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Imperial Attitudes and Policies to Self-Government in New South Wales with Special Reference to Precedents of British North America, 1842-1852 (Part II)*

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IN analysing the extent to which British North American constitutional developments influenced Imperial attitudes and policies to self-government in New South Wales between 1842 and 1852, convenience merits a further classification of the decade into two periods, the one between 1842 and July 1846 and the other between July 1846 and 1852. Between the passing of the New South Wales Government Act of 1842[1] and the appointment of the Third Earl Grey as Secretary of State for the Colonies in the Whig Administration of Lord John Russell in July 1846, the colonists of New South Wales came to take stock of the implications of the Act of 1842. Generally, the elective portion of the newly constituted Legislative Council were critical of the provisions of the Act of 1842 in that it did not grant an adequate measure of local autonomy. Though representative government was granted the colony in 1842, the Scheduules to the Act of 1842 which made permanent provision for certain items of government expenditure,[2] the right reserved to the Crown for the alianation of Crown Land and Crown Land Revenue,[3] the fact that the Legislative Council could not initiate money bills without the Governor's consent and the blue print of a system of District Councils imposed on the colony to raise from the inhabitants half the expenses for the upkeep of Police and Goals[4] made the elected members of the Council virtually powerless to control the administration. Much of the constitutional agitation in New South Wales between 1842 and 1846 was therefore specifically directed at removing some of the obstacles that stood in the way of the colonists having increased powers of self-government. Generally, most elected members in the Legislative Council

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*For Part I, see *Vidyodaya J. Arts, Sci., Lett.* Vol. 2, No. 1

1 5 & 6 *Vic. c.* 76.

2 *Ibid*, Shedules A, B and C attached to the Act of 1842.

3 Act for Regulating the Sale of Waste Land Belonging to the Crown in the Australian Colonies, 5 & 6 *Vic. c.* 36.

4 5 & 6 *Vic. c.* 76, Clauses XLI – L.

of New South Wales and the Colonial Press[5] agreed that the main obstacle to gaining a greater share in the administration of the colony was the Constitution Act of 1842. But as to the method of changing Imperial opinion and the Act itself, there does not seem to have been any significant or consistent unanimity of opinion in the colony. Discussion in the Legislative Council that dealt with the financial provisions Act of 1842 helps to illustrate colonial opinion and the differences that arose among the colonists over the methods best adapted to overcome these constitutional obstacles. The newly constituted Legislative Council received several petitions in its first two sessions[6] which revealed that a majority of the colonists generally disapproved of the provision for District Councils in the Act of 1842[7]. However, in July 1844, the Government introduced three Bills designed to give effect to the District Council clauses in the Act. The Legislative Council in response to this challenge curtly and quickly dismissed the Bills in question.[8] The opposition to the Bills emanated mainly from one section of the elected members of thc Council led by William Charles Wentworth. The opposition of the colonial Press[9] and some elected members in the Council led by James Macarthur to this somewhat abrupt dismissal of the District Councils Bills paved the way for another grouping in the Legislative Council in opposition to the Wentworth group. Wentworth and his supporters maintained that the Bills were rejected mainly because they contained an oppressive and uncalled for proposal which had no right to be included in the Constitution Act.[10] On the other hand, the colonial Press and the Macarthur group favoured the proposal for District Councils precisely because it was given constitutional sanction in an Act of Parliament.[11] In the eyes of the Press and this conservative–moderate group in the colony, the violation of a provision written down in an Act of Parliament implied disloyalty to the Crown and a legally constituted colonial Government.[12]

[5] *Australian*, 28 July 1843.

[6] The Council mct for the first time on 1 August 1842

[7] *Votes and Proceedings, Legislative Council of New South Wales*, Vol. I, 1843.

[8] *Ibid*, 25 July, 1844.

[9] *Sydney Morning Herald*, 27 July, 1844; *Colonial Observer*, 1 August 1844.

[10] *Votes and Froceedings, L.C. of N.S.W.*, 25 July 1844.

[11] J. Macarthur to E. Slatham and T. Forster, 9 Aug. 1844, (draft), *Macarthur Papers*, Vol. 31, p. 204, Mitchell Library, Sydney.

[12] This cleavage of opinion in the colony over attitudes to the Government's district council Bills was noticeable in another area of conflict when the Legislative Council came to consider the provisions in the Act of 1842 to meet the police and goal expenses of the colony. Since 1835, the police and goal establishment in the colony were supported by grants from Britain. In 1834, the then Governor of New South Wales was instructed to authorize payments for these services from the colonial revenue and, anticipating objections from New South Wales, the British Treasury agreed that, by way of compensation the colony could receive any surplus of the land revenue after the necessary funds were appropriated for assisted emigration and other casual revenues of the Crown. When the Governor of New South Wales, Sir George Gipps appropriated the surplus of the casual and territorial revenues, the Wentworth group in the Council accused the Governor of a "breach of faith", on the grounds that this revenue rightfully belonged to the colony. Wentworth then proceeded to bring forward a motion to stop supply until the land revenue was conceded to the Legislative Council. The moderate and conservative supporters of the Government rejected Wentworth's motion as a desperate gamble in legislation.

These issues help to illustrate the cleavage of opinion among the elective portion of the Legislative Council as to the methods best suited to gain political concessions from the Mother Country. The Wentworth group which opposed the Government emphasised colonial rights and constitutional principles came to be distinguished as a "radical group" by the conservative and moderate supporters of the Government who came close to adopting the view that representations to the Crown rather than stressing colonial rights and obstructing the Executive was a more appropriate method of expressing colonial grievances. The anti-Imperial overtones of the radical group were disliked by the conservative-moderate politicians who emphasised cooperation with and respect towards the Crown.

Despite the absence of any significant unanimity of opinion among the elected members of the Legislative Council about the methods best suited to gain constitutional concessions from the Mother Country, the Legislative Council sessions of 1844 temporarily and fleetingly healed the rift that already existed among the radical and conservative-moderate politicians in the Council. This occured when the Schedules to the Constitution Act were discussed in the Council. In October 1843, the Governor, Sir George Gipps requested the Council for a supplementary grant for Schedule (A) which made provision for some salaries of Government officials and also covered the judicial establishments of the colony. In so doing the Governor submitted to the Council, the details of the Government's proposed expenditure covered by Schedule (A) mainly to justify the request for an additional grant. It is likely that the Wentworth group interpreted the Governor's submission of the details of the proposed expenses for Schedule (A) as a right granted the Council to alter the details of the Schedule.[13] What the Governor had implied by his message to the Council was not this right but that of permitting the Council to scrutinize and perhaps criticize the Schedule submitted to them. To clarify the position, the Governor delivered another address to the Council in October 1843 where he stated that the Schedules provided the Government with a "means of subsistence" because Britain did not intend to hand over the Executive Government to the colonists.[14] The unconciliatory nature of the Governor's address incited the radical group to a further outburst of agitation and thereafter associated their right to alter details in the Schedules with a demand for responsible government.[15]

The reaction of the conservative-moderate group to the tactics of the radicals over the Schedule controversy did not, temporarily take the normal

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13 Technically, this claim of the Wentworth group was not provided for by the Constitution Act.

14 *Votes and Proceedings, L. C. of N. S. W*, Vol. 1, p. 151.

15 For the demands for responsible government in New South Wales, see T. H. Irving, "The Idea of Responsible Government in New South Wales before 1856." *Historical Studies, Australia and New Zealand*, Vol. 11, No. 42, April 1964, p. 194 ff.

course of opposition seen earlier. Though the conservative-moderate politicians continued to be suspicious of the Wentworth group in the Legislative Council, the Governor's actions on two fronts temporarily united the elected members of the Council from both camps. First, the nature and tone of Gipps' second address to the Legislative Council of October 1843 about the reasons which induced the British Government to incorpcrate Schedules in the Constitution Act created the impression that there was little hope of obtaining constitutional concessions in the executive sphere of the administration. Second, the Governor's proposed *Occupation Regulations*, of April 1844 designed to settle the squating problem in New South Wales[16] created an almost unanimous opposition to the Government on the grounds that the regulations conferred on the Governor the power to tax the people of the colony without the concurrence of the Legislative Council. The absence of any colonial control of land policy further aggravated the position.

The demand for responsible government which emanated from the radical group in the Legialative Council of New South Wales derived inspiration from Canadian developments during the same period. Making use of the *Durham Report* which was serialized in the colonial press and quoting the demands for responsible government in Canada, Wentworth moved for a select committee on general grievances on 21 June 1844.[17] Though some politicians in New South Wales drew upon contemporary developments in Canada when demanding political concessions from the Mother Country, the nature of constitutional agitation in Canada and New South Wales differed in some important respects. By 1844, a major element in Canadian political life, Anglo-French hostility had been healed by the formation of the Baldwin-Lafontaine Ministry.[18] Consequently politicians in Canada were able to put forward a relatively united and disinterested front in demanding constitutional concessions from the Mother Country. In New South Wales on the other hand, the demand for responsible government which emanated from the Wentworth group probably had diminished relevance with the Imperial Government because it was related to the economic grievances of a particular class in the colony. This occured

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[16] *Government Gazette*, 2 April, 1844. For a discussion of Gipps' land policy, see K. Buckley, Gipps and the Graziers of New South Wales, Parts I and II, *Historical Studies, Australia and New Zealand*, Vol. 16, 1955, No. 24.

[17] Legislative Council speech, 21 June 1844. Though Wentworth may not have referred to cabinet and party government when moving for a select committee, the *Grievances Report* referred to a majority of the Council effecting the choice and dismissal of Executive Officers. Wentworth saw this as a resignation of all heads of departments when the Colonial Secretary could no longer command a majority in the Council. See. T. H. Irving, *op. cit.*, p. 195 ff.

[18] For a fuller discussion of Canadian demands for responsible government and the response of the Colonial Office to them, see my M.A. thesis, (unpublished), "*Imperial Attitudes and Policies to Self-Government in New South Wales with Special Referenc to Precedents of British North America* 1837-1855, Chapter, 11, p. 41-65. University of Sydney, 1967.

when the radical group associated their demand for responsible government with an attempt to redress alleged grievances in the land policy to which Gipps gave expression in his proposed *Occupation Regulations* of 1844. As the Wentworth group was predominantly composed of large pastoral interests, "squatting" constituted one of the most suitable means of extending their "runs". But squatting was exposed to one significant limitation in that, the squatters were not guarenteed fixity of tenure for new acquisitions of land. At a time when the squatters were clamouring for fixity of tenure, the Governor's regulations created the impression that fixity of tenure was not forthcoming. Consequently, the Wentworth group which had hitherto emphasised constitutional principles came to associate their demand for constitutional concessions from the Mother Country with the need to redress alleged grievances in the land policy of the Government which predominantly affected the large pastoral interests of the Legislative Council. Once this connection between the demand for responsible government and self-interest became clear, the temporary unity among the elected members of the Council broke down. The conservative-moderate grouping reverted back to their former position of support for the Governor and the Imperial Government for fear that the squatters would exploit the advantages of responsible government to further their own interests,[19] while at the same time looking for an alliance that could effectively check the pretensions of the squatters. Appropriately, W.A. Duncan, Editor of the *Weekly Register*, held a lower-class radical view of the land question and the class he represented[20] expressed similar anti-squatter sentiments.[21] To say that the anti-squatter sentiments of the conservative-moderate politicians in the colony and the lower classes led to the formation of a distinct party or grouping would be misleading and premature for, by the middle of 1845, the structure of colonial politics was on the whole confused.

