority of hereditary chiefs, and if so, was there a sufficient guarantee (1) that the public peace of the country would be preserved, and (2) that they would advance towards the civilisation which Europeans have always regarded as a good in itself? Or should they be brought under the direct rule of the Colonial Government, and if so, (1) what law should be administered, and (2) was the Government prepared to finance the administration, and (3) would not the resultant contact with the very civilisation which it was intended to impart effect the debasement and ultimate ruin of the race? Could the Zulus be put to any use for purposes of labour,

¹ No. 111.² No. 132.³ No. 137.⁴ No. 136.⁵ No. 112.

defence, or commerce, and if so, what return could be made them as a people for the services rendered? The study of native customs and native law in Natal was essential to the good government of the territory, and the task could be accomplished by the Council at Cape Town only in a very perfunctory and half-hearted manner. A fuller consideration of the various aspects of the native problem must be reserved till the efforts to obtain responsible government are discussed.

While it was in the interests of the Empire with a view to upholding its dignity and establishing its hold on the new dependency that its officials should stand under its direct control, the inhabitants believed it to be to their interest that they should share that control. Of the European population those of British blood were still the less numerous section, though by immigration they were steadily increasing in proportion to the other settlers, and at the middle of last century any government in London which maintained a paternal rule in any colony inhabited by a large number of British citizens would have to make out before Parliament and country a strong case for keeping up such a position. Besides, while the colonial authorities were negotiating in 1843 with a view to taking over the government of Natal, the Governor had read in the Legislative Council of the Cape a minute which was soon published in Natal and in which it was declared that Her Majesty's Government was anxious to place the Natal institutions upon such a footing, consistent with the maintenance of her royal authority, as might be most acceptable to the bulk of her subjects.¹ Yet the settlement was still in its infancy, the Dutch farmers were disaffected, and it was said that there was not one English inhabitant possessing the united qualifications of character, interest in the country, and education, whom it would be expedient or proper to elect or appoint a member of any Legislative Council,² so that a petition which in 1848 asked for a representative form of government met with no success. One of the chief objections to an elective council, viz. the smallness of the number of British settlers, was overcome to some extent during the years 1850 and 1851, when a few thousand immigrants were introduced according to a scheme promoted by a certain Mr. Byrne,³ —that colossal benefactor of Natal going bankrupt over the operation. The colonists were gaining valuable experience in self-government in their village and district boards, and the Governor recommended compliance with a second petition

¹ *Parl. Papers, Settlement of Natal*, presented 14th Aug. 1850, p. 190.

² *Ibid.* p. 7. The petition is given on p. 2 of that work.

³ *Ibid.* Natal, presented 30th July 1851, pp. 19 ff. and 58 ff.

praying for representative government in 1852. His advice was adopted and Letters Patent establishing the principle of representation in the Council were passed in 1856.

During the period under review some alterations were made in the system of municipal government by extending the powers and duties of the corporations as previously established,¹ while divisional or county councils were created.² These, however, were devised on too pretentious a scale for the various districts to support. The arrangements were annulled after three years. As regards the administration of justice an Ordinance of 1849³ preserved the power of native chiefs to try according to native law cases arising between members of their tribes, subject to the advice and control of European officials appointed by the Lieutenant-Governor. In all cases appeals were allowed to the Lieutenant-Governor, acting with the advice of the Executive Council. For the benefit of the European population two laws were passed in 1852 to indicate the qualification and duties of jurymen⁴ and to introduce the institution of trial by jury in civil cases.⁵

§ 4. NATAL, 1856-93.

Up to this time Natal had been largely dependent on the Cape Government, carrying on its correspondence with the Colonial Office through that channel; but the Charter⁶ granted in 1856 raised it to the status of a separate Colony. The Legislative Council was reconstituted so as to consist of sixteen members of whom twelve were to be elective and the others, who were high officials, were Crown nominees. In practice these nominated members also constituted the Executive Council, which remained under the direct control of, and responsible to, the Ministers of the Crown in England. The Colony was definitely launched on its way to responsible self-government, the coveted goal which Canada had reached just ten years earlier and to which the Cape Colony and the Australian colonies were also moving. The British Government and the bulk of the people in the United Kingdom had no objection to pushing the system of government established in 1856 to its logical conclusion—that objection was a thing of the past, though of the recent past. It was only sixteen years since Lord Durham had published his memorable report on the government of Canada, in which he advocated the system of responsible government for that Colony, carrying the British political world by storm in a short space of time through the cogency of his arguments and the sound common-

¹ No. 133.

² No. 141.

³ Ord. 3, 1853; *P.R.O., C.O.* 180/1.

⁴ No. 142.

⁵ No. 143.

⁶ No. 113.

sense conclusions at which he arrived. But if his reasoning was unassailable it was obviously none the less imperative that in every colony due precautions should be taken to maintain imperial interests.

In Natal the movement for responsible government came to a head in 1870, when a Bill aiming at the introduction of that system was introduced in the Legislative Council, but was withdrawn without completed legislation. It was not until 1893 that the movement gained success. During the intervening twenty-three years some two or three dozen Bills were introduced, of which about a dozen were passed, and several petitions and addresses were presented aiming at making the executive responsible to the legislature. If then the imperial authorities had no objections to offer to the system, and readily admitted that the arrangement made in 1856 gave no guarantee that imperial policy would be carried out¹—the Executive Council having at times adopted an independent attitude—and that it was liable to end in a deadlock between the legislature which had to find funds and the executive which had the spending of it; and if the colonists desired the change, what caused the delay? If the answer must be given in a single sentence it must be stated that responsibility would bring with it obligations which a young Colony, situated as Natal was, could not shoulder; but the difficulties that stood in the way related in the main to the defence of the country, to native affairs, to the interests of Indian immigrants, to the relations between the Governor and the Executive Council on various issues, and to the relations to be observed by Natal with regard to the High Commissioner for South Africa, the Cape Colony, and the two Republics.

Reviewing each of these points, it was obvious in the first place with regard to defence that Great Britain would certainly follow the procedure adopted in most other colonies of withdrawing the bulk of the imperial troops stationed there, retaining only such garrisons as were imperatively demanded by possible eventualities of imperial defence. When an intimation of this intention was published in Natal it straightway divided the inhabitants into two more or less evenly balanced parties—the one, led by the elected members of the legislature, still agitating for responsible government, and the other fearing the burdens which that institution would entail. The question was only one of supplying the actual man-power for any war that might arise, for even before responsible government was established the Colony was liable to bear at least a large proportion of the

¹ *Parl. Papers*, [C-3174], p. 8.

expense involved.¹ For a long time the Government in London maintained its attitude, and consequently a majority of the colonists opposed a change in the constitution. Under these circumstances no improvement could be effected, for the Secretary of State for the Colonial Department was firm in his demand that so important a step as the appointment of a responsible Ministry should only be taken when a majority of the citizens, being fully aware of the results that would follow, had distinctly expressed themselves in favour of it. Indeed it was only when native pressure on the northern frontier had been weakened by a native war with the South African Republic, when the Cape Colony made itself responsible for the government of the territory on the south-western frontier, and when the Government in London promised to assist with the defence for a while longer, that a majority of the electors could be persuaded to accept responsibility. Really the matter was not quite so simple as it looked. More was involved than the mere question whether the Colony could enrol, equip, and pay the necessary number of troops for repelling a native attack. Native policy was initiated and directed by the imperial authorities. The question before the colonists was whether they should support blindly a policy over which they would have very little practical control, and which, they stated, had already led to complications. But this leads to a consideration of the second of the list of difficulties which faced the framers of the new constitution, the one which permeated nearly all the others, and made it impossible to do for Natal what was done for so many other colonies possessing representative government, viz. establish responsible government by merely amending a clause or two of their constitution Acts or altering a few words in the instructions of their governors.

In 1880 when demands for an improvement of the constitution became peculiarly insistent the white population of Natal consisted of about 30,000 souls, of whom less than 7000 were electors. The number of Kaffirs was estimated at not less than 400,000. It was out of the question to grant the franchise to those masses of coloured people unless a legislature of uncivilised persons were to be set up with perhaps three or four members to represent European interests. But the natives had been living under their own laws, which had lately been codified² and which were administered by special officers responsible to the Governor. In the event of responsible government being set up it was feared that native rights would be disregarded or exploited for the benefit of the white population, unless some

¹[C-3280], p. 16 ff.

²No. 141.

means could be devised for first securing those rights ; for if the unfettered direction of native affairs were placed in the hands of responsible Ministers representing the views of the majority in the legislature, the result might be that the taxpayer in the United Kingdom would have to bear the cost and responsibility of providing for a policy over which he had no control. On behalf of the colonists it was claimed that they more than any other people were likely to strive after the maintenance of a good understanding between whites and blacks, for to them a Kaffir war meant the spreading of distress and confusion, peril to life and property, and the arrest of progress.¹ They went so far as to say that the control of native policy which the Government in London exercised had not improved the coloured races. "It is a fact beyond dispute," they declared in 1888, "that the moral condition of the Native population, after forty years of British rule, is worse than it has ever been."²

At first the representative members in the Legislative Council did not claim a complete measure of control over the natives in the event of self-government being granted, but were content that all measures relating to native affairs should be referred to the Government in London for consideration and approval.³ This attitude, however, was probably of the nature of an offer in return for continued protection ; at any rate, it did not satisfy the constituencies. Seven years later, in 1888, the Council took some pains to remove the prevailing impression that, were responsible government established, the control of native affairs would practically remain in the hands of the Crown, observing that it was the essence of responsible government that the local administration should possess full control over all classes of the population.⁴ But now the Council took the wind out of the Imperial Government's sails by advocating as strenuously as the latter had ever done some form of representation of native opinion and native interests. Certainly the prolonged discussion of the subject had been stirring the white community to a readjustment of their early views. All this was to the good of the settlement, but the home Government insisted on some positive constitutional guarantee being afforded for the maintenance of native interests. The Council was not irresponsive. They suggested a legislature of two chambers. The seats in the upper chamber might be filled by nominees, and this House alone could be given the power to initiate legislation intended to deal with the Kaffir population.⁵ The Secretary of State, however, did not consider this expedient would contain any security that

¹ *Parl. Papers* [C-3174], p. 4.

² [C-3174], p. 10.

⁴ [C-6487], p. 8.

³ [C-6487], p. 9.

⁵ *Ibid.* p. 15.

adequate laws would be passed or sufficient money voted for the benefit of the natives,¹ particularly as the second chamber would have the initiation of money Bills. Being asked to offer a solution he suggested that all Bills exacting compulsory service of natives or restricting their freedom in any way or altering their old laws or increasing the taxes paid by them should be reserved by the Governor. He also thought a Native Protection Board independent of the legislature might be established and a sum of money should be reserved under the absolute management of the Governor to be spent annually for the education and general advancement of the natives.² This was written in August 1889. The Colony now only too gladly reverted to the idea of a unicameral legislature, but again the Secretary of State objected. Responsible government with only one House was an unknown thing in the Empire, and it was very desirable to have an upper chamber which would be expected to guard against hasty and ill-considered legislation for the non-European population. In 1892 the British Government demanded the erection of an upper chamber as an indispensable condition to the granting of responsible government.³

The third difficulty that had to be met arose from the presence in the Colony of a large body of natives of India.

The Indian population. Owing to the unreliable nature of the Kaffir as an agricultural labourer a commencement was made in the fifties with the introduction of coolies at the public expense. Within a few years several thousands arrived, and contrary to the expectation of the promoters of the scheme, they were not anxious to leave the country when their periods of indenture expired. In 1881 they numbered 25,000, thus nearly equalling the European population. As yet there were among them only some eight or nine dozen registered electors, but large numbers of names were being pushed forward for registration. There was considerable uncertainty as to the position of this class of men under the Charter, so three Bills were introduced into the Legislative Council in 1880 aiming at limiting the Indian franchise by demanding an education test for electors. In the same year a select committee of the Council dealt very summarily with this question by simply recommending the exclusion of the Indian population from the franchise.⁴ It was feared that in course of time the Indian vote might swamp the European vote. Another objection was that if the Indians, who belonged to another country and were only brought into the Colony as labourers, could by residence and by a property qualification obtain the franchise,

¹ [C-6487], p. 22.

² [C-7013], p. 19.

³ *Ibid.* p. 24. Cf. p. 74.

⁴ [C-3796], p. 6.

then grave dissatisfaction would be felt by the Zulus of Natal, who after all belonged to the country, assisted in police and military duties, and contributed a large proportion of the revenue. Yet the Indians were on the whole considerably further advanced than the Kaffirs in the scale of civilisation, they were not living under a separate code of law of their own, they were contributing a good deal to the agricultural progress of the Colony, and it was displeasing to the imperial authorities that any of the sons of the Empire should be placed under disabilities. But as a Bill was passed and sanctioned in 1883¹ providing for the enfranchisement of unindentured Indians possessing the necessary property or residence qualifications if they could write out an application for registration in English or Dutch and sign their names in European characters, the Indian franchise was not a serious ground of difference between the Colony and the Government in London during the later efforts that were made to procure responsible government.