Meanwhile, further developments in Imperial land policy with reference to New South Wales further complicated the structure of colonial politics which led to a new allignment of forces for and against the Government. Gipps' proposed squatting regulations of 1844 which temporarily united the elected members of the Legislative Council against the Government were sent to the Secretary of State, Lord Stanley, in may 1844. Though Stanley retained the Governor's power to administer land policy in New South Wales, his instructions revealed that he was more sympathetic to the demands of the squatters

19 *Sydney Morning Herald*, (edit), 17 Dec., 1844; *Australian*, 22 May 1845; *Weekly Register*, 14 Dec. 1844, (edit).

20 This class was predominantly composed of small - holding agriculturalists and urban elements.

21 *Weekly Register*, 14 Dec. 1844; 21 Dec. 1844, (edit).

than the Governor was[22] because Stanley proposed to grant the squatters fixity of tenure through eight year leases of runs. In addition, the new *Occupation Regulations* of 11 July increased the maximum area of a run for which a licence was required by 25%, a further concession to the squatters.[23] By August 1845, the Governor himself indicated that he was prepared to accept leasehold tenure as a solution to the squatting problem in New South Wales. Concessions to the squatters in land policy converted the Wentworth group to a force that came to support a Government which had hitherto opposed their specific economic grievances. Consequently the demand for responsible government which had originated from that group also lost its force. Self interest therefore turned the one time constitutional opposition to the Government to a "conservative force" which increasingly came to support a Government that would enable them to preserve and extend their specific economic interests in the colony.[24] In response to this developing alliance between the Government and the squatters, the moderate politicians and lower class radicals in the colony envisaged the possibility of forming an anti-government, anti-squatter philosophy of action to further their own particular economic and political interests. In the Legislative Council, a grouping of middle class popular members represented by Charles Cowper and Robert Lowe gradually came to assume the role of the constitutional opposition to the Government.[25]

An analysis of the structure of colonial politics in New South Wales between 1842 and 1846 shows that self-interest of the groups contending for political power in the Legislative Council predominantly influenced the nature and tone of constitutional agitation in the colony. The demand for responsible government which emanated from the Wentworth group in 1844 was in effect an isolated instance of the elective portion of the Legislative Council uniting in opposition to the Governor's unconciliatory attitude. The response of the Secretary of State, Lord Stanley, to this demand for responsible government was one of total opposition.

> 'With regard to the proposed concession of what is termed the principle of responsibility as to legislative control, which is described as having been conceeded in Canada, Her Majesty must decline to enter into any stipulation at once so abstract and so vague. In Canada, Her Majesty has commanded her representative to conduct the administration of the local

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22 Stanley to Gipps, 29 Jan. 1845, No. 11; 30 Jan. 1845, No. 12, *Historical Records of Australia*, Vol. XXIV, p 205, 218 ff. On 13 May the *Sydney Morning Herald* published Gipps' memorandum on the Squatting Regulations of April 1844. The colonists thought that Gipps' recommeudation for purchase of homesteads instead of fixity of tenure might be implemented by the Colonial Office. Hence the opposition to the Government.

23 *Government Gazette*, 11 July, 1845.

24 Legislative Council, 22 Oct., 1845. In 1845 for example, the squatters accepted an increase in the estimates for the Ccmmissioners of Crown Lands without a protest.

government in strict accordance with the terms and the spirit of the statute by which the provincial legislature is constituted. In New South Wales, Her Majesty has commanded you to conduct the administration of that government in strict accordance with the terms and spirit of the statute by which the legislature of New South Wales is constituted. In neither case has the Queen entered into any statement of any theory or abstract principles of colonial government; nor is Her Majesty advised that to discuss such theories, or to propound such abstract principles, forms any branch of the duties which the laws and constitution of the British Empire call on her to discharge.'[26]

Depite Stanley's assurance to the Legislative Council of New South Wales that the Government of Canada had been conducted in accordance with the terms of the Act of 1840, the constitutional position in Canada had been significantly transformed by Governor Charles Bagot's concession to party government in 1843.[27] Stanley had not only acquiesced in this de-facto arrangement but probably even went so far as to create the impression among Canadian politicians that the Imperial Government was prepared to permit the separate responsibility to the legislature and governor of a colonial ministry drawn from the party that had the largest backing in the assembly.[28] In analysing the reasons that induced the Colonial Office to change its attitude

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25 Others who came to be associated with Cowper and Lowe were, W. Bowmen, R. Windeyer (who broke away from the Wentworth group), T. A. Murray, E. J. Brewester, and D. J. Lang. Though this was the general grouping of the constitutional opposition till about 1847, the first session of the Council in 1845 once more saw a concerted opposition to the Government on the question of the arbitrary powers of the Governor in relation to land policy as Stanley's draft Bill of Aug. 1845 provided for an adjistment for reservation of minerals in the colony and for the continued executive control of land revenue. Stanley to Gipps, 7 Aug. 1845, *Historical Records of Australia*, Vol. XXIV, p. 435.

26 Presented to the Legislative Council, 15 May, 1846, *Votes and Proceedings, L.C. of N.S.W*. Vol. 1, p. 7.

27 In June 1841 when Lord Sydenham was Governor General of Canada, Robert Baldwin, representing the United Reform Party of Upper Canada Reformers and the French Canadians in the Assembly, specifically demanded the admission of the French to a share in the administration on the grounds that his party had the largest backing in the Assembly. A similar request wns made of Bagot when he became Governor General. Both requests were then turned down on the instructions of the Colonial Office. However, by the autumn of 1842 Bagot showed an inclination to develop his own policy on lines that he thought would best fit the situation. When the time came he chose his executive councillors in accordance with the wishes of the Reform Party of Canada. This concession implied the existence of party government in Canada though it did not imply the existence of cabinet government. The Colonial Office accepted this not as a constitutional principle to be established but as an accomplished fact which could not be rescinded at the time. See my M.A. thesis, *op. cit*., p. 45ff.

28 By 1844 Stanley appears to have agreed with Lord Durham's interpretatiou of responsible government that the "internal administration should be administered by heads of departments each of them being in the Legislature, answerable for his own department, prepared to defend it, and if not supported by the Legislature, prepared to resign. Lord John Russell endorsed Stanley's opinion. See, *Parliamentary Debates*, 3 Series, Vol. LVXXV, p. 43 and p. 69 f.

to Canadian self-government, one factor that merits comparison with New Wales was the absence in Canada of any significant cleavage of opinion among Canadian politicians on the merits of responsible government. Lord Elgin, a later Governor General of Canada, appropriately summarized the political situation of the Province on his arrival there. Though he was disappointed with the petty and inconsistent divisions of Canadian party life based at times on selfish and sordid motives, he nevertheless found unanimity of opinion on one point.

> 'In a community like this where there is little, if anything, of public principle to divide men, political parties will shape themselves under the influence of circumstances, and of a great variety of affections and antipathies, national, sectarian, and personal... Responsible Government is the one subject on which this coincidence is alleged to exist.'[29]

A concerted and relatively united demand for political concessions from the Mother Country therefore appears to have played some part in transforming Imperial attitudes and policies to Canadian self-government by 1844. In contrast, the absence of a relatively concerted and significant demand for constitutional concessions from the Mother Country may be suggested as having played some part in retarding the constitutional development of New South Wales.

However, the nature of constitutional agitation in New South Wales does not alone explain the absence of precedents derived from the Canadian colonies influencing Imperial attitudes and policies to self-government in New South Wales during this period. Another reason that can be suggested is the probable consequences of Sir George Gipps's attitudes to the constitutional problems of New South Wales. In response to the demand for responsible government in Canada, the Governor General Bagot appears to have displayed a conspicuous degree of tact and ability in handling the situation from the Imperial angle. While making no definite concession to full resposible government, he accepted the fact that some concession in the direction of responsible government, was inevitable if harmony between the Governor and the Assembly was to be maintained. The Colonial Office was therefore in the unenviable position of reluctantly santioning a "fait accompli" by the Governor who admitted the French to a share in the administration of the Province. In new South Wales on the other hand, it seems likely that Sir George Gipps was consistently hostile to colonial demands for changes in the financial provisions of the Constitution Act of 1842. It is therefore not surprising that the Colonial Office, which relied mainly on its "man on the spot" for advice and guidance on the constitutional problems of New South Wales, refusing to

[29] *Elgin-Grey Correspondence*, (ed) Sir A. G. Doughty, Ottawa, 1937, Elgin to Grey, 26 April, 1847.

accede to a demand for responsible government which emanated from the elevtive portion of the Legislative Council briefly in 1844.[30] Both factors therefore, the nature of constitutional agitation in New South Wales and the consequences of Sir George Gipps attitudes to the constitutional problems of the colony may be said to have delayed British North American constitutional precedents influencing Imperial attitudes and policies to self-government in New South Wales between 1842 and 1846.

The period between July 1846 and 1852–when the Third Earl Grey functioned as Secretary of State for the Colonies in the Whig Administration of Lord John Russell–were significant years in the constitutional history of the settlement colonies of the British Empire. During this period, due to a double process of colonial political agitation and Imperial acceptance of the principles of full self-government for colonies as compatible with the maintainance of the Imperial connexion, all of the British North American colonies save Newfoundland evolved towards responsible government.[31]

Grey's own attitude towards "responsible government" and the feasibility of its application to the settlement colonies before he became Colonial Secretary was one of initial opposition and later uncertainity. In 1840, after publication of the Durham Report, he had believed that responsible government was unsuited to a colony because the responsibility of a colonial governor to both the Crown and a colonial assembly was constitutionally impossible to attain.[32] His devotion to the concept of Imperial responsibility did not allow Grey to favour full self-government for the settlement colonies. This was most clearly seen in his attitude towards free-trade for the Empire. His belief that free-trade was something good and necessary for the Empire grew out of his personal convictions and the view that the Mother Country was duty bound to guide the colonies in their development. In conjunction with this view was the belief that the Mother Country should not interfere in the internal affairs of a colony if such affairs did not impinge on the interests of the Empire as a whole.[33] At times his devotion to the concept of Imperial responsibility outweighed his reluctance to interfere in the internal affairs of a colony.[34] With regard to Canada, however, it is not certain whether by 1846 Grey had decided on any firm course of action. His criticism of the Metcalfe administration gives the impression that he was aware of the existence of party government in

30 For Gipps's opposition to extending self-government to New South Wales, see, Gipps to Stanley, No. 34, 13 Feb. 1845, *Historical Records of Australia*, Vol. XXIV, p. 249 f.