The next point to be settled touched the relations that were to subsist between the Governor and the Executive Council. *Relations between the Governor and the Executive.* Under the 1856 Charter, and by Royal Commissions and Instructions issued since that date, the Governor was commanded to consult the Executive Council on practically every question on which a decision was to be taken, but he could act against the advice of a majority of the members. He alone was entitled to submit questions to the Council, but any member had the right to request him to submit any matter. He could either decline or accede to such a request. In practice the custom grew up, however, for the Governor to lay before the Council only the more important questions connected with the administration of the government of the Colony and such questions as the law demanded should be dealt with by the Governor in Council. The view of the successive Governors very probably was that they were responsible to the British Government, and that the Council was not so responsible. This view was confirmed by the Secretary of State in 1883² when he was called upon to settle a difference between the Governor and a section of the Council. So far there was little real trouble, but in the negotiations over the relation between Governor and Executive in the event of self-government being conceded, there arose the ever-recurring native question. From the early years of British rule in Natal the Lieutenant-Governor had occupied the position and held the title of Supreme Chief of the native tribes.³ His authority

¹ No. 124.

² *Vide* Preamble to Ord. 3-1849 (No. 141),

³ [C-3796], p. 86.

was absolute in all matters political, while in the administration of justice he acted through appointed deputies. Later on his authority was formally recognised by statutory enactments.¹ The point is that this authority was most of the time exercised by the Governor on his own personal views. The standpoint taken up by the colonists was that if they were to receive responsible government this procedure should be altered by the home Government, which ought to instruct the Governor to act on the advice of his Ministers in native affairs as in all other matters; but this the imperial authorities would not concede. The powers of the Supreme Chief were to be left in the hands of the Governor apart from his Council, except in the few particulars which, by the Code of Native Law, were vested in the Governor in Council.² This was a serious limitation of what is generally understood by responsible government, for it affected the Colony in nearly all its most vital interests, and towards the end of the agitation under review the scheme was nearly wrecked on this issue. Yet the Secretary of State remained firm on this point, though he modified his early views to the extent of promising that the colonial Ministers would be made acquainted with any action which the Governor might propose to take with regard to the natives. Mutual goodwill and co-operation could go a long way towards saving any situation that might arise, and he had little doubt that in every, or nearly every, case the Governor would be able to arrange satisfactorily with his Ministers as to any course to be adopted, although in the last resort the decision would rest with him.

Apart from his functions as Supreme Chief, though partly covered by those functions, were other duties of the Governor having reference to the native problem. Up to 1882 all British territories in South Africa were governed by the High Commissioner, who was also the Governor of the Cape Colony. In that year, however, the Governor of Natal was appointed a Special Commissioner for Zulu Affairs to conduct relations with the native tribes of Zululand.³ It was a recognition that the future of Zululand would be intimately connected with that of Natal. The terms of the commission are instructive: "We do hereby authorise and empower you in Our name and on Our behalf to take all such measures, and to do all such things in relation to the Native Tribes of Zululand as are lawful and appear to you to be advisable for maintaining our Colony of Natal in peace and safety, and for promoting the peace, order, and good government of the tribes aforesaid, and for preserving friendly relations with them. . . ." The

¹ Nos. 146 and 149 (Annexure).

² The commission is given in [C-3174], p. 20.

³ [C-7013], p. 41.

natives in Natal and those in Zululand were closely akin, and any matter affecting one group would also influence the other. But if responsible government were introduced in Natal the British Parliament would object to the speedy annexation of Zululand. An Aborigines Protection Society in London was keeping its eye on native conditions in South Africa,¹ and the feeling was abroad in Great Britain that the Zulus were being harshly treated. Yet if complications arose in Zululand it was the colonists of Natal who would suffer, and no less an official than the Attorney-General of the Colony gave it as his considered opinion in 1891 that the results would be mischievous if the government of the two countries were placed into different hands. This was not what the Secretary of State desired. On the contrary, keeping the direction of native affairs in Natal under the management of the Governor, he was perfectly logical in insisting that the same control should be extended over Zululand.

The last point that needed clearer definition was the relation of the Colony to the other countries in South Africa.

This necessity arose from an incident that occurred in 1882. The Natal Legislature being anxious to open railway communication with the Orange Free State and the Transvaal in order to give the Colony the benefit of the transport of goods to those countries, requested the High Commissioner for South Africa to arrange a conference of delegates of the three countries. The High Commissioner considered it his duty to inform the Government of the Cape Colony of the scheme, and Natal took exception to this, stating that its request had been directed to the High Commissioner as such and not to the Governor of the Cape Colony.² Next year the President of the Orange Free State opened the question of fixing certain points in the boundary between his State and Natal, addressing his communication, not to the High Commissioner, but to the Governor of Natal, who received it and dealt with it in the Executive Council.³ This was probably unconstitutional, and it was not the first time that Natal communicated directly with outside territories. On being requested to explain what would be the relations of Natal with the Cape Colony and the Republics in the event of self-government being introduced, the Secretary of State gave an evasive reply. No doubt he felt that the question would settle itself in course of time through experience far better than if he were to lay down fixed rules of procedure. The Ministers of the two Colonies, he thought, might correspond on matters not requiring the intervention of the Governors.⁴ Relations with the Republics would be conducted through

¹ [C-3796], p. 64.

² *Ibid.* p. 41.

³ *Ibid.* p. 80.

⁴ [C-6487], p. 22.

a High Commissioner, and the Governor of Natal might not improbably be appointed a High Commissioner for this purpose. On the point of established constitutional theory, however, he was emphatic. The granting of responsible government would not give the Colony power to make treaties or enter into alliances with outside States.¹

Such were the views of the Colonial Office and of Natal. On several points they had at first been diametrically opposed, but South Africa is the land of *via mediæ*. Both parties shifted their ground to a greater or less extent on various points of difference, and even a cursory perusal of the instruments which established responsible government in 1893² will show that the programme of neither party was fully carried out in the end. After all, many of the minor differences had arisen from the inexperience of the colonists, and it was repeatedly necessary for the Secretary of State to point to constitutional law and practice in Canada, in the Cape Colony, and in Australia. But the people were quick to learn, and by winning the confidence of the imperial authorities in their ability and moderation succeeded in gaining some benefits at first denied them.

§ 5. NATAL, 1893-1910.

For seventeen years Natal existed as a full-fledged Colony possessing responsible government. By responsible government in the British Empire is generally meant that *Responsible government.* the Executive Council, consisting of Ministers, advises the Governor, and that in performing executive duties he acts on such advice. And the Ministers, being appointed by the Governor from the one of two or more parties which commands the confidence of the enfranchised inhabitants, are supposed to be responsible to the Legislature for the advice they give. The elected members of the Legislature are obviously responsible to their electors for carrying out certain broad but definite principles which the majority favours.

In England it has been said in quite recent years, and truly said, that the Crown has no option, but must, in accordance with established constitutional usage, act according to the wishes of the Cabinet. "The advice of the Ministers is the act of the Crown." In *Limitations to colonial self-government.* works on colonial constitutions a good deal is always said about the advice of Ministers given to their Governors, but nothing about the Governor's advice to his Ministers; yet in matters of imperial interest—if in no others—such advice is given, and it is generally effective. In such matters a wide discretion is left to the Governor. Whilst he is expressly

¹[C-7013], p. 38.

²Nos. 126-128.

enjoined by Royal Instructions to guide himself by the advice of his Executive Council, a discretion is generally given him in those instructions to act in opposition to the opinion of the Council whenever he sees sufficient cause to dissent from that opinion. One reason for allowing a Governor some latitude is that it is necessary to fulfil British international obligations. Besides, the Governor has by his office the supreme command of the imperial troops stationed in his colony, and no movement of those troops can take place for any purpose whatever without the sanction and authority of the Governor acting on his unfettered personal responsibility. Such was the position in 1893 in all self-governing colonies. In Natal the presence of a large native and Indian population was regarded as affording a special and additional reason why the Governor should not be too firmly tied down. And as regards Natal the royal veto was apt to be exercised where in other colonies a compromise would be negotiated.

But whilst a degree of freedom was theoretically reserved to the Governor for cases of emergency, it was actually the policy of the white population that was eventually carried out. In 1896 a law was passed which in effect placed in the hands of the Ministers the power to grant or withhold the franchise in the case of the Indian residents,¹ and the next year, when Zululand was annexed to the Colony, it was laid down that the Governor in Council could legislate by proclamation for that territory² during a period of eighteen months, after which the province would pass under the legislative control of the Parliament of Natal. This was a complete departure from the position taken up by the Secretary of State for the Colonies a few years earlier. After the Anglo-Boer War a further accession of territory came to the Colony by the addition of a strip of Transvaal territory, and Natal was then ready to join hands with the other self-governing colonies of South Africa.

SECTION V.

THE ORANGE FREE STATE, 1836-1910.

The narrative relating to the course of events in the territory which afterwards became the Orange Free State must be connected with the history of Natal and of the Cape Colony; for all the emigrants came from the Cape Colony, while some of them settled for a time in Natal. There were three main movements, at different periods, through which the trans-Orange territory became

¹ No. 129.

² No. 130.

populated by white men. First, there were people who without discarding British authority moved across the river from the north-eastern parts of the Cape Colony in search of eligible pasturage during certain seasons of the year. Many of them began to settle down beyond the river long before the Great Trek commenced. It is important to note that this first group settled not only in what is now Orange Free State territory, but also to the westward, in what afterwards became Griqualand West. The second movement took place in 1836 and subsequent years as part of the Great Trek. Keeping to the westward of the great Drakensberg range, some emigrants spread themselves out in the Orange River territory in the vicinity of what is now Winburg. Others kept on moving till they had crossed the Vaal River and its tributaries, and their doings will therefore be described in the section dealing with the South African Republic. Others again crossed the mountains into Natal. These have already been discussed in the portion of this Introduction relating to Natal. The third movement came from Natal, which supplied settlers to the Orange River territory during the years 1843 to 1845, when British authority was being established at Durban and Pietermaritzburg.

Up to this time there was a Volksraad at Pietermaritzburg and an Adjunct Raad at Potchefstroom. Subject to Potchefstroom were not only the settlers to the north of the Vaal, but also, though in a somewhat vague and unsettled manner, most of those who had established themselves in the trans-Orange country. When the Volksraad at Pietermaritzburg was abolished the lesser body continued to claim authority over the emigrants who had not passed under British rule, and it arranged disputes with various tribes to the south of the Vaal River. Now there was a movement farther northward and eastward arising from two causes: (1) Large native states were created on the eastern frontiers of the Cape by the British authorities,¹ who desired to remove the possibility that an emigrant state should arise; and (2) the Natal seaport was lost to the emigrants through its occupation by the British. The movement was away from British control through native chiefs and towards the Portuguese port of Lorenzo Marques. This was in the later months of 1844 and during the year 1845. The most independent of the farmers were thus removed beyond the Vaal, and the establishment of a British Resident with a magistrate's authority supported by a small body of troops to the south of that river was easily accomplished. The Resident selected in 1846 for his headquarters a spot in the centre of

¹ *Parl. Papers, S. Africa, C.O. 42*, pp. 57-61. Cf. Theal., *Hist. of S.A.* 1795-1872 II. 481 ff., and Documents Nos. 153 and 154 below.

*Conditions
before the
establishment
of British
rule.*

the country which was bordered by the Orange and the Vaal. There the town of Bloemfontein arose. A little to the northward was the town of Winburg, where a landdrost and heemraden were established administering justice and performing administrative functions under the auspices of the Raad at Potchefstroom. That the Raad to the north of the Vaal had jurisdiction over the trans-Orange settlers explains how it came about that in the next few years Transvaalers offered to intervene in disputes between their compatriots south of the Vaal and the British or the natives. From the moment when the emigrants left the Cape Colony the authorities had intended to extend their sway over whatever territory might be occupied. It was easy to accomplish the object after 1845. Some time was spent in attempting to reach an agreement with the Griquas, who had been made an independent people, and with the Basutos, who also claimed territory to the north of the upper reaches of the Orange. When this was effected, a proclamation was issued in 1848 annexing to the Queen's dominions the territory lying between the Orange and the Vaal west of the Drakensbergen.¹

The question arose, by what title did the Crown hold authority over the new Colony? The Attorney-General of the Cape took the view that the Orange River Sovereignty, as it came to be called, was "a colony by occupancy." This the High Commissioner regarded as unsatisfactory, for it meant

*Who was to
legislate for
the new
Colony?*

that the Parliament of Great Britain would have to legislate for the district. Could the matter be brought before a court of law it would have constituted one of those delicate series of new combinations of circumstances with which the history of South Africa teemed during the last century. A colony planted by another colony, *i.e.* by practically unopposed settlement,—is it to be subject to the legislature of the mother colony or to that of the home country? And if the newly planted colony has formally declared its independence, what are its relations towards those two? The facts, however, were plain enough. The greater part of the territory had been conquered from a group of people who had previously performed all the functions of an independent state, but who

The narrative recognised as independent by the British tory which afterwards the High Commissioner did not base his connection or settlement. He stated that before the Cape Colony subjects into the country north of the Cape commenced, "that country must be held time in Natal. There were native chiefs"—which was not the periods, through which that of the territory concerned. He

*Three main
streams of
immigration.*

¹ No. 129.