31 See my M.A. Thesis, *op. cit*., Chap. 2, p. 41 - 65.

32 *Cambridge History of the British Empire*, Vol. 2, Cambridge, 1940, p. 370.

33 Earl Grey, *The Colonial Policy of Lord John Russell's Administration*, 2 Vols., London, 1853, Vol. 1, p. 13.

34 R. L. Schuyler, *The Fall of the Old Colonial System*, Oxford, 1945, p. 236.

Canada after Bagot had made that concession.[35] It is probable that he had gone some way from his 1840 stand of total opposition to full self-government. When he became Colonial Secretary Grey was receptive to new ideas that could tilt the scales in favour of full responsible government. By November 1846, when he sent his famous despatch to Sir John Harvey conceeding responsible government to Nova Scotia,[36] he had changed his attitude from one of uncertainity to a qualified support of the principles of full self-government. The cumulative effect of several factors may be suggested for this changed attitude.[37]

The movement in the Port Philip District for separation from the parent colony of New South Wales,[38] the growing requests for representative government from South Australia and Van Dieman's Land and the tariff clashes between New South Wales and Van Dieman's Land induced the Third Earl Grey to consider the constitutional problems of the Australian colonies.[39] His interest in the Australian colonies on being appointed Colonial Secretary had been mainly confined to the settlement of a long drawn out land problem between the squatters claims for pre-emptive rights, security of tenure, and a Colonial Executive initially intent on denying them these rights. The Order in Council of March 1847[40] for which Grey was largely responsible gave the

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[35] Grey to Elgin, 5 April, 1849, *Elgin-Grey Correspo ndence, op. cit.*

[36] Grey to Harvey, 3 Nov. 1846, W. P. M. Kennedy (ed), *Documents of the Canadian Constitution* 1795-1915, Toronto, 1918, p. 570ff.

[37] Apart from a united and concerted demand for responsible government on the part of Canadian politicians, in sanctioning the adoption of full self-government in Canada, Grey was influenced and guide by Charles Buller who was appointed Judge-Advocate at the Colonial Office to assist Grey. Unlike most other Coloninl Reformers who had misgivings about a complete concession of responsible government for the colonies, Buller had supported such a concession. In his position as Judge-Advocate, Buller by special arrangement, scrutinized much of the correspondence that transpired between the Nova Scotian Reformer, Joseph Howe. His private correspondence with Howe seems to give the impression that, while Howe iufluenced Buller, Buller in turn iufluenced Grey about the merits of responsible government. See Chester Martin, "Buller-Howe Correspondence", *Canadian Historical Review*, Vol. VI, No. 4, Dec., 1925, p. 310ff. For a fuller discussion of this and other reasons, see my M.A. thesis, *op. cit.*, Chapter 2, p. 52 ff.

[38] For Imperial attitudes and policies towards proposals for federnting the Australian colonies during this period. I have relied, unless otherwise stated, on J. N. Ward, *Earl Grey and the Australian Colonies*, 1846-1857. *A Study of Self-Government and Self-Interest*, Melbourne, 1958, Chapter, 2, 3, 4 and 5.

For seperation movement in the Port Shilip District, see, A. C. V. Melbourne, *Early Constitutionat Development in Australia*: *New South Wales*, 1788-1856, Melbourue, 1963 (second edition), Chap. 8, p. 331 ff.

[39] Before he came to consider the constitutioual problems of the Australian colonies, Grey had been responsible for the passing of the New Zealand Government Act, 9 & 10 *Vic.*, *c.* 103.

[40] Enclosure in Grey to Fitzroy, No. 120, 9 Nov. 1847, *Historical Records of Australia* (*H.R.A.*), Series I. Vol. XXV, p. 427.

pastoralists–who were in large measure synonimous with the more influential elected members of the New South Wales Legislature–a substantial part of their demands and consequently won their support and confidence in the Council.

On 31 July 1847, Grey wrote to the then Governor of New South Wales, Charles Augustus Fitzroy,[41] indicating the main lines of a policy designed to solve many of the constitutional problems of the Australian colonies.[42] In response to the demand for the erection of a separate colony in the Port Philip District and the concurrence of the Governor and Executive Council of New South Wales,[43] Grey informed Fitzroy that the necessary arrangements would be made for the erection of such a "new" colony that would also be given representative government similar to that which prevailed in New South Wales. The tariff problems of the Australian colonies as seen in the tariff clashes between New South Wales and Van Dieman's Land, Grey's belief in the need to preserve and extend free-trade principles within the Empire,[44] the demands for represen tative government in South Australia and Van Dieman's Land, and the failure of local government institutions imposed on New South Wales, all perhaps combined to convince Earl Grey that a "central authority" to decide matters that were of common concern to all the colonies would be a decided advantage. The nature of the central authority which Grey envisaged for Australia was not specifically described in the despatch to Fitzroy. It is now established[45] that the central authority and the entire constitutional structure Grey had in mind for the Australian colonies was derived from the constituton drawn up by James Stephen for New Zealand[46] which contained elaborate provisions that would ensure the succesful operation of representative government in small and scattered settlements.[47] The New Zealand constitution

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41 Fttzroy succeeded Gipps as Governor in 1846.

42 Grey to Fitzroy, 31 July, 1847, *H.R.A.*, Series 1, Vol. 25, p. 698ff.

43 Gipps to Stanley, 29 April, 1846, *H.R.A.*, Series 1, Vol. 25, p, 26ff.

44 Grey's attitude to free trade, see below, p.

45 J. M. Ward, *op. cit.*, Chap. 2, p. 34ff.

46 9 & 10 *Vic. c.* 103.

47 "With the intention of combining the advantages of both centralization and decentralil zation, his New Zealand constitution provided for a pyramid of municipal and federal institutions. Only the municipal corporations were to be elected directly by the people. The corporations themselves were to elect the lower houses of the provincial legislatures. They, in turn, were to elect the lower houses of the federal legislature. Stephen hoped that this complicated process of indirect election would minimize friction among the various legislatures and make local government efficiens and vital. The federal legislature on which he had particularly set his heart, was given power to pass laws on nine specified topics. In the event of conflict between federal law and provincial law, federal law was to prevail until the pleasure of Her Majesty was known. The Governor-in-Chief of all New Zealand had to approve of the enactments of the provincial legislatures before they became law". (J. M. Ward, *op. cit*,, p. 36ff.) The New Zealand constitution was suspended for five years as the Governor, Sir George Grey, refused to carry out its provisions on the grounds of its unsuitability to New Zealand conditions. (Suspension Act, 11 & 12 *Vic. c.* 5.)

which Grey contemplated for the Australian colonies was intended to solve in one sweep many of the constitutional problems of Australia. His willingness to confer representative government to Van Dieman's Land and South Australia was motivated not onliy by his desire to incorporate these colonies in the federal structure. It perhaps appeared as a solution to the demands for representative government from these colonies. The manner of selecting the members of a federal assembly on the basis of indirect election would not only minimize friction among the various legislatures but would also assist in the resurrection of local government institutions which Grey felt was a great necessity for the proper management of local affairs and for the prevention of concentrating too much power in the hands of a central legislature.[48] Lastly, the federal structure would assist not only in the management of inter-colonial problems but would, from the Imperial standpoint, help the preservation of free-trade within the Empire.

In his despatch to Fitzroy,Grey also expressed his partiality for the older type of conolial legislature of two houses in preference to the system of blended chambers operating in the Australian colonies. Grey therefore proposed amending the existing constitution of New South Wales so as to provide for two houses in its legislature and also suggested granting the other colonies bi-cameral parliaments when they received representative government. As the New Zealand constitution also contained provision for bi-cameral parliaments, Grey's proposal would have combleted the assimilation of the Australian constitutions to the immediate constitutional precedents of New Zealand. Though Earl Grey's constitutional proposals for Australia of July 1847 drew heavily on precedents from New Zealand, many of the specific features of the proposed constitution were neither novel nor were they suggested for the first time in relation to New Zealand. The New Zealand constitution which Grey proposed for Australia was in effect a chrystallization of Imperial attitudes and policies worked out or suggested in other parts of the British Empire long before they were contemplated in 1846. As early as the eighteen thirties both Grey and Stephen had shown interest in reviving federal institutions in the Leeward Islands.[49] Such long term interest in federation inevitably led Grey to show interest in federation for the Canadian colonies at the time of the Durham mission. When Durham changed his early preference for federation in Canada[50], Grey regretted the abandonment of his earlier views and wrote to

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[48] *H. R. A.*, Series I, Vol. XXV, 702, Grey wished to postpone the introduction of the federal structure and representative government to Western Australia until the colony defrayed the expenses of its civil government without assistance of an annual Parliamentary grant.

[49] C. S. S. Higham, "The General Assembly of the Leeward Island". *English Historical Review*, XII, 1926, p. 383 ff. For Grey's views see, Higham, Henry Taylor and the establishment of Crown Colony Governmeni in the West Indies", *Scottish Historical Review*, Vol. XXIII, 1925 - 26, p. 92 ff,

[50] C, P. Lucas (ed). *Durham Report*, Vol. 2, p, 304, 307.

Durham in 1839 expresseing a stong belief in federation instead of the contemplated union of the Canadas as an extreme and difficult step.[51] In his letter to Durham, Earl Grey (then Viscount Howick) mentioned four subjects on which the Canadian colonies had a common interest, namely, laws relating to trade including banks and the imposition of duties for raising a customs revenue, post-office arrangements and great lines of internal communication, the establishment of a common appeal judicature and a common militia.[52] It is interesting to observe that in accordance with Australian conditions, Grey reiterated two of these provisions in his constitutional proposals of July 1847– "the imposition of duties of import and export, the conveyance of letters, and the formation of roads, railways or other internal communications traversing any two or more of such Colonies."

Later when Colonial Secretary, Grey penned a despatch to the new Governor General of Canada, Lord Elgin,[53] suggesting the establishment of a customs union somewhat similar to the German Zollverein and revealed a strong preference for a central legislature which was to exercise powers delegated to it by the provincial legislature. Though Elgin had indicated a willingness to consider federation for Canada before his departure as Governor General,[54] he later declared that federal union was neither desirable nor practicable at the time.[55] Grey nevertheless continued to insist that "some bond of union...ought to be established among the different Provinces of North America".[56] In June 1847, before he wrote to Fitzroy on his contemplated constitutional changes for the Australian colonies, he again wrote to Elgin suggesting the need for a "Legislative Union"[57] of the British Noth Ameriean Provinces and an improved municipal organization. He explained that a federal union was suitable in a country of several small assemblies popularly elected, reasoning which found expression in his despatch to Fitzroy of July 1847.

Though the federal structure which Earl Grey suggested for Australia in 1847 relied more immediately upon the New Zealand constitution of James Stephen, it is not difficuit to see that Grey sanctioned the New Zealand constitution and suggested it for Australia mainly because of his past interest and experience with the problems of federation in British North America.

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51 Howick to Durham, 7, Feb., 1839, in Report of the Canadian Archives, 1923, p. 338 ff., *Canada Sessional Papers*, 1924.

52 *Ibid.*

53 Grey to Elgin, 31 Dec., 1846, *Colonial Office* (*C.O.*). 43/148.

54 Grey to Elgin, 8 Aug., 1849, *Elgin-Grey Papers* (1846-1852), ed. A.G. Doughty and N, Storey, Vol. 1, p. 437 f.

55 *Ibid*, Vol. 1, p. 34 ff.

56 *Ibid*, Vol. 1, p. 37.

57 According to J. M. Ward, *op. cit.*, Grey probably meant a federal union, Chap. 2, p. 43.

Grey also expressed his partiality for the older type of colonial legislature composed of two houses in preference to the system of blended chambers operating in the Australian colonies. An examination of the motives that led to the adoption of blended chambers in the British Empire after about 1832 seems to give the impression that they were, in some respects, intended as an interim arrangement in a settlement colony's transition towards acquiring a larger measure of self-gevernment within the traditional bi-cameral representative system.[58] The transition from the predominance of the old representative system based on a bi-cameral legislature to that of a single legislative council is seen in the constitutional histories of Newfoundland and British Columbia. When the question of granting representative government to New Zealand was considered in 1831, James Stephen preferred a single chamber with an elected majority instead of the traditional bi-cameral system. He then stated that the main weakness of the older "upper house" was that it was neither a popular body nor one composed of a colonial aristocracy. Its main function was to shield the Governor from responsibility. Stephen believed that a blended chamber would help obviate the passions and ignorence of elected officials. Conversely, in a single chamber, the elected majority would restrain the authority of the official members.[59]

In the context of a changed Imperial attitude towards the constitution of colonial legislatures between 1832 and 1846, it may be asked whether Grey was prepared to grant representative government based on a blended chamber as an interim arrangement in a colony's move towards acquiring a larger degree of self-government within the traditional bi-cameral system. Theoretically, Grey's preference for the older type of colonial constitution fits in with this reasoning. But, in practice, Grey's preference did not proceed along these lines. Although Grey revived the traditional system in Newfoundland in 1847, Newfoundland was the only colony in the Britsh North American land mass that did not recieve full self-government during Grey's tenure at the Colonial Office. Dispite the partiality he expressed for the older type of colonial legislature in his despatch to Fitzroy, his proposal for a bi-cameral legislature for New South Wales had an important reservation in the system of indirect election to the provincial legislature. In the context of the Constitution Act of 1842 this suggestion seemed a retrograde step. In 1847 therefore, though Grey was theoretically in favour of bi-cameral legislatures, with regard to the Australian colonies he had prefaced this preference with an important practical reservation.

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[58] M. Perham (ed), *Studies in Colonial Legislatures*, Vol. 1; Martin Wight, *The Development of the Legislative Council*, 1606-1945, Chap. 3, p. 71.

[59] Memorandum of Dec., 1831 in A. H. McLintock, *The Establishment of Constitutional Government in Newfoundland* 1783-1832, 1941, p. 270 ft. Though Newfoundland was granted a blended chamber in 1841, Grey revived the old bi-cameral system in 1847. In British Columbia the old representative system was abolished in favour of a single chamber in 1844.

Despite the influence of Canadian precedents on specific features of Grey's costitution proposals of July 1847, in one fundamental respect, the proposed constitutions for the Australian colonies differed from the system of government in operation in Canada and Nova Scotia. In November 1846, Grey had conceded responsible government in principle to Nova Scotia and this implied the accountability of ministers chosen from and responsible to a colonial legislature which had control of the internal administration of the colony. Grey's proposed constitutions for Australia did not envisage any alteration in the system of representative government which had been introduced into New South Wales by the Act of 1842. It did not propose to surrender the heredetary revenues of the Crown in lieu of a civil list as in Canada. It did not contemplate surrendering control of land and land policy to the colonial legislatures. Consequently, as was the case between 1842 and 1846, though Imperial attitudes and policies to Australian self-government between 1846 and 1847 were influenced marginally by British North American precedents, in more fundamental respects, the colony failed to approximate to constitutional developments in British North America.

Though Grey suggested the main outlines of a policy designed to solve most of the constitutional problems of Australia, he was careful not to impose his views on the colonists and merely invited comment from New South Wales.[60] Generally, his constitutional proposals provoked outspoken hostility in New South Wales.[61] Before the Colonial Secretary received these criticisms, a series of events that directly affected the Colonial Office made Grey re-consider the the feasibility of applying some of his constitutional proposals to the Australian colonies. The Governor of New Zealand, Sir George Grey refused to work Stephen's constitution on the grounds of its unsuitability to New Zealand conditions.[62] The difficulties which the Colonial Office encountered when implementing the requisite legislation to suspend the New Zealand constitution led Earl Grey to change his mind about applying the fundamentals of the same constitution to the Australian colonies. At a time when New South Wales was discussing Grey's constitutional proposals of 1847, Grey had obtained the assistance of James Stephen who had retired from the Colonial Office, to advise him on questions of policy. On examining the papers relating

60 The Executive Council of New South Wales published Grey's proposals in the *Government Gazette*.

61 The colonists felt that the circumstances of the colony did not warrant the creation of municipal institutions, that the proposed system of indirect election was unwarranted, and that the colonists would not be satisfied with a constitution that did not resemble the constitution of the Mother Country. As to the federal proposals proper, the colonists were at most indifferent or hostile. New South Wales however accepted the separation of the Port Philip District as inevitable but insisted that separation be effected without the constitutional changes which Grey had contemplated. See, J. M. Ward, *op. cit.*, Chap. 3, p. 45 ff.

62 W. P. Morrell, *British Colonial Policy in the Age of Peet and Russel*, Oxford 1930, p.313ff,

to the Australian constitutions, Stephen recommended that questions of policy be put before a committee of the Privy Council for deliberation.[63] On 9 May 1848, Grey formally accepted Stephen's advice to refer the problems of Australian government to a Committee of the Privy Council.[64]

The Privy Council Committee Report[65] on the Australian constitutions was completed on the 4 April, 1849 and contained a detailed analysis of the constitutional problems of the Australian colonies. It was in many respects a commentary on Imperial attitudes and policies to Australian self-government between 1846 and 1849.

In presenting the Report, the Committee distinguished between two types of colonial legislatures, the one, based on three estates of a Governor appointed by the Sovereign, of a Council nominated by the Sovereign and an Assembly elected by the People; the other, by implication the system granted New South Wales by the Act of 1842 of a Governor and Council comprising the nominees and elected representatives in a single chamber. It recommended that, as representative government had been granted New South Wales, the colonies of South Australia and Van Dieman's Land which were able and willing to sustain the costs of civil government be granted "a legislature in which the representatives of the people at large should enjoy and exercise their constitutional authority". The Committee suggested that with the concession of representative government to Van Dieman's Land and South Australia on the lines of the existing arrangements in New South Wales, it would be necessary to extend the same principles of government to the Port Philip District which was to be detached from New South Wales and formed into the colony of Victoria. The Privy Council Committee reiterated the arguments in favour of bi-cameral legislatures which the Colonial Secretary had made in 1847. It maintained that government by a Governor, Council and Assembly instead of the existing system of a blended chamber would make the government of the Australian colonies resemble that in force in the United Kingdom. Despite the advantages of bi-cameral legislatures, in the face of opposition in New South Wales to such changes, the Committee expressed its reluctance to impose constitutional changes on the Australian colonies. Consequently, the Committee recommended that the existing legislature in New South Wales based on a blended chamber be extended to Van Dieman's Land, South Australia and Victoria. The Privy Council Committee also proposed granting the colonies of New South Wales, Van Dieman's Land, Victoria and South Australia the power to

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[63] Stephen's views in an undated minute which appears in a series printed for use of the Cabinet, *C.O.*, 201/438 (confidential).

[64] Grey to Merrivale, 9 May, 1848, *C.O.*, 201/438.

[65] *Report of the Committee of her Majesty's Privy Council for Trade and Plantatations on the subject of the proposed Bill for the seperation of Port Philip from New South Wales and extension of representative insiitutions to the Australian Colonies* (1849), *Great Britain and Ireland-Parliamentary Documents*, 1850, Vol. 57, p. 55 ff.

amend their own constitutions subject to Imperial sanction. It, however, was disinclined to regulate the details of these constitutional arrangements and recommended that such provision be left to the colonial legislatures. The Report of the Privy Council Committee also dealt with the problems of local government in New South Wales and admitted that the colony would derive benefit from district councils which could be entrusted with all the powers of local administration. It recommended that one-half of the land revenue not devoted to emigration be placed at the disposal of the District Councils and the Committee believed that such a concession would supply a powerful motive "for the acceptance and employment of the proposed corporate franchises." As the Act of 1842 had made statutory provisions for a system of local government institutions for New South Wales, the Committee recommended that the Act be amended by the removal of compulsion and the inclusion of a caluse, stating that district councils "should not be brought into operation unless upon the petition of the inhabitants of the several districts." The Report of the Committee of the Privy Council also touched on a point which the Colonial Secretary had not mentioned in his constitutional proposals of 1847. It admitted that the complaints which have been made in New South Wales regarding the Civil List provided for by the Constitution Act of 1842 was not without foundation.[66]

Though admitting the financial weakness of the Legislature, the Committee thought that the public service should not be dependent on an annual vote and quoted United Kingdom constitutional precedents to indicate that even there a considerable part of the establishments devoted for the public service were provided for by a permanent charge upon the Consolidated Revenue. It therefore recommended that Parliament retain the right to set apart the costs of the public service while leaving the colonial legislature power to alter this appropriation by laws passed in the usual manner.