¹ No. 155.

further affirmed that just prior to his proclamation annexing the country he had conferred with all the native chiefs, and that they had agreed to cede the sovereignty of the country to him as the representative of the Crown.¹ The country therefore was held by cession, and the High Commissioner could legislate on behalf of the Crown. It must be noted, however, that the constitutional theory involved was not very strictly observed in South Africa. Or at any rate when the facts of a case were inconvenient they were made to conform to the theory; but that was a matter that concerned the Crown and the British Parliament, and Parliament was content.

Preliminary arrangements for the government of the Sovereignty were published a few weeks after the annexation,² but in the next year these were superseded by a proclamation of the High Commissioner which gave the new Colony a constitution.³ The government was carried on by the High Commissioner and a Council of five official and eight non-official nominees. The highest of the officials, the British Resident, acted for the High Commissioner in most matters and was the president of the Council. For the administration of justice in the districts the Cape magisterial system was followed, and the employment of the Roman-Dutch Law was confirmed, except as referring to natives, who retained their own laws and customs within certain territories allotted to them. Serious criminal cases involving European residents were tried by a court of three or four magistrates. The most serious offences had to be tried by judges of the Cape Colony. The constitution was very similar to the one existing at the Cape. One of the chief reasons why the people had left the old Colony had been the absence of a satisfactory system of representative government. Since the date of their departure they had begun to enjoy the freedom for which they longed, so that it was inevitable that they should be discontented when the system from which they had fled was reimposed.

In 1854 the Sovereignty was abandoned by Great Britain. Even to-day the reasons for this withdrawal are not quite plain. Probably many motives were at work. Britain was drifting into war with Rumania, and had to support Turkey and defend her Asiatic official. And as her standing army is apt to inflict has generally found it necessary to order in the eyes of various parts of the globe to proceed to offence committed. whenever a serious war broke out. At removed from their drawal there were serious troubles & the laws are not quite

¹ *Parl. Papers, O.R. Sovereignty*, 19th May 1836, 316.

² No. 156.

³ No. 161.

*Reasons for
the abandon-
ment of the
sovereignty.*

the Sovereignty. British arms had met with reverses and British prestige had not been vindicated. The imperial authorities were unwilling to incur heavy expense in South Africa, and unable to supply at short notice a large body of troops. They probably preferred, too, to regain the goodwill of the natives. At any rate, in the face of more pressing affairs in Europe the question of the Orange River Territory could easily stand over for future settlement, particularly as the country was still undeveloped and the tracts that had fallen under direct British rule seemed to be of no great value. Besides, a strong party in the Sovereignty was opposed to British rule, and they had the sympathy of the settlers in the Transvaal. Here, too, trouble might arise at any moment. Possibly one of the strongest reasons for withdrawing was a desire to conciliate public opinion in the Cape Colony. Very many of the Cape burghers strongly disliked the assumption of sovereignty beyond the Orange. Some who had no objections to the step on national and sentimental grounds were averse because the Cape was being made to pay much of the expense involved in governing the Orange River Sovereignty. Such views were expressed in the Cape Legislative Council with warmth and occasionally with bitterness. It was politic to meet Cape views while a serious war was being waged in Europe; for after all the Cape Colony was throughout the century the basis of British authority in South Africa, and more apparent vagaries in British policy in South Africa than most people realise were due to a wish on the part of the imperial authorities to defer to Cape opinion. Whatever might happen in other territories, it was of vital importance that the old Colony should not be alienated. By so much as the Government in London failed to carry the Cape Colony with it in the steps it took, by so much would imperial interests be jeopardised. Indeed, looking at the Empire as a whole, imperial policy must not be criticised only by referring to the wishes of the home Government, but by calculating the influence on it and on its governors and commissioners of the various outlying parts.

The Bloemfontein Convention of 1854 gave complete ~~freedom~~ life to the people residing between the Orange and the ~~narrow~~ Vaal. They were no longer connected with tory which after ~~the~~ State across the Vaal which had been reconnected two years earlier. Indeed, in 1852, while the Cape Colony on a recognition of their independence it ~~clear~~ that they were not to interfere to time in Natal. There were ~~native~~ of the trans-Orange inhabitants, through which ~~of~~ ing left in the lurch. Therefore

*Three main
streams of
immigration.*

¹ No. 129.

¹ No. 1.

join the northern State, and

when such a suggestion was afterwards made the High Commissioner set his face hard against the project. Consequently a new State arose, taking the name of the Orange Free State, thus realising the people's ambition expressed in 1837 "to establish our settlement on the same principles of liberty as those adopted by the United States of America, carrying into effect, as far as practicable, our burgher laws."¹ There was to be a Republic then, and legislation was to be modelled after the old Cape Laws. One legislative chamber called the Volksraad was created, consisting of elected members, and a President was chosen.² The Executive consisted of two Government officials and three ordinary members elected by the Volksraad. It held monthly meetings, at which the President of the Republic was the chairman, and measures were decided upon by a majority of votes. Field-cornets and field-commandants were elected by the burghers. The constitution was drawn up and adopted in 1854, and before the end of the year laws were passed to establish Dutch as the official language,³ and to define the duties of field-cornets.⁴ The other salient features of the Free State constitution are given so fully below that it is not necessary to say more on the subject. It may be pointed out, however, that in its local government and its higher courts of justice it copied the Cape systems rather closely. The district courts of justice indicated an extension of the old Dutch system that had existed at the Cape, and the elective principle was introduced here as elsewhere. Trial by jury was established. The close connection and almost daily intercourse of the people of the Free State with those of the Cape Colony had the inevitable result that many of the institutions which worked well in the one would be introduced into the other. Besides, during the years when British authority extended over the territory Cape institutions had already been established, and the changes made in those were mainly intended to popularise them. The central government, of course, was something quite different.

Some documents are given to illustrate the manner in which subject native tribes were governed. As in Natal, the *Government of the natives* franchise was not given them, but they generally retained their own laws and customs administered by their own chiefs under the guidance of a European official. Yet, native chiefs and their councils were often apt to inflict punishment on their followers which was in the eyes of Europeans out of proportion with the offence committed. For this reason all criminal cases were removed from their jurisdiction—so it would seem, though the laws are not quite

¹ Quoted by Theal, *Hist. of S.A. 1795-1872*, ii. 316.

² No. 159.

³ No. 160.

⁴ No. 161.

plain on the point—and they were not permitted to inflict corporal punishments. The criminal laws of the State were made to apply to the natives to their immense advantage and to the exclusion of any chance of undue favouritism or hasty revenge on the part of the chiefs. Two other principles were established: In the first place, native tribes were made subject to the legislative and administrative authority of the President and the Executive Council, being thus removed from the control of the popular assembly by the desire of that body itself. It will have been noticed that a similar arrangement existed in Natal, at least till the introduction of responsible government. Secondly, the idea of segregation was affirmed. In the reserves set aside for subject tribes no Europeans were allowed to reside without the consent of the Executive Council. In practice this came to mean that a missionary, a few traders, and a few Government officials were the only white men who went to live in those reserves. It is not a final solution of the native problem, nor can it be adopted everywhere, but personal observation has shown that in such a district the natives have not deteriorated, as they have undoubtedly done wherever they reside among Europeans, but have become industrious, sober, and contented, while they are gradually being civilised and Christianised. As there has been no familiarity between whites and blacks, the Kaffir still respects the European and the civilisation for which he stands.

The Orange Free State had a fairly smooth career, though in its infancy it had a severe struggle with the Basutos, who when conquered passed under British rule. Considering the amount of trouble the Cape had with those people and the loss of money and dignity it suffered at their hands, it was perhaps well that they did not fall to the guidance and management of the little State. Though it lost to Great Britain a diamond-laden tract of territory,¹ it never went to war with its great neighbour. Its own diamond mines at Jagersfontein did not attract a large and difficult alien population as did Griqualand West and the Witwatersrand. No industries arose. The farming community was spared the disadvantages of the commercial and materialistic spirit which degraded politics and retarded education elsewhere. Its idealism remained unimpaired, and it will be strange if it does not turn out to be the bearer of ideas to the other communities in the present century. The smoothness of its career was reflected in the stability of its constitution. Its laws were as terse and finished as could be expected, nearly as complete and polished as could be desired. The tiny annual publications show that as regards its constitution it

*Stability of
the constitu-
tion.*

¹ No. 171.

pursued the even tenor of its way till the end and hardly found any modifications necessary.

Casting in its lot with the northern Republic in the war of 1899 to 1902 the Free State was annexed by Great Britain on the 24th May 1900, under the name of the Orange River Colony.¹ The officers who remained in the field subscribed to the Vereeniging Peace Treaty two years later.² Military rule came to an end by virtue of Royal Letters Patent dated 2nd August 1901, which provided for the government of the Colony by a Governor and by nominated Executive and Legislative Councils. These came into operation on 23rd June 1902. The period of Crown Colony Government ended with the publication of Letters Patent dated 5th June 1907, which set up the system known as responsible government.³ There were a Legislative Council and a Legislative Assembly for which provisions similar to those passed for the Transvaal were enacted.

The country becomes a British Colony. Its constitution.

SECTION VI.

THE SOUTH AFRICAN REPUBLIC, 1886-1910.

It has been pointed out that the great constitutional lesson which the Dutch burghers had to learn during the second quarter of the nineteenth century was to direct their efforts towards securing the control of the central government, and that thereby they could acquire the local liberties after which they hankered. Centralisation *versus* localism, the Colony against the District, the State against the Individual—that was the issue at the Cape. Before the farmers could learn the lesson fully several thousands of them left the country, carrying with them the ideals which had become a part of their life. Many of those who departed had not possessed the patience to learn, and many did not consider the lesson worth acquiring, for it would be useless and untruthful to say that national antipathies did not act as an incentive towards the exodus of the thirties. But surely when the emigrants arrived to the north of the Vaal national rivalries had ceased for the time being. What remained was the sense of personal dignity and importance.

For a few years this lay in the background. In the face of threatening dangers the community united to clear for itself habitable regions where marauding natives should not trespass. When they believed this to have been accomplished, and after they obtained a recognition of their independence,⁴ the different localities that

Local and personal motives.

The rise of three republics.

¹ No. 172.

² No. 173.

³ [Cd. 3526.]

⁴ No. 177.

had been settled by various parties at different times drew away from each other, with the result that five years elapsed before a satisfactory constitution could be established. And even while that instrument was being adopted by a section of the community there were no fewer than three republics to the north of the Vaal. In 1858, however, two of these, Zoutpansberg and the South African Republic—the latter name had been adopted in 1853¹—joined hands, while Lijdenburg maintained its independent position for two years more, and was eventually brought into the fold by an agreement² which contained a series of compromises admirably illustrating how impossible it was to overcome the feelings of local and personal independence.

The constitution which was finally accepted by all the burghers of the Transvaal territory was a lengthy document.³

The constitution adopted. With the Grondwet of the Orange Free State and the demands for constitutional liberties made by the people of the Cape and Natal it forms a series for the study of the political theories of the Boers of South Africa. Naturally they drew up the provisions with their experiences of earlier years very vividly before them. What they had disliked in the Cape Colony they discarded, what they thought had suited their needs they retained—whether it was something quite old or something very novel to their experience did not matter. The whole document becomes one of the most interesting instruments ever published in South Africa if it be read with this obvious fact in mind. There was, *e.g.*, the insistence that a member of the Volksraad should not be a Government official—a protest against the position that had existed at the Cape since 1652. The executive was to be responsible to the legislature. Treaties and alliances were not to be made without the consent of the legislature. The State was to assist in maintaining the Church. Courts of landdrosts and of landdrosts and heemraden were erected to administer justice, these officials being selected in the case of the chief magistrates by the Executive Council, but subject to the approval of the people, and in the case of the heemraden by the outgoing heemraden, but again subject to approval by popular consent. A High Court of Justice consisting of three landdrosts was appointed to go on circuit. This, and the adoption of a jury system, were two expedients copied from institutions established at the Cape under British rule. As in the case of the Free State, the natives were totally excluded from the franchise, and military officers were elected by the burghers.

¹ Nos. 179 and 180.

² No. 182.

³ No. 188.

But the most significant feature about the constitution is the reiteration of the theory that the people were the source of all authority. The people will have no equality between blacks and whites. The people will have no slavery. The people entrusts the task of legislating to the Volksraad, the government to the Executive Council, defence to the army, the administration of justice to landdrosts and jurors. When a law is passed, it cannot as a rule be enforced until the people has signified its assent. When a person is arrested for crime this is done in the name of the people. Judgments are pronounced in the name of the people, and when proclamations are issued, they end with the words: God save Land and People.

Another feature of the constitution was its peculiar flexibility. Being the fountain of all authority the people did not bind themselves down to any rigid measures. It was well for them that they did not, for they would gain in time by education and experience. Some of the clauses could be interpreted in more ways than one, while situations could quite easily be imagined that were not covered by the provisions, and very often no adequate arrangement was made for carrying out the rules laid down¹ or for punishing any breach of those rules. As a result the custom grew up of modifying the provisions in any respect deemed necessary by a resolution of the Volksraad passed by a majority of votes taken at an ordinary session of that body.