Lastly, the Committee attempted to solve the problem of inter-colonial tariffs with the recommendation that provision be made for a common tariff with free-trade within Australia. The instrument for the implementation of this policy was to be a Governor-General and Assembly convened for all Australia at the request of two or more of the colonial legislatures. The Committee suggested a number of subjects of general interest which might come within the province of such a General Assembly.

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66 "It appears to us hardly consistent with the full adoption of the principles of representative government that, as to a large part of the public expenditure of the colony, the legislature should be deprived of all authority, nor does, there appear to us to be real occasion for imposing a restrietion upon the powers of that body which manifests so much jealousy as to the manner in which these powers may be excercised .... The colonists themselvel are mainly concerned in the proper and efficient performance of those (the public) services and it appears to us that they ought to possess, through their representatives, the power of making such changes from time to time in the public establishments as circumstances may recquire."

What, then, was the extent to which British North American constitutional precedents influenced the Privy Council Committee Report on the Aus'ralian constitutions ?

It has been shown that[67] with regard to the introduction of bicamarel Legislatures to the Australian colonies, Grey had maintained a theoretical preference, though in practice he had adopted a conditional reservation in the form of a system of indirect election. The Privy Council Committee reiterated this theoritical preference in a clearer and comprehensive manner. It is very likely that the Committee and its Chairman derived this preference for the traditional bicameral system largely on its examination and observation of colonial constitutions in the British North American Colonies. By the end of 1848, every British North American colony had a bi-cameral legislature and three of them, Canada, Nova Scotia and New Brunswick, had been granted responsible government in principle within that system. It is significant that Canadian politicians who had been demanding full self-government as early as 1829 did not criticize the existing legislative machinary but mainly the form of government. Consequently, the theoretical preference which the Privy Council Committee showed towards bi-cameral legislatures was a proven and tested one based largely on British North American constitutional precedents.

The Privy Council Committee also contemplated granting the Australian legislatures the power to alter their constitutions subject to Imperial sanction. The insertion of this recommendation may have been due to Stephen's presence in the Committee as well as to contemporary constitutional changes in the British North American colonies for which Grey was mainly responsible. When Stephen first examined the papers relating to the Australian colonies, [67] he had suggested the grant of responsible government where practicable. It is probable that the decision to grant the Australian colonies the right to alter their constitutions subject to Imperial sanction was a compromise solution between Grey and Stephen as the system of representative government was retained in the Report. Grey's own attitude towards granting the Australian legislatures the limited right of changing their constitutions may have arisen out of his willingness to grant responsible government in principle to New Brunswick in March 1848[68] and his willingness to grant the same form of government to Prince Edward Island if the Lt. Governor thought it desirable.[69] It is probable, though not certain, that Grey treated the limited right of granting the Australian legislatures the right to amend their constitutions as a political concession indirectly derived from his attitude to the extension of self-government in New Brunswick and Prince Edward Island.

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[67] See above

[67] *C.C.* 201/438 (confidential), - "What is called responsible government, seems to me a penacea for the remediable evils of colonial mis-rule, wherever it can be safely applied".

[68] Grey to Colebrooke, 4 March, 1848.

[69] Grey to Campbell, 27 March, 1848, *C.O.* 226/78.

With regard to the establishment of district councils in the Australian colonies which Grey had suggested in his constitutional proposals of 1847, the Privy Council Committee omited the reference to indirect election for these councils and substituted the phrase–"some body of a representative character, constituted in some simple manner, to which should be entrusted all the powers of local administration." The omission was directly related to the opposition with which New South Wales treated Grey's original proposel of 1847. The inclusion of a provision that one half of the proceeds from land revenue be placed at the disposal of the district councils was intended to encourage the colonists to adopt a measure which both Grey and Stephen regarded as essential for an effective colonial administration. It is significant that when Grey sanctioned the adoption of the principles of responsible government in New Brunswick, he instructed Lt. Governor Colebrooke to establish municipal corporations simaltaneously.[70] It was an implied recognition that full self–government could not work effectively without local government institutions. Similar reasoning affected his attitude to local self–government in Australia.

In his constitutional proposals of July 1847, Earl Grey had not touched on the Civil List provided for New South Wales by the Act of 1842. The Privy Council Committee accepted the argument put forward earlier by the colonists of New South Wales that the Civil List imposed a financial check on the Legislature. But the Committee defended it as a necessasity not only in New South Wales but in the United Kingdom as well. It therefore went so far as to grant the Australian colonies a limited right of altering appropriations once the expenses of the public service were defrayed. The fuudamental difference in the provision for a Civil List in British North America and new South Wales was that, in the former, the Civil Lists was accepted in lieu of all heredetary revenues of the Crown, whereas in the latter, Crown Land revenue was reserved to the Crown despite the Civil List. Although the idea of a Civil List was derived mainly from British North Amerinan precedents, the nature and from of the Civil List was based on the local circumstances of New South Wales. In some respects however the reservation of land revenue to the Crown in New South Wales was similar to the settlement of the Clergy Reserves question in Upper Canada by the Act of 1840,[71] whereby the proceeds from the sale of the reserves was apportioned among the several religious denominations in Upper Canada. Though Earl Grey (then Howick) was not completely satisfiied with the arrangement of the Clergy Reserves question,[72] the principles adopted in both cases had a similar basis of reasoning.

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70 Grey to Colebrooke. 4 March, 1848, *op. cit.*, footnote 68.

71 Canada Clergy Reserves Act, 1840, 3 & 4 Vic. c. 128.

72 K. N. Bell and W. P. Morrell, *Select Documents in British Colonial Policy*, 1830-1860, Oxford, 1928, p. 41, footnote.

Though Imperial attitudes and policies to Australian self-government were in this way indirectly influenced by British North American constitutional precedents, Grey's desire to maintain free-trade within Australia may be said to have had a more direct connection with contemporary developments in British North America and other parts of the British Empire. The repeal of the Corn Laws in 1846 gave a significant though temporary set-back to economic interests in Canada. In its protest to the Colonial Office,[73] the Canadian Assembly viewed with apprehension the abandonment of the protective principle. The Colonial Secretary, W. E. Gladstone,[74] while refuting the view that the protective principle was the binding link of the Empire, took pains to show the Canadian Assembly that the Australian colonies without such preferential treatment had made singular advances aided "by the enjoyment of commercial freedom". When Grey became Colonial Secretary he answered[75] an Address to Her Majesty presented by a Committee of the House of Assembly of New Brunswick for the resetlement of a bounty on the cultivation of hemp. Grey's reply was the expression of a general principle applicable equally to Australia and other parts of the British Empire.

> "Parliament has for many years steadily persevered in a course of policy which has had for its object gradually to relieve the Commerce of the Empire from restrictions-to abandon all attempts to direct Capital and industry by artificial means into channels which they would not naturally seek. In persuance of this policy, Laws enacting such restrictions and imposing high duties on Imports have been successively repealed, and bounties which were formerly granted to some extent in this Country have been gradually discontinued, until the Trade of the Empire may now be said to stand on the footing of being nearly free from such interference "

Grey's desire to establish a commen tariff for the Australian colonies was also directed at preventing the imposition of protective duties detrimrntal to the principles of free-trade and it becomes clear that the inclusion of this provision in the Privy Council Committee Report had a direct connection with contemporary developments in the British North American colonies.

Without waiting for the opinion of the Australian colonies on the Privy Council Committee Report, Grey brought down two Bills embodying the major

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[73] Parliamentary Papers, XXVI, Bell and Morrell, *op. cit.*. p. 339 ff.

[74] *Ibid*,Gladstone to Cathcart, 3 May, 1846.

[75] *Ibid.*, p. 359 f, Grey to Head, 11 Dec, 1849.

recommendations of the Report in the Commons sessions of June 1849.[76] Both Bills were abandoned, the first primarily because of technical difficulties, and the second, because of Parliamentary opposition and the lateness of the session.[77] Within a few days of the introduction of the Australian Colonies Bill (2) the Government decided on important changes. As a result of criticism both within and without the House of Commons on the Government's decision to establish uniform duties of customs throughout Australia, Grey decided to withdraw these clauses. Instead Russel wished to give the proposed general assembly the power to make a general tariff for all the colonies when they had federated. Lord John Russell also referred to another significant change the Government had decided to make in the Bill. The general assembly was to be given power to amend the Land Sales Act of 1842 (*5 & 6 Vic. c. 36*) which involved transfering to the federal legislature powers over Crown Land and Crown Land revenue hitherto reserved to the Colonial Office.

After the abandonment of this Bill, a new Bill was introduced in the Parliamentary sessions of February 1850[78] incorporating the changes contemplated in the previous Parliamentary proceedings of 1849. The general assembly was to be given power "to regulate the sale, demise, licensing and occupation of Crown lands withing the colonies forming the federation and to appropriate the proceeds." The legislative councils were given the power to impose customs duties on imports subject to a prohibition of levying differential duties. The federal assembly was given power to legislate on tariffs with regard to those colonies that joined the Union and also the power to allot to the colonies part of the total customs revenue collected "in lieu of the seperate Revenues arising from such duties levied within such several colonies, respectively." The inclusion of this provision meant that the general assembly was given power to appropriate the whole and not a part of the customs revenue of the several colonies as before. Lastly, the composition of the general assembly was confined to only those colonies that had requested its convocation whereas

76 Though both bills embodied the recommendations of the Privy Council Committee Report in some respects they went beyond its specific suggestious. The federal and tariff clauses of the 1849 bill (1) were more extensive, providing for the establishment of a general assembly of Australia consisting of a Governor-General and a house of delegates elected by the respective legislative councils of the Australian colonies save Western Australia. Though the Report had limited federal appropriation to an "equal percentage from the revenue received in all the Australian colonies in virtue of any enactment of the General Assembty of Australia", the Bills of 1849 gave the federal assembly authority to raise money from whatever source they desired. In the case of a conflict between federal and colonial legislation, the Report had suggested reference to the Queen in Council. The Bills of 1849 stated that legislation of the general assembly should "control and supersede" any colonial legislation repugnant to federal law.

77 Bill (1) on 4 June. 1849, *Parliamentary Papers*, 1849, 1 (375), p. 107,
Bill (2) on 26 June, 1849, *Ibid.*, 1 (429). p. 137 ff.

78 *Ibid*, 1850, 1 (36), p. 83.

the earlier Bills of 1849 provided that at the request of any two of the Legislative Councils a federal union could be established for all the self-governing colonies.[79]

The Australian Colonies Bill of 1850 excited strong criticism in the Commons and the Lords. The clauses providing unicameral legislatures were opposed as were the federal clauses on the grounds that they were unasked for by the colonists, that they were unsuitable to Australian conditions, that the federal clauses were unworkable within the machinery set-up, and lastly, as anti-imperial and republican in intent.[80] The Parliamentary criticism of the Australian Colonies Bill was directed mainly at the federal clauses. Criticism of the Bill by the conservative opposition in the House of Commons led to the abandonment of the clauses for federal control of Crown Lands. The Lords also directed their criticism at the federal clauses of the Bill, treating the other provisions with comparative favour. To ensure the passage of the bill in the Lords, Grey withdrew the federal clauses altogether, and accepted an amendment on the franchise of elections designed to give better representation to the pastotal interests. These amendments were accepted in the Commons and the Bill received the Royal Assent on 5 August 1850, becoming the Australian Colonies Government Act, 1850 (*13 & 14 Vic. c. 59*)[81]

Section (i) of the Australian Colonies Government Act effected the separation of the Port Philip District from the parent colony of New South Wales and the new colony thus established was to be called the colony of Victoria. The form of government by a single-chambered legislative council with two-thirds of its members elected and one-third nominated, which had been granted New South Wales by the Constitution Act of 1842 was extended to Victoria, Van Dieman's Land and South Australia. (Section VII, Clause 2) The Act of 1850 also maintained and extended the Civil List provided for New South Wales in 1842 to the Colonies of Victoria, Van Dieman's Land, and South Australia. It also extended the franchise hitherto existing in the four eastern colonies of Australia by halving the value of existing electoral qualifications.[82] The powers of the respective Legislative Councils were practically unchanged with two exceptions. The four colonial governments were

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[79] This clause was rediculed because Lord Stanley objected that some colonies should not be given the power to bind the rest. Other minor changes made in the Bill of 1850 were, 1. duration of the general assembly was to be set at 3 years and was not to be affected by a dissolution of the Legislative Councils through which it had been elected; 2. Governor-General was given power to prorogue the assembly.

[80] For a fuller account of Parliamentary debates on the Bill of 1850, see, J. M. Ward, *op. cit.*, Chap. VII, p. 162ff.

[81] C. M. H. Clerk, *Select Documents in Australian History*, Vol. 1, Section VII, p. 377 ff.

[82] The franchise was extended to owners of free-hold estates worth £ 100, occupiers of dwellings worth £ 10 per annum, holders of depasturing licences and lease — holders paying £ 10 a year whose leases had not less than 3 years to run.

permitted to levy non-differential customs duties and were given the right of constitutional amendment subject to Imperial sanction. (Section XXVII, and XXXII.). Lastly, the Act provided for the continuation of local government institutions introduced into New South Wales by the Act of 1842 into the other eastern colonies on a voluntary basis.

It will be seen that, in so far as New South Wales was concerned, the Act of 1850 did not sanction any fundamental alteration in the constitution granted the colony in 1842. The position and powers of the Governor and Executive Council and their relation to the Legislative Council was scarcely altered by that Act. The Civil List appropriated fixed sums for the maintainance of the civil service, for the administration of justice and for public worship. The The control of Crown Land and Crown Land revenue was still withheld from Legislative appropriation. The absence of significant constitutional changes meant that contemporary British North American constitusional changes only barely affected New South Wales in 1850. Though Grey and the Privy Council Committee recommended a comprehensive federal structure for the Australian colonies based mainly and initially on Canadian developments of the eighteen thirties and forties, the absence of such a provision in the Act of 1850 meant that in this respect New South Wales did not benefit by Canadian experiences of an earlier decade. Despite Grey's belief in the advantages of local government institutions which he had recommended for British North America as well as Australia, the most he could do was to permit their introduction on a voluntary basis. From 1847 to 1850 Grey persisted with a theoretical preference for bi-cameral legislatures but revealed a disinclination to introduce the system to the Australian colonies. It is likely that by 1850 Grey had been converted to the view that the system of blended chambers was the best arrangement for the Australian colonies. This is reflected in his explanatory despatch to Fitzroy accompanying the Act of 1850.[83]

> "We were by no means insensible to the force of the arguments commonly adduced against legislation by a single Chamber. But, on the other hand, we were acquainted with the peculiar difficulties which, in Australian Colonies, at present impede the attendance of members from distant districts, and render it inadvisable to adopt for their legislature a Constitution which would have increased the number of persons required for the satisfactory transaction of business...".

The Privy Council Committee Report of which Grey was Chairman had recommended a single-chambered legislature mainly because the colonists had not expressed a desire to have their constitution altered. In 1850, however, Grey found an additional reason for not recommending the establishment of a traditional bicameral legislature for the Australian colonies. This attitude was also expressed and defended by Grey on his retirement from the Colonial

[83] Grey to Fitzroy, No. 125, 30 August, 1850, C.O. 202/58. For a copy of despatch, see Earl Grey, *Colonial Policy*, Vol. 11, Appendix, p. 347ff., London, 1853.

Office.[84] Such a firm recital of his preference for blended chambers meant that in this respect also British North American constitutional precedents had little prospect of influencing Imperial attitudes to Australian self-government. Both Grey and Russell were prepared to grant the control of Crown Land and its revenue to a federal legislature and it is not far wrong to say that such a willingness was in principle similar to the provisions which gave the British North American colonies control of the hereditary revenues of the Crown in lieu of a Civil List. But the Parliamentary criticism of the entire federal structure meant that this provision had to be struck off from the Australian Colonies Bill of 1850. It would seem, therefore, that specific features of the Australian Colonies Act of 1850 were hardly based on British North American constitutional precedents. More significant was the fundamental difference between the type of government established for the Australian Colonies and the system in operation in the British North American Colonies. By 1850, Canada, Nova Scotia, New Brunswick and Prince Edward Island had been granted full responsible government in principle. Newfoundland continued to be ruled under representative government but with full control of all hereditary revenues of the Crown in lieu of a Civil List the colony had obtained a measure of representative government in excess of what prevailed in New South Wales. New South Wales continued to be ruled under the same form of government introduced by the Act of 1842 which meant that, though the Act admitted certain elected members into the Legislature, it withheld from it that power to control the administration which is the essential characteristic of responsible government. Why then, was responsible government denied New South Wales between 1846 and 1850? Three reasons may be suggested. As between 1842 and 1846 the structure of colonial politics and the nature of constitutional agitation in New South Wales between 1846 and 1850 may be said to have delayed British North American constitutional precedents influencing Imperial attitudes and policies to Australian self-government. Secondly, although an attempt has been made to analyse Grey's constitutional proposals for the Australian colonies between 1846 and 1850, an examination of the underlying reasons which induced Grey to propose these changes in the way he did may explain why responsible government was denied New South Wales during this period. Lastly, the absence of sound and considered advice from Grey's

[84] With the Legislature of a single Chamber, the want of a sufficient number of fit persons to compose it was less felt, than when the Members are divided into two bodies; and if the Crowns' power of nominating one third of the former Legislative Councils had been allowed to continue, on the establishment of Parliamentary Government, it would have been practically exercised by the Administration of the day, and would thus have conferred upon it that authority in the Legislature .... which I have shown to be the very foundation of this system of government. and the want of which has been so much felt since it was adopted in the Australian Colonies. It would also have tended to prevent the embarassments that arose from Parties being so divided, that none is strong enough to govern, but each has sufficient power, when combined with the allies it finds in opposition to render government by its rivals impossible. (Earl Grey, *Parliamentary Government - considered with reference to a reform af Parliament - An Essay*, London, 1858, Ch. VIII, p. 218.

See also, Grey, Colonial Policy, *op. cit*., Vol. 2, p. 97, - "that the close attention it was my duty to give to the working of various colonial constitutions while I held the office of Secretary of State for the Colonies, led me to alter a good deal the opinion I at first held, ... that a Legislature divided into two branches is in itself greatly to be preferred in all cases to one composed of a single Chamber. I now consider it to be very doubtful, at least, whether the single Legislature ought not under many circumstances to be preferred",

"man on the spot" in New South Wales, Sir Charles Augustus Fitzroy, and the indirect consequences of the grant of responsible government to Canada may also be said to have delayed the operation of British North American constitutional precedents on New South Wales during this period.

It has been shown that, by 1845 colonial attitudes to the squatting problem had been mainly responsible for the growth of two embroyonic factions in the Legislative Council of New South Wales. When Lord Stanley at the Colonial Office indicated his willingness to accede to the demands of the squatters for pre-emptive rights, fixity of tenure and compensation for improvements on squatting stations, the squatting interests in the Legislative Council who had hitherto acted as the constitutional opposition to the Government became a "conservative" force which increasingly tended to support the Government in the Council. In opposition to them stood an amorphous anti-government grouping which tended increasingly to seek out and formulate an anti-squatter philosophy of action.

The Cowper-Lowe faction in the Legislative Council perhaps epitomized this attitude which embraced lower middle class urban elements and small land-owners in the colony. They feared the predominance of a "squatting party" in the Legislature which would introduce "class legislation" in their own interests. Paradoxically, as was the case with the squatting interests, the anti-squatter grouping also emphasised a sectional interest and this was mainly responsible for the dilution of a concerted agitation for concessions from the Mother Country. Consequently the demand for responsible government which interested the Legislative Council in 1844 tented to fade out of colonial politics by the end of 1845.[85]

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[85] Though Stanley had indicated a willingness to grant the squatters their demands, his retirement from the Colonial Office meant that Earl Grey, the New Colonial Secretary who assumed duties in July 1846 was saddled with the task of making a more permanent settlement of the land problem. In November 1846 he sent Fitzroy an Act which made provision for the granting of leases or licences for occupation for periods of up to 14 years with the roots or dues thus collected to be disposed of in accordance with the terms of the Land Sales Act of 1842. The Act gave the Queen-in-Council the right to issue rules and regulations determining the conditions of such leases and licences and the conditions upon which pre-emptive rights might be given to the squatters. Grey also sent Fitzroy draft regulations which were to be incorporated in an Order-in-Council. The Order-in-Council of 6 March 1847 effected a variable settlement of the squatting problem in New South Wales. It provided for a classification of all land in New South Wales into what were called unsettled, intermediate and settled districts. In the unsettled areas provision was made for the issue of leases up to 14 years duration. At the expiration of 14 years the Government reserved the right to offer the land for sale at a minimum upset price of £ 1 per acre. If the purchaser of the land was someone other that the original lessee the original holder was to receive compensation for his improvements. If the land was to remain unsold, the lessee was entitled to a renewal of his lease. In the intermediate areas the Order-in-Council provided for 8 years leases with similar conditions. In the settled districts only annual leases were to be available. This Order-in-Council gave the squatters a large portion of their demands. As none of the land occupied under its regulations was to be used for commercial acriculture, the pastoral industry was recognized as the economic basis of the colony. As the vast majority of squatting stations fell into the category of unsettled areas, and as the Land Sales Act of 1842 kept the minimum price of land at a relatively high £ 1 per acre, there was little prospect of the land being sold if the squatters chose not to exercise their per-emptive rights, but decided rather to renew their leases on the same terms as before. For a fuller description see. S. H. Roberts, *History of Australian Land Settlement*, 1788-1920, Melbourne, 1924; *The Squatting Age in Australia*, 1835-1847, Melbourne, 1935.