A third point of note was the absolute supremacy of the legislature in the constitution. This was laid down in express terms in 1859. Every Court was to observe all the resolutions of the Volksraad as law, and no Court was to express an opinion as to the validity of any law.² The law was as explicit as it could be, and the Courts observed it for some thirty-seven years. Then an attempt was suddenly made by the High Court to set it aside and establish new precedents.³ The effort failed, and the incident, though it aroused a good deal of discussion and some political agitation outside the Republic, mainly served to bring to light the sound common-sense arrangement of the constitution. The same arrangement is one of the characteristic features of the British constitution, for an English court never thinks of declaring a law passed by the Imperial Parliament opposed to the constitution. The absence of a similar provision in the United States constitution has in past years led to much trouble.

¹ See, e.g., No. 225.

² No. 185.

³ See No. 231.

As the chosen man of the people the President was in a very strong position. He became the leading figure in the executive as well as in the legislature though he did not select his executive, had no veto on legislation, and could not dissolve the Volksraad. His patronage to office, too, was subject to the approval of the legislative body. The President's influence was due to the stress and danger to which the country was always exposed. The fact that the holders of the office nearly without exception embodied the passionate love of independence which throbbed through the people and consistently acted up to it, explains the confidence they placed in him and the large powers they delegated to him.

The government of the country being entirely under the influence of the burghers, the subject of local government was not given so much attention as had previously been bestowed on it. The Field-cornets became elective officials¹ instructed to maintain the peace in the several wards of each district, to register the names of electors, to hold inquests, to regulate the conduct of natives in their vicinity and to perform important military duties in time of war. In 1870 Justices of the Peace were appointed for the better maintenance of the laws.² They were to be of two classes, corresponding pretty closely to the Justices who assisted in the government of England during the first and the second half of the fourteenth century. The one class was empowered to take evidence on oath, to make arrests on such evidence, and to conduct preliminary examinations. They had to hand over prisoners to the public prosecutor of their district to be tried by the courts of law. They could further bind over persons to keep the peace. The second class consisted of men who, with the title of Resident Justices of the Peace, were stationed in the smaller towns where there were no landdrosts. These could hear and determine minor civil and criminal cases. All these officials were an exception to the elective principle, for they were appointed by the President of the Republic; but, as was the case with other officials, they had to take an oath to be faithful to the people of the Republic. District Councils³ and boards of town management arose in course of time.³

The division of the Republic into districts and field-cornetcies had been accomplished with a view to purposes of defence. These subdivisions were managed for some time by the Executive Council with the assistance of landdrosts, field-cornets, market-masters, and pound-masters. Minute provisions were made in 1876 for men going on military service.⁴

¹ No. 183.² No. 189.³ No. 202.⁴ No. 194.

The President could call out a commando to defend the country or quell internal risings, but unless the danger was imminent he was required to summon the Executive Council and take its advice. Most probably he was to decide in each case whether the danger admitted of delay, but in any case he had afterwards to justify his action to the Volksraad. All male inhabitants, a few classes excepted, were liable to serve if they were between the ages of sixteen and sixty.

Such in very broad outlines was the constitution when in 1877 the Republic was annexed to the British Empire.¹ The

The annexation period was not marked by any constitutional changes of permanent importance.
The government was a despotism; but in 1881, when the inhabitants rebelled after futile missions to England and petitions for the restoration of independence, the Government in London permitted the State to be re-established, though under British suzerainty.² For three years the people chafed under the control which such suzerainty implied, till it was virtually withdrawn as a result of friendly negotiation, while the right was reserved for the British Crown to control the treaty-making power of the Transvaal.³

In 1885 gold reefs of great richness were discovered in the territory which up to that time had been devoted only to pastoral and agricultural pursuits. The Dutch burghers were not the class of people who could readily turn their hands to gold-mining, so that the work fell to strangers, many thousands of whom streamed into the country. The industry grew with almost miraculous rapidity. It brought much wealth to the country and to the miners. The revenue went up by leaps and bounds. But it also brought a new factor into Transvaal politics. The immigrants began to agitate for political liberties. At first the country turned a deaf ear. When the Government was requested by its friends in the Cape Colony to arrange for the representation of the newcomers in the Volksraad it replied that the districts where the mines had arisen all had their members. This was really evading the question, for those representatives were being chosen by the old inhabitants, while the immigrants did not possess the franchise. Round the franchise question then the agitation centred.

When the constitution was adopted in 1858 the white population was practically homogeneous, and as all the people had taken an equal share in opening up the country

The franchise.

all male white inhabitants over twenty-one years of age could vote at all elections. Thereafter all such persons born in the Republic became enfranchised in the ordinary course

¹ Nos. 196 to 199.

² Nos. 200 and 201.

³ No. 204.

of events on becoming of the people grants became burghers after one year's residence. became the act that laid down this rule was the Franchise Law. Such immigrants were further to be possessors of immovable property—no particular amount was demanded—and they had to take an oath to be true to the people and the Government of the Republic, to obey its laws and to maintain its independence. This arrangement was not regarded as unsatisfactory, as there were as yet few people to complain; but now the annexation came, and the direct result of this step was that in 1882 the franchise was limited to those who had resided for five years.¹ Such was the position when gold was discovered and the city of Johannesburg began to shoot up on the Witwatersrand, a little distance to the south of Pretoria.

A small concession was made to the mining industry in 1887 when it was laid down that public diggings could be erected into separate electoral divisions, thus removing the chance of swamping the mining vote by the votes of farmers in the surrounding wards. But this was only patchwork, as the miners and their employers could only vote if and when they had been registered as residents for five years.² It is obvious that the founders of the Republic were afraid that if the rapidly increasing number of immigrants were given the franchise they would soon be able to subvert the existing republican form of government and pass measures oppressive of the farming community, the Dutch language, etc. They were very probably mistaken. But the real fear was that the immigrants in the Republic would eventually unite with an outside power to deprive the country of its independence.

A further step in the direction desired was taken, however, in 1890. This was the greatest change that the Grondwet underwent while the Transvaal preserved its existence as a Republic. Two laws were passed which must be read side by side.³ Instead of the unicameral legislature which had existed till now two houses were erected, the First Volksraad and the Second Volksraad. The members of the First Volksraad were to be elected by persons who had already obtained the franchise or were still to obtain it by virtue of having been born in the country. Voters had to be sixteen years of age. Obviously this body would be practically the same as the old Volksraad. The electors of the Second Volksraad were persons who possessed the franchise for the First Volksraad and also other white male inhabitants of sixteen years of age who

¹ No. 193.² No. 214.³ Law No. 7 of 1882.⁴ Nos. 219 and 220.

had resided for two years, who took an oath and paid £5. Anyone who for ten years was an elector of the Second Volksraad could become an elector for the First. This second body could legislate on matters relating to the mining industry, roads, the postal service, patents, companies, bankruptcy, civil and criminal procedure, and such other matters as the First Volksraad might at a future date delegate to its care. The First Volksraad could "deal with" any law passed by the Second Volksraad. The language of the Act is so vague that it could probably be regarded as within the competency of the First Raad to approve or amend or reject a law passed by the Second. If no change or rejection was made by the First Volksraad, and if, further, the President decided to publish such a law, then it was to take effect. No provision was made in the event of an amendment by the First Volksraad whether the law was to be referred back to the Second Volksraad or whether it was to take effect as amended. All that can be said in favour of these arrangements is that immigrants could get the right to vote after two years' residence, and that the body which they were to assist in electing could initiate legislation on some very important matters and that the other house—presumably—could not.

In 1891¹ and 1893² the differences between the two kinds of franchise were further specified. Persons who possessed *Two kinds of franchise.* the franchise in 1890 and those receiving it by right of birth could vote for Field-cornets in their respective wards, for Commandants and members of both Volksraads in their respective districts, and for a President and a Commandant-General throughout the Republic. Those who became burghers by naturalisation, on the other hand, could only vote for Field-cornets, Commandants, and members of the Second Volksraad. And it was now left to the Government to decide in the end whether papers of naturalisation should be granted to any applicant or should be withheld. To the strictness of this law was added an unwonted rigidity, for it was laid down that no extension of the franchise could be effected unless the plan was published beforehand for one whole year. Even then it could be adopted only if two-thirds of the old electors agreed to it. The burghers of the Transvaal and their friends held that further privileges could not be given to the people of foreign birth because they were intriguing with persons outside the Republic and aimed at the destruction of the country's independence, while the other side maintained that the restlessness of the alien population was due to the withholding of constitutional rights.

¹ Law No. 13 of 1891.

² No. 224.

Matters remained on this footing till, during the closing days of 1895, the Transvaal was invaded by a force operating from the western border which intended to join hands with disaffected people in Johannesburg with the object of overthrowing the Pretoria Government. The effort failed. One of its results was that a law was passed giving the Government power to expel persons who were dangerous to the public peace.¹ Another result was that a close alliance was formed between the Orange Free State and the South African Republic.² No further extension of the franchise was made to the immigrants. Most of them were British, and Great Britain having espoused their cause a war broke out in 1899. On the 1st September of the following year the country was annexed to the British dominions, receiving the name which had previously been in general popular use, the Transvaal.³

By a commission dated the 8th October 1900 the High Commissioner for South Africa was appointed to be Administrator of the Transvaal and of the Orange River Colony.

The Transvaal becomes a British Colony. Its constitution. Military rule in the Transvaal came to an end on 21st June 1902, the date on which Letters Patent were published,⁴ providing for the establishment of the office of Governor. Nominated Executive and Legislative Councils, both consisting of the same persons, were also created by this instrument which was dated 2nd August 1901. It was revoked by fresh Letters Patent dated 23rd September 1902, which provided for the government of the Transvaal on similar lines and also constituted the office of Lieutenant-Governor.

But in the Peace Treaty it had been agreed that as soon as possible representative institutions leading up to responsible government should be introduced. As a step in this direction it was intended to provide for the constitution of a partially nominated and partially elected Legislative Assembly, and Letters Patent to this effect, dated 13th March 1905, were actually issued ;⁵ but a general election in the United Kingdom resulted in a change of Ministry, and the outcome was that before an election could be held in the Transvaal further Letters Patent were issued on the 6th December 1906, conferring full responsible government on the the Colony⁶ and revoking the instruments of 23rd September 1902 and 31st March 1905. This is an interesting example of the way in which the Imperial Executive can sometimes employ prerogative powers to overcome the opposition of the legislature, for it was believed that the House of Lords was

¹ No. 228.² Law No. 16, 1898.³ No. 234.⁴ *Trans. Govt. Gaz. Extraord.*⁵ [Cd. 2400.]⁶ [Cd. 3250.]

hostile to the grant of responsible government at the time. The Letters Patent were published in the *Transvaal Government Gazette* on the 12th January 1907. There were two chambers, a Legislative Council and a Legislative Assembly. The Council consisted of fifteen members nominated in the first instance by the Governor. Vacancies were to be filled by the Governor in Council. In the Legislative Assembly sat sixty-nine members elected by white male British subjects possessing certain qualifications. It was provided that in the event of disagreement between the two chambers of the legislature, the Governor could convene a joint session, when matters at issue would be decided by an absolute majority of votes. The Transvaal had but a brief period of responsible government, for three years later she cast in her lot with the rest of South Africa in the Union of 1910.

SECTION VII.

THE UNION OF SOUTH AFRICA.

A glance at the map of South Africa suggests that the country is by nature suited to form a single political entity.

Early efforts to establish unions in South Africa. To bring about a union or federation of the various parts in some way was the ideal of many men on the spot and of imperial statesmen in London. Numerous unions had been conceived on South African soil and several had been put into effect. The earliest union actually established in South Africa dates back to the year 1840. Three different groups of persons who were engaged in evolving three separate governments formed what may be correctly called a federation. The people at Winburg acquired no legislative body, but fell under the control of a Raad to the north of the Vaal, which in turn performed legislative and executive functions under the auspices of a Volksraad which met in Natal. The Drakensberg barrier made the close association between Pietermaritzburg and the towns to the west impossible, and it has greatly influenced the subsequent history of those parts. Not many years passed before a second union was attempted. When, after the middle of the century, the Free State and the Transvaal arose as independent republics a party grew up in each State which agitated for a union of the two republics. In 1857 recourse was nearly had to war, but the attempt failed, thus making the achievement more difficult than ever. Whilst the movement was going on a suggestion for co-operation between the various governments came from the Volksraad of the Orange Free State. In 1854 it requested that the governments in South

Africa of European stock should assist each other in unavoidable wars with the natives.¹ Nothing came of the proposal at the time, but it is interesting to note that on subsequent occasions when the subject of federation was discussed the native question always figured very prominently. During that decade there were several agreements of union between outlying communities to the north of the Vaal River. By far the most remarkable of these was the union between the South African Republic and the Republic of Lijdenburg in 1859.² As regards the British territories it will be remembered that Natal was at one time united to the Cape Colony, but more as an ordinary district than as a partner in a large governing concern. Sir George Grey lost his office as Governor for recommending a confederation scheme at a time when it was not favoured by the Colonial Office. But the idea survived none the less. Long before the Government in London adopted the plan of federating the states and colonies it was discussed in the Cape colonial press, the Dutch inhabitants taking the lead in the matter. In 1875 came Lord Carnarvon's famous dispatch inviting the colonies and states to a conference to discuss the possibility of a closer political union.³ The Cape Colony favoured the principle, the President of the Orange Free State seemed likely to bring round his Republic, and Natal was an enthusiastic supporter. The South African Republic opposed. It was brought under the British Crown in April 1877. In the middle of May 1877 the Cape Ministry drew up a minute which shows that they were lukewarm.⁴ Before the end of the same month the Volksraad of the Orange Free State in the most courteous of terms declared itself completely opposed to confederation.⁵ The scheme was wrecked for the time being and the permissive South Africa Act⁶ passed by the Imperial Parliament to provide for the union under the British Crown of any two or more of the colonies or states could not be carried into effect. In 1886 another attempt was made to unite the Orange Free State and the South African Republic. A resolution was brought before the Volksraad in each country proposing to appoint commissions to negotiate with regard to an ultimate union between the two Republics.⁷ The Free State rejected the proposal on the ground that by such a union its independence would be endangered by reason of the British suzerainty under which the older Republic was alleged to stand. The idea of union was a very familiar one to South Africans when out of the mists of war the new century

¹ Letter of the Secretary of the O.F.S. Govt. to Sir George Grey, 18th Nov. 1854; MS. in *P.R.O., C.O.*, 48/361.

² No. 188.

³ *Ibid.* p. 18.

⁴ [C-1244], p. 1.

⁵ 40 and 41 Vict. cap. 47.

⁶ [C-1980], p. 14.

⁷ No. 210.

dawned on them.¹ Up to the time, with the exception of individual men of non-indigenous stock like Sir George Grey, Lord Carnarvon, and Cecil Rhodes, the movers towards the unification of the white peoples were in the main of Dutch extraction. They joined forces across the Drakensberg in the early years, they amalgamated to the south of the Limpopo, they tried to join hands across the Vaal, they worked for a united Cape Colony from 1836 till 1854, and in 1872 they prevented the splitting up of the Cape. There was very little coercion in these notable achievements, and in no case was the foundation laid in the blood of their fellow-countrymen.

During the early years of the twentieth century the situation was different to the one of 1875 in nearly every respect.

Differences between early and later efforts.

All the territories were British. The desirability of uniting was pointed out to the various colonies, but no Act was passed at Westminster until each colony had been given the fullest possible freedom to accept or reject the suggested union. The delegates sent to the Convention at which the subject was discussed were not designated by the Colonial Secretary, as had been the case in the Carnarvon plan, but were appointed by the uninfluenced choice of the colonies themselves. During the efforts to work out the earlier scheme an unsympathetic Ministry at the Cape had been dismissed and another substituted. In Natal a part of the constitutional powers vested in the Legislative Council had been suspended, and the body had been radically reconstituted by adding to it eight nominee members and requiring that all laws imposing taxation should be carried by not less than two-thirds of the members present, the operation of these arrangements being limited to five years. The Colony had further been promised responsible government when and if they should federate with other territories. Now, however, there was no curtailment of colonial liberties or colonial independence of action. On the contrary, as an admittedly necessary preliminary to union the two newly conquered countries were given responsible government. Then the colonies worked out a scheme among themselves and all that was done in London was to sanction and register their wishes.

From the point of view of the imperial authorities the desirability of a union is obvious. Such union had already been achieved in the North American Colonies and in Australia. Both these events were regarded by many as necessary steps towards the federation of the Empire into a great Commonwealth of British dominions. For purposes of defence, too, a single

Reasons why imperial statesmen desired a union.

¹ Vide also the proposed Customs Union and the Postal Union of 1884, Nos. 206 and 208.

central government could act more energetically and effectively than a number of comparatively weak communities. Moreover, the unification of the colonies would be the surest means to counteract any tendency to separate that might remain in any of them. For the rest, people in England were watching the development of South Africa with lively interest, and the adoption of so desirable a measure was almost universally favoured.

While these considerations appealed to statesmen in Great Britain and South Africa alike, there were, as might be expected, many reasons which had special weight in the minds of the peoples most nearly concerned. The country is a land of idealists. The task of making a strong and happy nation caught the imagination of the young. The old were worn out with the strife of the previous century. The eye was turned to the future. In a young country with immense possibilities and opportunities the imagination runs little danger of becoming narrow. There is always fresh nourishment to feed it with. And the bulk of the people had for centuries been looking beyond the horizon with an overmastering desire to launch into the unknown. They now saw to the northward huge unsettled tracts of land which awaited occupation and development. The native problem loomed large on all occasions when the subject of union was mentioned. There was no danger that a serious native war would have to be faced, but the numbers of the coloured people were increasing very rapidly and they would want to expand. Their old habits of life needing large areas to grow their mealies and graze their cattle would have to be modified. Many of them were being educated and the systems of government would have to be readjusted. It was eminently undesirable that there should be marked differences in the manner of treating persons of the same blood and colour, perhaps in adjoining areas. A consistent, large and enlightened policy was needed and it could only be worked out by employing the most capable men in the whole country and backing them with the authority of some central power.

There was considerable scope for assimilating the laws of the various colonies in some respects. It might for instance be regarded as a joke when you heard that your friend had crossed a river for a few hours to get married in the Cape Colony because he wished to evade the marriage law of the Orange River Colony, but physiologists and eugenists would doubtless be shocked by a contract which sanctioned consanguinity; and they would probably urge that backward colonies should not be permitted to frustrate the good intentions of others that

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were more advanced. The laws governing higher education needed the introduction of rational principles of training and examination, for the University of the Cape of Good Hope was only an examining and a degree-granting body, the most indispensable qualification of its examiners being that they should know nothing about the candidates beyond their powers of assimilation. The other colonies fell under the wing of the Cape University. The decision of the Transvaal, taken before the South African War, to erect its own University had had no chance of being carried out.

On economic grounds the argument in favour of union was also a strong one. It was necessary within certain limits to equalise taxation, to get an equality of customs duties for all the colonies, to end the old rivalry between the Cape and Natal seaports, to work the Government railways on a common basis and so avoid the recurrence of inter-colonial disputes. A considerable saving in the expense of administration could be effected, if only by avoiding the repetition in each colony of all the necessary ministerial offices and heads of departments. The combating of diseases in fruit, cereals, and stock would supply a very extensive field of labour which could be best performed by one Government with a consistent policy and the power to enforce it.

Some of the outstanding provisions of the South Africa Act of 1909¹ may be briefly noted. The legislatures of the four colonies, the Cape, Natal, the Orange River Colony—it was now renamed the Orange Free State—and the Transvaal, ceased to exist and their powers were vested in the Union Parliament. This body consisted of two houses, the Senate and the House of Assembly. In each of the colonies, which now received the name of Provinces, a Provincial Council was erected. It had power to make ordinances with regard to direct taxation for provincial purposes, to elementary education, to municipal and divisional councils, and a number of other specified subjects of less importance. All other matters were delegated to the care of the Union Parliament. The Provincial Councils each had an Executive Committee just as the Union Parliament had its Executive Council. The King was declared the supreme head, and on his death his heirs and successors. It is interesting to note that for ordinary purposes there is no mention of the Crown, or of the King in Council, as had been the practice in earlier constitutional Acts passed in the colonies. The phraseology was copied from the Act establishing the

The constitution of the Union of South Africa.

Act is concerned, means the King—or his representative, the Governor-General—acting with the advice of his South African Ministers. If his South African Council were to tender one kind of advice with regard to South African affairs and his Privy Council were to advise an opposite course the fundamental relations between the Union and the rest of the King's dominions would be affected. The letter of the law does not sanction the view that the South African democracy is subject to the democracy of the United Kingdom; but constitutional theory based on many decisions of the Judicial Committee has established the fact beyond controversy. The theory that the advice of the Ministers in England is the act of the Crown does apply to the self-governing dominions, though many attempts are being made in the dominions to question the doctrine. It is true that it has not been definitely or successfully challenged up to the present—perhaps because it has not been definitely formulated with reference to the dominions. On the outbreak of the European War, for example, an order was issued from London prohibiting the export of copper from South Africa to foreign countries, but that was a temporary measure calculated to meet common imperial needs in a time of great stress. It was probably taken after consultation with the South African Government, and may have been issued to assist that Government in its difficulties with Parliament and country. Still, in normal times the indications are that the South African Parliament would wish such an order to be registered by itself before it could take effect; and the matter will doubtless settle itself in the future if it is not complicated by tactless egotism on either side.

The smooth working of the constitution depends very largely on the ability and tact of the Prime Minister. Somebody has said in days gone by that the Prime Minister of the United Kingdom has more real power than the Czar of Russia. In his own country and as regards internal affairs a colonial Prime Minister's authority is nearly as great. And throughout the Empire the authority of Prime Ministers tends to increase. Centralisation has gone a long way. It is obvious that under the system of cabinet government the popular control exercised over the Prime Minister and the rest of the executive is feeble and slow. The referendum as it exists in Switzerland would hardly help the people in directing administrative measures or controlling the management of affairs generally unless some machinery were devised to give them the power to annul as well as to sanction or reject. The Cabinet has certain arbitrary powers which are exercised by issuing orders

Extensive powers of the Prime Minister and the Cabinet.

and it sometimes publishes proclamations. It tends to become an autocracy in practice if not in law. But the South Africa Act gives legal sanction to this tendency in certain matters. The Schedule, which is one of the most interesting portions of the instrument, provides that when any of the native territories still under the Crown is taken over by the Union, the Prime Minister shall be charged with the administration of such territory. He will be advised by a commission of three or more members appointed by the Governor-General in Council. Here obviously the term Governor-General in Council means the Governor-General acting with the advice of his South African Ministers. The extension of the Cabinet's powers has results of two different kinds. It limits the chance of control by the electors, but it also narrows the authority of the imperial representative. Prior to the date of Union in the three younger colonies native affairs were much under the influence of the Government in London. Provision was made in the Act of 1909 that at some future date that influence should cease. But at the same time those parts where the natives were most numerous and had all along enjoyed special privileges of their own were placed beyond the control of the popular legislature. This was following the arrangements of the old Free State Republic. Indeed it was a principle which had been recognised as sound throughout South Africa, but which had in the other parts been carried out in a more half-hearted manner.

That suggests an inquiry as to how far in other respects the Act of Union was a consummation of the earlier history of the various parts of the country, to what extent it was a development of earlier constitutional arrangements. Most of the great principles of democracy were retained: the elective principle in the various governmental bodies, in a certain degree the responsibility of the executive to the legislature and of the legislature to the electorate, in a large measure the certainty that in administering justice the judges would pronounce sentence according to the laws without fear or favour. Except for one large and important body of people, the mining population in the Transvaal, who had naturally received the franchise on the introduction of responsible government, no person received constitutional liberties which he had not enjoyed for very many years. Where the natives were already enfranchised they retained their rights. In other places they were left in their old situation. Every person became a small unit in a great whole and his power to influence the direction of his concerns was greatly lessened. In the Transvaal and the Orange Free State the people had in 1902 lost

The Union does not represent any real constitutional advance.

their control of foreign policy and the right to sanction or veto the appointment of public officials. Everywhere local traditions and individual tastes were limited in their scope. Yet the idea of union was a grand one. Political parties in each colony were anxious to amalgamate with corresponding parties in the others. Union would give a better chance to consolidate and to expand, it promised to advance their material prospects, and the people decided—in so far as they were in a position to decide at all—that it would be to their advantage to unite.

The Union was a very real one, much more so than in Australia or Canada. It may seem strange that the delegates who had the drafting of the Bill went to such extreme lengths in the process of centralisation, *Centralisation pushed very far.* for many of them must have known that the early history of the country had brought to light strongly local and individualistic tendencies. Possibly it was with set purpose that they proceeded to counteract those tendencies as being subversive of real strength and unity of purpose, though this could hardly have been the attitude of the majority of the delegates. It should be noticed, however, that during the previous fifty years the old individualism had been considerably weakened by different forces that operated in each of the countries. That is the only sense in which the Union of South Africa is the natural outcome of its previous history. Yet individualism had by no means disappeared, as is witnessed by the history of South Africa's troubles since 1910. But the real explanation probably lies therein that at the time of the meeting of the delegates there were brought under discussion the constitutions of several confederations: the Swiss, the German, the American, the Canadian, and the Australian. The weak points of each of these were pointed out, and the delegates, several of whom were lawyers, must have been struck by the amount of litigation that had been going on in Canada and particularly in Australia arising from the division and distribution of powers between the central and the local legislatures. Except in a few matters they decided that the Provincial Legislatures should occupy a position quite subordinate to the Union Executive and the Union Parliament. As the Executive Council may sanction or reject provincial ordinances, it is very unlikely that disputes leading to litigation will arise. That is another illustration of the great powers reserved to the central executive. It is further obvious that no matters will be referred to the Privy Council, so that imperial influence must be greatly weakened. More than that: no appeal from the Supreme Court of South Africa to the King in Council is

allowed, except when the King in Council grants special leave to appeal. Colonial autonomy has been carried much further in the Union than in either of the other two great Dominions.