Concessions to tne squatters in Imperial land policy was reflected in the allingment of political factions in the Legislative Council. Having obtained legal recognition of squatting, the spokesmen for the squatting interests in the Council continued to support the Government. The opposition to the squatting interests was for a time eptimized by Robert Lowe who delivered no less than five major speeches in the Council, attacking them for their greed, demanding a reduction in the price of Crown Land and insisting that the colony be given control of the waste lands and their revenue.[86] In these speeches Lowe made his first direct appeal for popular support and it was inevitable that William Charles Wentworth, leader of the squatting rump should become his major personal target. Wentworth for his part, did not endeavour to hide the fact that by trying to keep the price of land high, he was serving his own personal interests but maintained that he would not do so if he did not think that he was also serving the interests of the colony.[87]

The debates in the Legislative Council which dealt with Imperial land policy in 1847 it will be seen, chrystallized the cleavage of opinion between the squatting interests and the anti-squatter grouping which was perceptible by the end of 1845. This cleavage of opinion reflected in the land debates of 1847 was extended into the arena of constitutional questions proper when the Legislative Council came to consider Grey's constitutional proposals of 1847.[88]

Initially, Grey's constitutional proposals of July 1847 produced a superficial sense of unity among the two major factions in the Legislative Council.[89] It will be remembered that one of the major grievances of the colony since the passing of the Constitution Act of 1842 had been directed at the provision for district councils in that Act. Grey's proposals suggested making the district councils the only elective prop to the provincial and federal legislature. Consequently, his proposals implied not only the perpetuation of an odious system, but more significantly, a plan to diminish the powers of the Legislative Council in favour of the district councils. A majority of the elected members of the Legislative Council therefore opposed the district council provisions as

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86 For an estimate of Rodert Lowe I have relied mainly on Ruth Knight, *Illiberal Liberal, Robert Lowe in New South Wales*, 1842-1850, Melbourne, 1966, p. 175ff.

87 Outside the Council, Lowe attacked both the squatters and the Colonial Office in a pamphlet (*The Impending Crisis. An Address to the Colonisis of New South Wales on the Proposed Land Orders*, Sydney, 1847). Grey, wrote Lowe, was under the impression that the Waste Lands Act had accomplished its purpose of preventing jobbing, concentrating population, and had brought out immigrants with the assistance of a land fund. On the contrary Lowe thought that the Act had "sacrificed the whole territory to one vast job:'. Instead of concentrating population, the Act created dispersion, destroying also the land fund which the Act was intended to raise. Besides, wrote Lowe, the Act belied its expetation of promoting immigration and enhancing the value of land.

88 For the attitude of the Legislative Council towards Grey's proposals see, J. M. Ward, Earl Grey, *op. cit.*, Chap. 3, p. 67ff.

89 A copy of the despatah was laid in the table of the House on 21 March, 1847. But the proposals were actually dicussed on 21 April, 1848.

an attempt to diminish the degree of self-government granted the colony in 1842. The fact that 1848 was an election year for legislative councillors meant that the Wentworth group and the Cowper–Lowe faction had to compete for public favour to ensure retaining their seats in the Council. When Wentworth tried to win popular support outside the council by putting himself at the head of the protests against Grey's proposals, the superficial sense of unity among the elected members came to an end.

On 21 April, Wentworth gave notice of submitting a series of resolutions on Grey's constitutional proposals. Collectively they gave expression to a strongly worded protest against Grey's suggestions but contained a favourable though guarded approval of the federation scheme. Wentworth objected to the creation of a bi-cameral legislature as there was "no class of sufficient fortune and stability to be raised to the situation of hereditary legislators for life" and "because he believed that that an upper house composed of nominees would be a buffer interposed between the executive and the representatives of the people thereby warding off the responsibility attached to the exercise of the veto and preventing constitutional collisions essential for the preservation of constitutional freedom".[90] In response to the Wentworth resolutions, Cowper and Lowe together submitted another set criticizing Grey's proposals. Though both sets of resolutions were similar in many respects they contained one significant difference. Whereas Wentworth opposed a bi-cameral legislature, the Cowper-Lowe resolutions contained a decided preference for the establishment of a bi-cameral legislature in the colony.[91]

Though the Cowper-Lowe group raised the question of bi-cameralism partly to undermine Wentworth's bid to gain popularity outside the council, there was perhaps a more deep-seated cause for resurrecting the subject at this time. From about 1846, after the alliance between the squatters and the Government had become percceptible, both Lowe and Windeyer had advocated the erection of an upper house to reduce government influence in the elected chamber. Lowe and Windeyer were then also aware of the implications of the demand for responsible government which had emanated from the squatting interests in the Legislative Council in 1844. If the British Government acceded to their demands, it meant an executive responsiblie to the squatting interests alone. In the eyes of the "moderate anti-squatter and emergent middle class opinion" such a concession implied an irresponsile exccutive as far as their own interest were concerned. Hence bicameralism appeared as an alternative to pastoralism in the Legislave Council. By 1848 when Grey's constitntional

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90 A. C. V. Melbourne, *op. cit.*, Chap 9, p. 349ff.

91 "The effect: . . of the constitution of the present Council is to stifle public opinion. . . . A second House may not assent, may amend and alter bills we send to it, but our petitions and resolutions they cannot stifle. . . . As opening the eyes of the Government both here and at home, to the real wants and feeling of the community, the Council will be a great gainer by the division."

proposals came up for discussion by the council, the demand for responible government had been disassociated from the platform of the squatters as a result of concessions in Imperial land policy and as a result of their alliance with the Government. The Cowper-Lowe faction therefore emerged as the constitutional opposition to the Government and the squatting interests in the Legislative Council. By supporting a bi-caneral legislature they were in fact advocating a major change in the constitution to strengthen the popular non-pastoral interests in the council. At the opening of the debate on Grey's proposals Wentworth had rightly prophesised that, although the constitution was its ostensible subject, the squatters and the pastoral industry would come under artack.

The Legislative Council accepted the Cowper-Lowe resolutions individually without division. But two groups in the council were not reconciled to the turn of events. Though the Governor and most Govenment members supported bi-cameralism, the officials had no desire to see resolutions adopted that were critical of the Secretary of State. The Wentworth group, chafing under a setback to their chances of gaining popular support, fully prepared to block the further progress of the resolutions prevented the "Coucil from placing on record any opinion whatever on the momentous question affecting so largely the interests of the community, (and) which had engaged its attention throughout a protracted debate. . . .[92]"

Though the Legislative Council of New South Wales did not preface their criticism of Grey's constitutional proposals of 1847 with any constructive suggestions[93], it adopted a more constructive attitude to the Australian Colonies Government Act of 1850. The new Legislature which was convened on the terms of the Act of 1850 endorsed the Report of its predecessor and added its own comments.[94] The Report expressed "deep disappointment and dissatisfaction" with the new constitution. It harked back to earlier criticism of the Act of 1842 and pointed out that the schedules had been repeated in the

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[92] Fitzroy to Grey, 11 August, 1848, *H. R. A.*, Series 1, Vol. XXVI, p. 545ff. For attitude of Government memberst towards bi-cameralism, see. Speeches in Council of Colonial Secretary, J. B. Darvall and the Attorney General.

[93] The absence of a united demand for constitutional concessions from the Mother Country during this period does not mean that there was no discussion in New South Wales about changes in Imperial policy towards colonial responsible government. When the British Government recognized cabinet and party government in Canada the press generally gave sympathetic consideration to responsible government. Many liberal politicians in the colony favoured responsible government, while the ruling conservative politicians were generally opposed to responsible governmenment. See. T. H. Irving, The Idea of Responsible Government in New South Wales Before 1856, *Historical Studies, Australia and New Zealand*, Vol. 2, No. 42, April, 1964.

[94] *Votes and Procedings, L. C. of N. S. W.*, 8 April 1851. Report, 1 May, 1851, Declaration. Protest and Remonstrance of the Legislative Council of New South Wales, *Votes and Procceedings, L. C. of N. S. W.*, 1851. Vol. 1. This second petition was adopted by the Council on 5 Dec., 1851,

Act of 1850. It maintained that the territorial revenue was still witheld from legislative appropriation, the patronage of the government was controlled by the Colonial Office and that official salaries were fixed without the concurrence of the Council. The Report declared that the power to tax the people of the colony, the revenue arising from public lands and the control of government departments and official salaries be vested with the colonial legislature. Lastly, it declared that "plenary powers of legislation should be conferred upon and exercised by the Colonial Legislature for the time being; and that no Bills should be reserved for the signification of Her Majesty, unless they affect the Prerogatives of the Crown, or the general interests of the Empire."

A close examination of the specific demands of the Legislative Council as expressed in the Report of the Select Committee indicates that the Council was primarily concerned with obtaining concessions from the British Government in those aspects that were denied it by the Act of 1842. These demands however did not approximate to a demand for responsible government granted Canda, Nova Scotia and New Brunswick during this period. The concluding part of the Report nevertheless contained some direct reference to constitutional developments in Canada.

> "That in order,... that your Majesty's Confidential Advisers may have no excuse for the continuance of these abuses, we unhesitatingly declare that we are prepared upon the surrender to the Colonial Legislature of the entire management of all our Revenues,... and upon the establishment of a Constitution among us similar in its outline to that of Canada... to grant to Your Majesty an adequate Civil List, on the same terms as in Canada."

As responsible government had been granted Canada in 1848, the demand for a constitution similar in its outline to that of Canada by the Select Committee may be interpreted as a demand for responsible government. However, the entire Report read in context does not seem to bear out this interpretation. It is more likely that the Council demanded the constitution granted Canada by the Re-Union Act of 1840.[95] It is a significant fact that the grant of responsible government to Canada was not incorporated in an Imperial Statute but, was provided for by instructions to the Governer-General.[96] In other words, responsible government was granted Canada within the terms of the Act of 1840. Indirectly, the Report of the Select Committee perhaps derived inspiration from earlier suggestions to demarca'e Imperial and Colonial affairs when it demanded plenary powers of legislation in all matters that did not affect the prerogatives of the Crown and the general interests of the Empire.[97] In advocating responsible government for colonies

[95] Act of Union, 3 & 4 Vic. c. 35, W. P. M. Kennedy, *op. cit.*

[96] Earl Grey, Colonial Policy, *op. cit.*, Vol. 1, p. 208f.