Everything points to the likelihood that the native problem will always be with political workers in South Africa. Pre-

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judice of colour and race is very strong, but it is in some measure understandable if we remember that Europeans have complicated the matter by employing the natives on more than one occasion to fight Europeans. But it will be wise to make a real effort to bury the past for the sake of winning a brighter future. There can be no intention to place the bulk of the black-skinned races permanently in a position of subordination, for that would be nearly tantamount to a form of slavery. The tendency is to-day to reserve tracts of country for occupation by natives wherever that is still possible. The whole history of the last century seems to suggest that for the present that scheme is the only way to prevent the undesired contact between whites and blacks, which has not been beneficially felt by either, but least of all by the natives. There should be no hurry in trying to colour the native with the civilisation of the European by the agency of uncontrolled association. There are highly educated natives who are the ideal teachers of their own people, and perhaps the Union Government will assist in the training of others. When competition arises between natives and Europeans, the white man may well be left to fend for himself. In the meantime there seems to be no reason why in the native reserves the people should not be given municipal government on the same lines as those laid down for the white population. The natives are backward, it is true, but they will be backward only so long as the white men choose to keep them so. If their sense of responsibility can be called forth, half the battle will be won. In the end they must take their place side by side with other citizens of the Union, but it is not necessary to remark here on all that that will involve, for it lies in the remote future, when the outlook of South Africans of European extraction may have altered.

As South Africa is by no means a sovereign state it is almost impossible not to theorise at the present time with regard to the future of her constitutional position within the Empire. The world is moving so rapidly and the conservative instincts of humanity are being so rudely shaken that the reception of ideas is accomplished with unusual readiness. In the Empire there are two classes of thinkers who desire to take advantage of this

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unwonted receptiveness, both including men of the highest ability and political wisdom. One class is moving for the federation of the Empire. The exact form has not been agreed upon, and many different paths are still being pointed out; but eventually some scheme that finds general favour will be arrived at. The other class stands for the maintenance of the present situation and the preservation, or perhaps even the extension, of the constitutional liberties already granted. The former class desires a return to protection in trade and advocates an imperial customs union, while the latter pleads for free trade and the unrestricted association with the other nations of the world. All matters with which the citizen of the Empire is concerned are involved in the speculations of the two opposing schools, questions of nationality, language, economics, domestic politics, foreign relations, travel, education, science, art, and man's outlook on life generally. Pushed to their logical conclusion one view leads to a highly organised Empire which will be all in all to itself, the other brings its supporters to exchange goods and ideas and ideals with other nations of the world and may conceivably lead to the control of foreign policy by the people and even to internationalism, in one form or another. But it is not easy to see very far ahead and, perhaps fortunately for its supporters, it is seldom possible to push a view to its extreme limits at any one epoch. After all, we can influence the rate or direction of our growth only very slightly, and our premeditated action is more likely to spoil than to improve. The one view is based on the assumption that the colonies are bent on secession and aims at restraining them. The other is grounded on the belief that the colonies only desire the greatest possible degree of freedom which is compatible with the maintenance of the imperial connection.

The student of history keeps wide awake to these discussions and he is chiefly interested in the academic aspect of the disputations, for he sees before him constitutional history in the making. But he observes that in South Africa the agitation for imperial federation has had the result of raising a counter claim—curious perhaps and uninstructed in itself, but not entirely inexplicable under the circumstances—that when at any future time the imperial authorities get involved in a war it should be the right of any one of the dominions to decide whether it shall participate or stand out. A similar suggestion has been raised in Canada. That is an extreme counter-irritant to imperial federation;—but imperial statesmen know that the colonies and dominions as well as India are not, nor are they likely to be at any time, unwilling to

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contribute to the utmost of their power towards performing the common duties of them all as long as there is no curtailment of their freedom. It is extremely unlikely that this attitude will be abused or alienated by precipitate inconsiderateness. No doubt as regards commerce and foreign affairs the colonial governments will in future be consulted and action will be taken only if there is no strong objection on the part of any of them. That this was, to some extent at least, the practice before the war can hardly be doubted. Possibly such informal procedure will conduce more to the peace and welfare of the proletariat in the various countries concerned than could any federal executive with the consciousness of having behind it millions of men who can be called to arms by signing and issuing a proclamation; and it seems as if such an executive could never in practice be called to account by anybody. It seems to be an absolute negation of democracy. At any rate great tact and moderation will be exercised in moving for constitutional changes, for the liberties granted to the colonies in the past have extended so far that it will not be an act of real statesmanship to appear to withdraw any of them. Without those liberties the Empire could not have stood and grown, and they have therefore acquired the character of goods delivered in fulfilment of a contract. To adapt a wise man's saying: if the tie that holds together the separate parts of the Empire is strong as steel that is only because it is as light as a feather.

Imperial conferences have laid down lines of policy without reference to the peoples committed thereby. The delegates have agreed to suggestions and action has been taken on such agreement. The opportunity of making up their minds and expressing their wishes has been withheld from the people, whether unavoidably or with set purpose makes no difference. But there is undeniably a general tendency to do away with that method of procedure. The British peoples seem to be outgrowing the old system. They demand that they should know of every contemplated step that will affect them. They argue that if they know and endorse their commitments then they cannot be otherwise than faithful to them, but they demand to know and they state that they have a right to decide and that no one else has such a right. They further assert that as regards foreign policy if the British Empire transacts its business in public no other power will very long be able to take shelter in secrecy as a normal process of negotiation. It is obvious that in this respect liberties can not be extended to the colonies until they have begun to be enjoyed in the United Kingdom. Whatever the future

utility of imperial conferences may be, their significance has not been generally grasped in the past, not even in the most advanced colonies. Whether the institution will be extended and made permanent so as to effect a virtual federation of the Empire seems doubtful, as the delegates will certainly in future be called to account by their legislatures, so that their decisions will have no binding effect.

Names and phrases and catch-words often have the effect of obscuring the thoughts that lie behind them. It may be that those who speak of a Commonwealth of Nations and those who are labouring to establish a Self-contained Empire have somewhat different roads in view by which to reach the same goal. Possibly, too, the one term is meant to attract one class of people, and the other to satisfy another class. In the United Kingdom propaganda of a determined character has been proceeding, but in the dominions there is a great deal of hostility and misapprehension arising from ill-timed and ill-considered agitation. Any scheme that may be submitted to the peoples of the Empire in the near future will probably be decided on without their grasping the issues at stake. There can be no intention to force a decision until the whole question in all its bearings is everywhere understood. The people will be honestly told that they are to decide whether there is to be greater scope for individual and local liberty, for self-development along fairly democratic lines, or whether for the sake of a powerful Empire they will sink their provincial ambitions. Either course has its attractions. Temperament, education, lack of education, and past history will decide for individual men and women as for the various peoples the course to be favoured. There seems to be a great parting of ways in the Empire, and any action taken will greatly influence the world's history. The maintenance of peace in the future is the great object which the bulk of the human race is trying for the moment to assure. The question is whether that peace can be best preserved by organising into a complicated but perfect fighting-machine a large number of groups of peoples whom no one power will dare to assail, or by allowing each group freedom to act or stand out as its own inclination dictates. But there is a further and vastly more important question: will a highly organised Empire or a number of separate and semi-independent dominions give greater freedom of action to the individual and contribute to the common fund of human liberty which has been painfully but steadily accumulated during the ages, and which has been and is still to-day the great fountain of inspiration for the oppressed? Ultimately, of course, we get involved in a

consideration of the whole aim and object of human existence, but here it is only necessary to note the issues as they dimly seem to unfold themselves, leaving it to historians to present the narrative when the events have been played off.

APPENDIX A.

No. 236. CHARTER OF THE BRITISH SOUTH AFRICA COMPANY. [29 Oct. 1889.]

VICTORIA, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith.

To all whom these presents shall come, greeting.

WHEREAS a Humble Petition has been presented to Us in Our Council by the Most Noble James, Duke of Abercorn, . . . ; the Most Noble Alexander William George, Duke of Fife, . . . ; the Right Honourable Edric Frederick, Lord Gifford, V.C. ; Cecil John Rhodes, of Kimberley, in the Cape Colony, Member of the Executive Council, and of the House of Assembly of the Colony of the Cape of Good Hope ; Alfred Beit, of 29 Holborn Viaduct, London, merchant ; Albert Henry George Grey, of Howick, Northumberland, Esquire ; and George Cawston, of 18 Lennox Gardens, London, Esquire, Barrister-at-Law.

And whereas the said Petition states amongst other things :

That the Petitioners and others are associated for the purpose of forming a Company or Association, to be incorporated, if to Us should seem fit, for the objects in the said Petition set forth, under the corporate name of The British South Africa Company.

That the existence of a powerful British company, controlled by those of Our subjects in whom We have confidence, and having its principal field of operations in that region of South Africa lying to the North of Bechuanaland and to the west of Portuguese East Africa, would be advantageous to the commercial and other interests of Our subjects in the United Kingdom and in Our Colonies.

That the Petitioners desire to carry into effect divers concessions and agreements which have been made by certain of the chiefs and tribes inhabiting the said region, and such other concessions, agreements, grants, and treaties as the Petitioners may hereafter obtain within the said region or elsewhere in Africa, with the view of promoting trade, commerce, civilisation, and good government (including the regulation of liquor traffic with the natives) in the territories which are or may be comprised, or referred to in such concessions, agreements, grants, and treaties as aforesaid.

That the Petitioners believe that if the said concessions, agreements, grants, and treaties can be carried into effect, the condition of the natives inhabiting the said territories will be materially improved and their civilisation advanced, and an organisation established which will tend to the suppression of the slave trade in the said territories, and to the opening up of the said territories to the immigration of Europeans, and to the lawful trade and commerce of Our subjects and of other nations.

That the success of the enterprise in which the Petitioners are engaged would be greatly advanced if it should seem fit to Us to grant them Our Royal Charter of incorporation as a British Company under the said name or title, or such other name or title, and with such powers,

as to Us may seem fit for the purpose of more effectually carrying into effect the objects aforesaid.

That large sums of money have been subscribed for the purpose of the intended Company by the Petitioners and others, who are prepared also to subscribe or to procure such further sums as may hereafter be found requisite for the development of the said enterprise, in the event of Our being pleased to grant to them Our Royal Charter of incorporation as aforesaid.

Now, therefore We, having taken the said Petition into Our Royal consideration in Our Council and being satisfied that the intentions of the Petitioners are praiseworthy and deserve encouragement and that the enterprise in the Petition described may be productive of the benefits set forth therein, by Our Prerogative Royal and of Our especial grace, certain knowledge, and mere motion, have constituted, erected, and incorporated, and by this Our Charter for Us and Our Heirs and Royal successors do constitute, erect, and incorporate into one body politic and corporate by the name of The British South Africa Company, the said James Duke of Abercorn, Alexander William George Duke of Fife, Edric Frederick Lord Gifford, Cecil John Rhodes, Alfred Beit, Albert Henry George Grey, and George Cawston, and such other persons and such bodies as from time to time become and are members of the body politic and corporate by these presents constituted, erected, and incorporated, with perpetual succession and a common seal, with power to break, alter, or renew the same at discretion and with the further authorities, powers, and privileges conferred, and subject to the conditions imposed by this Our Charter: And We do hereby accordingly will, ordain, give, grant, constitute, appoint, and declare as follows (that is to say):

I. The principal field of the operations of The British South Africa Company (in this our Charter referred to as "the Company") shall be the region of South Africa lying immediately to the north of British Bechuanaland, and to the north and west of the South African Republic, and to the west of the Portuguese Dominions.

II. The Company is hereby authorised and empowered to hold, use, and retain for the purposes of the Company and on the terms of this Our Charter, the full benefit of the concessions and agreements made as aforesaid, so far as they are valid, or any of them, and all interests, authorities, and powers comprised or referred to in the said concessions and agreements. Provided always that nothing herein contained shall prejudice or affect any other valid and subsisting concessions or agreements which may have been made by any of the chiefs or tribes aforesaid, and in particular that nothing herein contained shall prejudice or affect certain concessions granted in and subsequent to the year 1880 relating to the territory usually known as the district of the Tati; nor shall anything herein contained be construed as giving any jurisdiction, administrative or otherwise, within the said district of the Tati, the limits of which district are as follows, viz., from the place where the Shasi River rises to its junction with the Tati and Ramaquaban Rivers, thence along the Ramaquaban River to where it rises and thence along the watershed of those Rivers.

III. The Company is hereby further authorised and empowered, subject to the approval of one of Our Principal Secretaries of State (herein referred to as "Our Secretary of State") from time to time, to acquire by any concession, agreement, grant, or treaty, all or any rights, interests, authorities, jurisdictions, and powers of any kind or nature whatever, including powers necessary for the purposes of government and the preservation of public order in or for the protection of terri-

teritories, lands, or property, comprised or referred to in the concessions and agreements made as aforesaid or affecting other territories, lands, or property in Africa, or the inhabitants thereof, and to hold, use, and exercise such territories, lands, property, rights, interests, authorities, jurisdictions, and powers respectively for the purpose of the Company and on the terms of this Our Charter.

IV. Provided that no powers of government or administration shall be exercised under or in relation to any such last-mentioned concession, agreement, grant, or treaty, until a copy of such concession [etc.] in such form and with such maps or particulars as Our Secretary of State approves, verified as he requires, has been transmitted to him, and he has signified his approval thereof either absolutely or subject to any conditions or reservations; and provided also that no rights, interests, authorities, jurisdictions, or powers of any description shall be acquired by the Company within the said district of the Tati as hereinbefore described, without the previous consent in writing of the owners for the time being of the concessions above referred to relating to the said district, and the approval of Our Secretary of State.

V. The Company shall be bound by and shall fulfil all and singular the stipulations on its part contained in any such concession, agreement, grant, or treaty as aforesaid, subject to any subsequent agreement affecting those stipulations approved by Our Secretary of State.

VI. The Company shall always be and remain British in character and domicile, and shall have its principal office in Great Britain, and the Company's principal representative in South Africa and the Directors shall always be natural-born British subjects or persons who have been naturalised as British subjects by or under an Act of Parliament of Our United Kingdom; but this Article shall not disqualify any person nominated a Director by this Our Charter, or any person whose Election as a Director shall have been approved by Our Secretary of State, from acting in that capacity.

VII. In case at any time any difference arises between any chief or tribe inhabiting any of the territories aforesaid and the Company, the difference shall, if Our Secretary of State so require, be submitted by the Company to him for his decision, and the Company shall act in accordance with such decision.

VIII. If at any time Our Secretary of State thinks fit to dissent from or object to any of the dealings of the Company with any foreign power, and to make known to the Company any suggestion founded on that dissent or objection, the Company shall act in accordance with such suggestion.

IX. If at any time Our Secretary of State thinks fit to object to the exercise by the Company of any authority, power, or right within any part of the territories aforesaid, on the ground of there being an adverse claim to or in respect of that part, the Company shall defer to that objection until such time as any such claim has been withdrawn or finally dealt with or settled by Our Secretary of State.

X. The Company shall, to the best of its ability, preserve peace and order in such ways and manners as it shall consider necessary, and may with that object make ordinances (to be approved by Our Secretary of State), and may establish and maintain a force of police.

XI. The Company shall, to the best of its ability, discourage and, so far as may be practicable, abolish by degrees, any system of slave trade or domestic servitude in the territories aforesaid.

XII. The Company shall regulate the traffic in spirits and other intoxicating liquors within the territories aforesaid, so as, as far as

practicable, to prevent the sale of any spirits or other intoxicating liquor to any natives.

XIII. The Company as such, or its officers as such, shall not in any way interfere with the religion of any class or tribe of the peoples of the territories aforesaid, or of any of the inhabitants thereof, except so far as may be necessary in the interests of humanity, and all forms of religious worship or religious ordinances may be exercised within the said territories and no hindrance shall be offered thereto except as aforesaid.

XIV. In the administration of justice to the said peoples or inhabitants, careful regard shall always be had to the customs and laws of the class or tribe or nation to which the parties respectively belong, especially with respect to the holding, possession, transfer, and disposition of lands and goods and testate or intestate succession thereto, and marriage, divorce, and legitimacy and other rights of property and personal rights, but subject to any British laws which may be in force in any of the territories aforesaid, and applicable to the people or inhabitants thereof.

XV. If at any time Our Secretary of State thinks fit to dissent from or object to any part of the proceedings or system of the Company relative to the peoples of the territories aforesaid, or to any of the inhabitants thereof, in respect of slavery or religion or the administration of justice, or any other matter, he shall make known to the Company his dissent or objection, and the Company shall act in accordance with his directions duly signified.

XVI. In the event of the Company acquiring any harbour or harbours, the Company shall freely afford all facilities for or to Our ships therein without payment, except reasonable charges for work done or services rendered or materials or things supplied.

XVII. The Company shall furnish annually to Our Secretary of State, as soon as conveniently may be after the close of the financial year, accounts of its expenditure for administrative purposes, and of all sums received by it by way of public revenue, as distinguished from its commercial profits, during the financial year, together with a report as to its public proceedings and the condition of the territories within the sphere of its operations. The Company shall also on or before the commencement of each financial year furnish to Our Secretary of State an estimate of its expenditure for administrative purposes, and of its public revenue (as above defined) for the ensuing year. The Company shall in addition from time to time furnish to our Secretary of State any reports, accounts, or information which he may require to be furnished.

XVIII. The several officers of the Company shall, subject to the rules of official subordination, and to any regulations that may be agreed upon, communicate freely with Our High Commissioner in South Africa, and any others Our officers, who may be stationed within any of the territories aforesaid, and shall pay due regard to any requirements, suggestions, or requests which the said High Commissioner or other officers shall make to them or any of them, and the Company shall be bound to enforce the observance of this article.

XIX. The Company may hoist and use on its buildings and elsewhere in the territories aforesaid, and on its vessels, such distinctive flag indicating the British character of the Company as Our Secretary of State and the Lords Commissioners of the Admiralty shall from time to time approve.

XX. Nothing in this Our Charter shall be deemed to authorise the Company to set up or grant any monopoly of trade ; provided that

the establishment of or the grant of concessions for banks, railways, tramways, docks, telegraphs, waterworks, or other similar undertakings or the establishment of any system of patent or copyright approved by Our Secretary of State, shall not be deemed monopolies for this purpose. The Company shall not, either directly or indirectly, hinder any Company or persons who now are, or hereafter may be, lawfully and peacefully carrying on any business, concern, or venture within the said district of the Tati hereinbefore described, but shall, by permitting and facilitating transit by every lawful means to and from the district of the Tati, across its own territories, or where it has jurisdiction in that behalf, and by all other reasonable and lawful means, encourage, assist, and protect all British subjects who now are, or hereafter may be, lawfully and peacefully engaged in the prosecution of a lawful enterprise within the said district of the Tati.

XXI. For the preservation of elephants and other game, the Company may make such regulations and (notwithstanding anything hereinbefore contained) may impose such licence duties on the killing or taking of elephants or other game as they may see fit: Provided that nothing in such regulations shall tend to diminish or interfere with any hunting rights which may have been, or may hereafter be, reserved to any native chiefs or tribes by treaty, save so far as any such regulations may relate to the establishment and enforcement of a close season.

XXII. The Company shall be subject to and shall perform and undertake all the obligations contained in or undertaken by Ourselves under any treaty, agreement, or arrangement between Ourselves and any other State or Power whether already made or hereafter to be made. In all matters relating to the observance of this article or to the exercise within the Company's territories for the time being of any jurisdiction exercisable by Us under the Foreign Jurisdiction Acts, the Company shall conform to and observe and carry out all such directions as may from time to time be given in that behalf by Our Secretary of State, and the Company shall appoint all necessary officers to perform such duties, and shall provide such Courts and other requisites as may from time to time be necessary for the administration of justice.

XXIII. The original share capital of the Company shall be 1,000,000*l.*, divided into 1,000,000 shares of *1*l.** each.

XXIV. The Company is hereby further specially authorised and empowered for the purposes of this Our Charter from time to time—

(I.) To issue shares of different classes or descriptions, to increase the share capital of the Company, and to borrow moneys by debentures or other obligations.

(II.) To acquire and hold, and to charter or otherwise deal with, steam vessels and other vessels.

(III.) To establish or authorise banking companies and other companies and undertakings or associations of every description, for purposes consistent with the provisions of this Our Charter.

(IV.) To make and maintain roads, railways, telegraphs, harbours, and any other works which may tend to the development or improvement of the territories of the Company.

(V.) To carry on mining and other industries, and to make concessions of mining, forestal, or other rights.

(VI.) To improve, develop, clear, plant, irrigate, and cultivate any lands included within the territories of the Company.

(VII.) To settle any such territories and lands as aforesaid, and to aid and promote immigration.

(VIII.) To grant lands for terms of years or in perpetuity, and either absolutely, or by way of mortgage or otherwise.

(IX.) To make loans or contributions of money or money's worth for promoting any of the objects of the Company.

(X.) To acquire and hold personal property.

(XI.) To acquire and hold (without licence in mortmain or other authority than this Our Charter) lands in the United Kingdom, not exceeding five acres in all at any one time for the purposes of the offices and business of the Company, and (subject to any local law) lands in any of Our Colonies or Possessions and elsewhere, convenient for carrying on the management of the affairs of the Company, and to dispose from time to time of any such lands when not required for that purpose.

(XII.) To carry on any lawful commerce, trade, pursuit, business, operations, or dealing whatsoever in connection with the objects of the Company.

(XIII.) To establish and maintain agencies in Our Colonies and Possessions, and elsewhere.

(XIV.) To sue and be sued by the Company's name of incorporation, as well in Our Courts in Our United Kingdom, or in Our Courts in Our Colonies or Possessions, or in Our Courts in Foreign countries or elsewhere.

(XV.) To do all lawful things, incidental or conducive to the exercise or enjoyment of the rights, interests, authorities, and powers of the Company in this Our Charter expressed or referred to, or any of them.

XXV. Within one year after the date of this Our Charter, or such extended period as may be certified by Our Secretary of State, there shall be executed by the Members of the Company for the time being a Deed of Settlement, providing so far as necessary for—

(I.) The further definition of the objects and purposes of the Company.

(II.) The classes or descriptions of shares into which the capital of the Company is divided, and the calls to be made in respect thereof, and the terms and conditions of membership of the Company.

(III.) The division and distribution of profits.

(IV.) General Meetings of the Company; the appointment by Our Secretary of State (if so required by him) of an Official Director, and the number, qualification, appointment, remuneration, rotation, removal, and powers of Directors of the Company, and of other officers of the Company.

(V.) The registration of Members of the Company, and the transfer of shares in the capital of the Company.

(VI.) The preparation of annual accounts to be submitted to the Members at a General Meeting.

(VII.) The audit of those accounts by independent auditors.

(VIII.) The making of byelaws.

(IX.) The making and using of official seals of the Company.

(X.) The constitution and regulation of Committees or Local Boards of Management.

(XI.) The making and execution of supplementary Deeds of Settlement.

(XII.) The winding up (in case of need) of the Company's affairs.

(XIII.) The government and regulation of the Company and of its affairs.

(XIV.) Any other matters usual or proper to be provided for in respect of a chartered Company.

XXVI. The Deed of Settlement shall, before the execution thereof, be submitted to and approved by the Lords of Our Council, and a certificate of their approval thereof, signed by the Clerk of Our Council, shall be endorsed on this Our Charter and be conclusive evidence of such approval, and on the Deed of Settlement, and such Deed of Settlement shall take effect from the date of such approval, and shall be binding upon the Company, its members, officers, and servants, and for all other purposes whatsoever.

XXVII. The provisions of the Deed of Settlement or of any supplementary Deed for the time being in force, may be from time to time repealed, varied, or added to by a supplementary Deed, made and executed in such manner as the Deed of Settlement prescribes: Provided that the provisions of any such Deed relative to the Official Director shall not be repealed, varied, or added to without the express approval of Our Secretary of State.

XXVIII. The Members of the Company shall be individually liable for the debts, contracts, engagements, and liabilities of the Company to the extent only of the amount, if any, for the time being unpaid on the shares held by them respectively.

XXIX. Until such Deed of Settlement as aforesaid takes effect the said James, Duke of Abercorn, shall be the President; the said Alexander William George, Duke of Fife, shall be Vice-President; and the said Edric Frederick, Lord Gifford, Cecil John Rhodes, Alfred Beit, Albert Henry George Grey, and George Cawston shall be the Directors of the Company; and may on behalf of the Company do all things necessary or proper to be done under this Our Charter by or on behalf of the Company: Provided always that, notwithstanding anything contained in the Deed of Settlement of the Company, the said James, Duke of Abercorn, Alexander William George, Duke of Fife, and Albert Henry George Grey, shall not be subject to retire from office in accordance with its provisions, but shall be and remain Directors of the Company until death, incapacity to act, or resignation, as the case may be.

XXX. And We do further will, ordain, and declare that this Our Charter shall be acknowledged by Our Governors and Our naval and military officers and Our consuls, and Our other officers in Our Colonies and Possessions, and on the high seas, and elsewhere, and they shall severally give full force and effect to this Our Charter, and shall recognise and be in all things aiding to the Company and its officers.

XXXI. And We do further will, ordain, and declare that this Our Charter shall be taken, construed, and adjudged in the most favourable and beneficial sense for, and to the best advantage of the Company, as well in Our Courts as in Our United Kingdom, and in Our Courts in Our Colonies and Possessions, and in Our Courts in Foreign countries or elsewhere, notwithstanding that there may appear to be in this Our Charter any non-recital, mis-recital, uncertainty, or imperfection.

XXXII. And We do further will, ordain, and declare that this Our Charter shall subsist and continue valid, notwithstanding any lawful change in the name of the Company or in the Deed of Settlement thereof, such change being made with the previous approval of Our Secretary of State signified under his hand.

XXXIII. And We do further will, ordain, and declare that it shall be lawful for Us, Our heirs and successors, and We do hereby expressly reserve to Ourselves, Our heirs and successors, the right and power by writing under the General Seal of the United Kingdom at the end of 25 years from the date of this Our Charter, and at the end of every succeeding period of 10 years, to add, to alter, or repeal any of the

provisions of this Our Charter, or to enact other provisions in substitution for or in addition to any of its existing provisions : Provided that the right and power thus reserved shall be exercised only in relation to so much of this Our Charter as relates to administrative and public matters. And We do further expressly reserve to Ourselves, Our heirs and successors, the right to take over any buildings or works belonging to the Company, and used exclusively or mainly for administrative or public purposes, on payment to the Company of such reasonable compensation as may be agreed, or as, failing agreement, may be settled by the Commissioners of Our Treasury. And We do further appoint, direct, and declare that any such writing under the said Great Seal shall have full effect and be binding upon the Company, its members, officers, and servants, and all other persons, and shall be of the same force, effect, and validity as if its provisions had been part of and contained in these presents.

XXXIV. Provided always, and We do further declare that nothing in this Our Charter shall be deemed or taken in anywise to limit or restrict the exercise of any of Our rights or powers with reference to the protection of any territories or with reference to the government thereof, should We see fit to include the same within Our dominions.

XXXV. And We do lastly will, ordain, and declare, without prejudice to any power to repeal this Our Charter by law belonging to Us, Our heirs and successors, or to any of Our courts, ministers, or officers independently of this present declaration and reservation, that in case at any time it is made to appear to Us in Our Council that the Company has substantially failed to observe and conform to the provisions of this Our Charter, or that the Company is not exercising its powers under the concessions, agreements, grants, and treaties aforesaid, so as to advance the interests which the Petitioners have represented to Us to be likely to be advanced by the grant of this Our Charter, it shall be lawful for Us, Our heirs and successors, and We do hereby expressly reserve and take to Ourselves, Our heirs and successors, the right and power by writing under the Great Seal of Our United Kingdom to revoke this Our Charter, and to revoke and annul the privileges, powers, and rights thereby granted to the Company.¹

In Witness whereof, We have caused these Our Letters to be made patent.

(L.S.) MUIR MACKENZIE.

S. African Treaties, Conventions, etc., presented to the Cape Parl. 1898, p. 358.

¹ Cf. art. 150 of the South Africa Act, 1909, p. 554, above.

APPENDIX B.

BRITISH AND GERMAN SPHERES IN THE SUB-CONTINENT OF AFRICA.

No. 237. *Agreement* between the BRITISH AND GERMAN GOVERNMENTS, respecting Africa and Heligoland.—BERLIN, 1st July 1890.

The Undersigned,—Sir Edward Baldwin Malet, Her Britannic Majesty's Ambassador Extraordinary and Plenipotentiary; Sir Henry Percy Anderson, Chief of the African Department of Her Majesty's Foreign Office; The Chancellor of the German Empire, General von Caprivi; The Privy Councillor in the Foreign Office, Dr. Krauel,—

Have, after discussion of various questions affecting the Colonial interests of Germany and Great Britain, come to the following Agreement on behalf of their respective Governments:

EAST AFRICA. GERMAN SPHERE OF INFLUENCE.

ART. I. In East Africa the sphere in which the exercise of influence is reserved to Germany is bounded—

1. To the north by a line which, commencing on the coast at the north bank of the mouth of the River Umba [or Wanga], runs direct to Lake Jipé; passes thence along the eastern side and round the northern side of the lake, and crosses the River Lumé; after which it passes midway between the territories of Taveita and Chagga, skirts the northern base of the Kilimanjaro range, and thence is drawn direct to the point on the eastern side of Lake Victoria Nyanza which is intersected by the 1st parallel of south latitude; thence, crossing the lake on that parallel, it follows the parallel to the frontier of the Congo Free State, where it terminates.

It is, however, understood that, on the west side of the lake, the sphere does not comprise Mount Mfumbiro; if that mountain shall prove to lie to the south of the selected parallel, the line shall be deflected so as to exclude it, but shall, nevertheless, return so as to terminate at the above-named point.

2. To the south by a line which, starting on the coast at the northern limit of the Province of Mozambique, follows the course of the River Rovuma to the point of confluence of the Msinje; thence it runs westward along the parallel of that point till it reaches Lake Nyassa; thence striking northward, it follows the eastern, northern, and western shores of the lake to the northern bank of the mouth of the River Songwe; it ascends that river to the point of its intersection by the 33rd degree of east longitude; thence it follows the river to the point where it approaches most nearly the boundary of the geographical Congo Basin defined in the 1st Article of the Act of Berlin as marked in the map attached to the 9th Protocol of the Conference.¹

From that point it strikes direct to the above-named boundary; and follows it to the point of its intersection by the 32nd degree of

¹ For map see Hertslet's *Map of Africa by Treaty*, vol. ii., to face p. 643.

east longitude ; from which point it strikes direct to the point of confluence of the northern and southern branches of the River Kilambo, and thence follows that river till it enters Lake Tanganyika.

The course of the above boundary is traced in general accordance with a map of the Nyassa-Tanganyika Plateau, officially prepared for the British Government in 1889.¹

3. To the west by a line which, from the mouth of the River Kilambo to the 1st parallel of south latitude, is conterminous with the Congo Free State.

EAST AFRICA. BRITISH SPHERE OF INFLUENCE.

The sphere in which the exercise of influence is preserved to Great Britain is bounded—

1. To the south by the above-mentioned line running from the mouth of the River Umba (or Wanga) to the point where the 1st parallel of south latitude reaches the Congo Free State.

Mount Mfumbiro is included in the sphere.

2. To the north by a line commencing on the coast at the north bank of the mouth of the River Juba ; thence it ascends that bank of the river and is conterminous with the territory reserved to the influence of Italy in Gallaland and Abyssinia, as far as the confines of Egypt.

3. To the west by the Congo Free State, and by the western watershed of the basin of the Upper Nile.

ART. II. [Withdrawal by Germany in favour of Great Britain of protectorate over Witu.]

SOUTH-WEST AFRICA. GERMAN SPHERE OF INFLUENCE.

ART. III. In South-West Africa the sphere in which the exercise of influence is reserved to Germany is bounded—

1. To the south by a line commencing at the mouth of the Orange River, and ascending the north bank of that river to the point of its intersection by the 20th degree of east longitude.

2. To the east by a line commencing at the above-named point, and following the 20th degree of east longitude to the point of its intersection by the 22nd parallel of south latitude, it runs eastward along that parallel to the point of its intersection by the 21st degree of east longitude ; thence it follows that degree northward to the point of its intersection by the 18th parallel of south latitude ; it runs eastward along that parallel till it reaches the River Chobe ; and descends the centre of the main channel of that river to its junction with the Zambesi, where it terminates.

It is understood that under this arrangement Germany shall have free access from her Protectorate to the Zambesi by a strip of territory which shall at no point be less than 20 English miles in width.

The sphere in which the exercise of influence is reserved to Great Britain is bounded to the west and north-west by the above-mentioned line.

It includes Lake Ngami.

The course of the above boundary is traced in general in accordance with a map officially prepared for the British Government in 1889.

The delimitation of the southern boundary of the British territory of Walvisch Bay² is reserved for arbitration, unless it shall be settled by the consent of the two Powers within two years from the date of the conclusion of this Agreement. The two Powers agree that, pending

¹ For map see Hertslet's *Map of Africa by Treaty*, vol. ii., to face p. 643.

² Cf. No. 41.

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such settlement, the passage of the Powers through the territory in treatment of their subjects equal. No dues shall be levied on the movement shall be effected the manner mentioned in paragraph 1.

ART. IV. [Boundary between German Protectorate of Togo and Benue are nominal]

ART. V. [Freedom of goods from transit duties above shall be subject to rectification by agreement.]

ART. VI. [Lines of demarcation traced above shall be subject to rectification by agreement.]

ART. VII. The two Powers engage that neither will interfere with any sphere of influence assigned to the other by Articles I. to IV. One Power will not in the sphere of the other make acquisitions, conclude Treaties, accept sovereign rights or Protectorates, nor hinder the extension of influence of the other.

It is understood that no Companies nor individuals subject to one Power can exercise sovereign rights in a sphere assigned to the other, except with the assent of the latter.

ART. VIII. [Application of Berlin Act of 1885 in spheres of influence within the limits of the free trade zone.]

ART. IX. Trading and mineral concessions, and rights to real property, held by Companies or individuals, subjects of one Power, shall, if their validity is duly established, be recognised in the sphere of the other Power. It is understood that concessions must be worked in accordance with local laws and regulations.

ART. X. In all territories in Africa belonging to, or under the influence of, either Power, missionaries of both countries shall have full protection. Religious toleration and freedom for all forms of divine worship and religious teaching are guaranteed.

ART. XI. [Cession to be made by the Sultan of Zanzibar to Germany of possessions on the mainland and of the island of Mafia. German recognition of British protectorate over the remaining dominions of the Sultan of Zanzibar, including the islands of Zanzibar and Pemba, and Witu. Withdrawal of German protectorate up to Kismayu.]

ART. XII. [Cession of Heligoland by Great Britain to Germany.]

EDWARD B. MALET.
H. PERCY ANDERSON.
V. CAPRIVI.
K. KRAUEL.

BERLIN, 1st July 1890.

S. African Treaties, Conventions, etc., presented to Cape Parl. 1898, p. 388.

AP.
THE CAPITULATION ^{IS KNOWN} OF GERMAN SOUTH-WEST
AFRICA. [9 July 1915.]

The terms of surrender of the military forces of the Protectorate of German South-West Africa, as agreed to by the Government of the Union of South Africa and accepted by His Excellency Dr. Seitz, the Imperial Governor of the Protectorate of German South-West Africa and Commander of the said military forces, which was signed at Kilometre 500 on the railway line between Otavi and K' on July 9, 1915, are as follows:

(1) The military forces of the Protectorate of German South-West Africa, hereinafter referred to as the Protectorate, remain in the field under arms and disposable at the command of the () of the said Protectorate forces are hereby surrendered to General Right Hon. Louis Botha, Commanding-in-Chief the Forces of the Union of South Africa in the field. Brigadier-General H. T. Lukin, C.M.G., D.S.O., acting on behalf of General Botha, shall be the Officer in Charge with arranging the details of the surrender and giving effect to it.

(2) The active troops of the said forces of the said Protectorate surrendered in terms of paragraph 1 shall in the case of officers retain their arms, and may give their parole, being allowed to live each under that parole at such places as he may select. If for any reason the Government of the Union of South Africa is unable to meet the wish of any officer as regards his choice of abode, the officer concerned will choose some place in respect of which no difficulty exists.

(3) In the case of other ranks of the active troops of the said forces of the said Protectorate such other ranks shall be interned under proper guard in such place in the Protectorate as the Union Government may decide upon. Each non-commissioned officer and man of the other ranks last referred to shall be allowed to retain his rifle, but no ammunition. One officer shall be permitted to be interned with the other ranks of the artillery, one with the other ranks of the remainder of the active troops, and one with the other ranks of the police.

(4) All reservists, Landwehr and Landsturm of all ranks of the said forces of the Protectorate now remaining under arms in the field shall, except to such extent as is provided for in paragraph 6 below, give up their arms upon being surrendered in such formation as may be found most convenient, and, after signing the annexed form of parole, shall be allowed to retire to their homes and resume their civil occupation.

(5) All reservists, Landwehr and Landsturm of all ranks of the said forces of the Protectorate who are now held by the Union Government prisoners of war taken from the said forces of the Protectorate, upon signing the form of parole above-mentioned in paragraph 4 shall be allowed to resume their civil occupation in the Protectorate.

(6) The officers of the reserve, Landwehr and Landsturm of the

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said forces of the Protectorate, w^{governor}
above, shall be allowed to sign parole^{graph 1}
above mentioned in parag.

(7) All officers of the said forces of the Protectorate who sign the form of parole above mentioned in paragraph 4 shall be allowed to retain the horses which are nominally allotted to them in their military establishments.

(8) The police of the Protectorate shall be treated, as far as they have been mobilised, as the active troops. Those members of the police who are on duty on distant stations shall remain at their posts until they are relieved by Union troops in order that the persons and property of non-combatants may be protected.

(9) Civil officials in the employment of the German Imperial Government or of the Government of the Protectorate shall be allowed to remain in their homes, provided they sign the parole above mentioned in paragraph 4. Nothing, however, in this statement shall be construed as entitling any such officer to exercise the functions of the appointment which he holds in the service of either of the Government aforesaid or to claim from the Union Government the emoluments of such appointments.

(10) With the exception of the arms retained by the officers of the Protectorate forces and by the ranks of the active troops as provided for in paragraph 2 above, all war material, including all field and mountain guns, small arms ammunition, and the whole of the property of the Government of the Protectorate shall be placed at the disposal of the Union Government.

(11) His Excellency the Imperial Governor shall appoint a civil official of the Protectorate service, who shall hand over and keep a record of all Government property of the civil departments, including records which are handed over to the Union Government in terms of paragraph 10 above, and the Commander of the said forces of the Protectorate shall appoint a military officer who shall hand over and keep a similar record of all Government property of the military departments of the Protectorate.

Given under our hands on this ninth day of July 1915.

(Signed) LOUIS BOTHA, *General Commanding in Chief
the Union Forces in the Field.*
SEITZ, *Imperial Governor of German South-
West Africa.*
FRANKE, *Lieut.-Colonel, Commander of the
Protectorate Forces of German South-West
Africa.*

The form of parole is as follows :

"I, the undersigned, hereby pledge myself on honour not to re-engage in hostilities in the present war between Great Britain and Germany."

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