[97] *Durham Report*, (ed), Lucas, Vol. 2, p. 327. See also, William Molesworth's proposed constitution for New South Wales in H. E. Egerton (ed), *Selected Speeches of Sir William Molesworth*, London, 1903, p. 392ff.

Durham was at most prepared to grant the individual responsibility of colonial ministers to a colonial legislature and colonial executive.[98] It is probable that the Legislative Council of New South Wales made a similar demand when they requested plenary powers of legislation in all internal matters. The Governor of New South Wales, enclosing the Petition of the Legislative Council in a despatch expressed the view that though the Council and reputable members of the community were anxious for a constitution similar in its outline to that of Canada, there was no demand for full responsible government.[99]

Colonial political parties or factions competing among themselves for control of the legislative machinary within a traditional bi-cameral or blended legislature has been a common feature of colonial political life. In this sense there was nothing unusual or unique in Australian political life in the eighteen forties or fifties. But fighting for control of a legislative machinary is not the same as agitating for constitutional concessions from the Mother Country. In the former case, the arena of political conflict is mainly confined to colonial politics. In the latter case, colonial agitation for constitutional concessions from the Mother Country presupposes a certain degree of unanimity among colonial politicians. It was this unanimity that was conspicuosly absent in the Legislative Council of New South Wales during this period. In contrast, despite the factiousness of British North American party life,[100] most of the colonies there had advanced to the position of making a relatively united demand for constitutional concessions from the Mother Country in the direction of responsible government.[101] In this sense, colonial politicians in British North America were partly responsible for converting Grey to accepting the principles of colonial responsible government. In New South Wales, on the other hand, the absence of a united demand for constitutional concessions from the Mother Country in the direction of responsible government may partly explain the failure of New South Wales to approximate to contemporary constitutional developments in British North America.

When in 1846, the Third Earl Grey become Secretary of State for the Colonies in the Whig Administration of Lord John Russell, he had acquired a

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[98] *Vidyodaya J. Arts, Sci. Lett*, Vol. 2, No. 1, Jan. 1969 H. B. A. Rambukpota, Imperial Attitudes and Policies to Self-Government in New South Wales with Special Referance to Precedents of British North America 1837–1842, p. 51.

[99] Fitzroy to Grey, 15 Jan., 1852; Fitzroy to Pakington, 1 Jan., 1853, *C. O.*201/463.

[100] Elgin to Grey, 25 April, 1847, Elgin Grey Correspondence, *op. cit.*

[101] For example Baldwin at the head of the United Reform Party of Canada and Joseph Howe, the leader of the Liberals in Nova Scotia.

reputation as a person deeply interested in colonial questions.[102] Though an ardent supporter of free-trade for the Empire,[103] he did not subscribe to the view advocated by the Cobdenites that, since the commercial basis of the Empire was to be removed with the advent of free-trade, Britain should grant the colonies independence and rid herself of the trouble and expense of maintaining them. Grey claimed that Britain had a responsibility of the highest kind towards the colonies she had acquired and that she had no right to throw off this responsibility despite the romoval of the cld basis of commercial imperialism.[104] To him, the Imperial connection was an association of reciprocal advantage. Britain derived wealth, prestige and power from the Empire. The colonies, by associating with the Mother Country, were protected from external enemies, had their internal stability preserved and their relationship withe one another regulated. Grey believed that in perpetuating the Imperial tie, the Mother Country was duty bound to guide the colonies in the path of political, economic and social progress. This paternalistic philosophy of Empire which Grey adopted towards the colonies was reflected in more concrete terms in his attitude to the constitutional problems of the Australian colonies.

In supporting the Imperial transition to free-trade, Earl Grey believed that free-trade would help strengthen the Imperial tie.[105] Grey even anticipated the later day Imperialists when he claimed that free-trade was essential for the preservetion of the Empire.[106] If free-trade was essential for the Empire, Grey could then draw on his concept of Imperial responsibility to say that the Mother Country had a duty to maintain and preserve free-trade principles within the Empire. The Australian colonies felt the impact of Grey's devotion to free-trade and the concept of Imperial responsibility in his constitutional proposal of July 1847, in the Privy Council Committee Report on the Australian Constitutions and in the Australian Colonies Government Bills of 1849 and 1850. In all of them, the the Colonial Secretary emphasised the need for some central authority to regulate inter-colonial tariff problems in Australia. In all of them he made specific provision for an elaborate federation scheme to ensure the preservation of free-tade within the Empre. The Legislative

[102] For Grey's attitudes to the problems of colonial government, see, W. P. Morrell, British Colonial Policy, Chap. IX, XIX, XX, *op. cit.;* R. L. Schuyler, *Fall of the Old Colonial System*, p. 235ff, op. cit.; J. M. Ward, Earl Grey, Chap. 2, *op. cit* ; J. M. Ward, The Colonial Policy of Lord John Russell's Administration, *Historical Studies, Australia and New Zealand*, Vol. 9, No. 35, p. 244ff; Earl Grey, *The Colonial Policy of Lord John Russell's Administration* 2 Vols.; *Parliamentary Government, considered with reference to a reform of Parliament*, London, 1858, Chap. 8.

[103] J. R. Thursfield, Notes on the Greville Memoirs, *English Historical Review*, Vol. 1, 1886, p. 125ff.

[104] Earl Grey, Colonial Policy, *op. cit.*, Vol. 1, p, 13.

[105] *Parliamentary Dabates*, 3 Series, LXXXVI, p. 1307ff.

[106] R. L. Schuyler, *op. cit.*, p. 145.

Council of New South Wales however treated Grey's fedeıal proposals with indifference. Since the passing of the New South Wales Government Act of 1842, the major grievance of the Council had been directed at specific features of that Act. Invoking the concept of Imperial responsibility and the need to preserve free-trade within the Empire, Grey in effect ignored the demands of the Legislative Council for changes in the Act of 1842. Earl Grey's preoccupation with the need to preserve free-trade within the Empire as an Imperial responsibility studied in association with his attitude towards colonial self-government, may explain the absence of constitutional precedents derived from the British North American colonies influencing Imperial attitudes and policies towards Australian self-government.

Though Grey had changed his attitude from one of initial opposition and later uncertainity to a qualified support of responsible government for Nova Scotia, Canada, New Brunswick and Prince Edward Island, he was less inclined to advocate the same system for Newfoundland and the Australian colonies.[107] In refusing an isolated demand for responsible government which emanted from the Catholic population of Newfoundland,[108] Grey hit upon one of his fundamental attitudes to colonial self-government. He claimed that "in its present social condition the experiment of applying to it arrangements which have only very lately been brought into successful operation even in Canada, should at all events be deffered".[109] In colonies with small populations, with an insufficient number of men with property, leisure and intelligence to devote their energies to public life, Grey maintained that responsible government was not the only system by which a colony exercised real control over the administration of its affairs.[110]

The Australian colonies seemed to fit the bill almost exactly. With a small population,[111] and in the absence of men with sufficient fortune to man a traditional bi-cameral legislature,[112] Grey perhaps believed that New South Wales could not provide an alternate administration based on definable political parties to ensuıe the successful operation of responsible government. He was also aware of the uncertainity which prevailed in the Legislative Council when a select committee of that body failed to place on record an

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107 See above, *footnotes*, 36 ; 68 ; 69.

108 In 1851, the House of Assembly of Newfoundland prepared an address to the Queen asking for responsible government. It was made predominantly by the Roman Catholic inhabitants and was not unconnected with the cessation on the death of their Bishop, of the Government grant of £ 300 towards his salary. Besides, the demand emanated at the end of a protracted session from a thin House which had a total membership of fifteen.

109 Earl Grey, Colonial Policy, Vol. 1, p. 294, *op. cit.*

110 Grey to Le Marchant, 13 Dec. 1851, *C. O.* 195/21.

111 The total popalation in Australia in 1850 was 405, 356, Demography, 1949. See Statistical Appendix, G. Greenwood, *Australia – a social and political history*, Sydney, 1965, p. 428.

112 Grev, Parliamentary Government, An Essay, p. 218, *op. cit.*

official opinion regarding Grey's constitutional proposals of July 1847.[113] On his retirement from the Colonial Office, Grey elaborated on the arguments against a hasty extension of responsible government to colonies having representative institutions.[114] First, he feared the possibility of corruption and jobbing if the executive government was handed to a legislature composed of a few members in a colony with a small population. The "high relative value of individual votes affords a strong temptation to the exercise of corrupt influence for the purpose of gaining them". Second, Grey believed that from "the state of society and the nature of occupations, only a few inhabitants even in propotion to their numbers" were either qualified for the public service or could devote their time to it without making it their profession. When colonial offices are subject to the uncertain tenure of a parliamentary majority, colonial offcials would be exposed to the temptation of grasping at irregular gains to make up for what they might otherwise lose by relinquishing their private occupations for precocious employment in the public service. Third, and most significantly, Grey feared that in small societies, parliamentary government would aggravate the tendency towards unwholeseme and acrimonious party strife detrimental to the progress of a colony.

Consequently, it is not surprising that Grey did not seriously consider the possibility of introducing responsible government to the Australian colonies. Besides, at a time when inter–colonial tariff problems posed a threat to the maintainance of free–trade within the Empire, there were limitations to his acceptance of the principles of colonial self–government.[115] With regard to the Australian colonies it was therefore inevitable that the grant of self–government was subordinate to the federation scheme designed to protect the new Imperial policy of free–trade even if that scheme had little support in New South Wales. Grey's devotion to free–trade, his belief in the concept of Imperial responsibility and the limitations he envisaged for an extension of colonial responsible government, all combined to significantly limit the operation of British North American constitutional precedents influencing Imperial attitudes and policies to Australian self-government.[116]

113 See above, p. 53ff.

114 Grey, Parliamentary Government, An Essay, Chap. 8, p. 200ff, *op. cit.*

115 R. L. Schuyler, *op. cit.*, p. 236, "If Colouial self-govenment should come into conflict with his other ideal, free-trade,. . . . Grey had no doubt that free trade ought to prevail. . . .".

116 Though Grey did not seriously envisage the prospect of introducing responsible government to the Australian colonies, it would be misleading to interpret his intentions as an unwillingness to extend colonial self-government in principle. When the Colonial reformers accused him of grudging self-govenment and blamed him for meddling too much in the internal affairs of colonies, he defended himself in his *Colonial Policy* thus–. . . "this Country has no interest whatever in exercising any greater influence in the internal affairs of the Colonies than is indispensable either for the purpose of preventing any one Colony from adopting measure injurious to another, or to the Empire at large; or else for the promotion of the internal good government of the Colonies, by assisting the inhabitants to govern themselves when sufficiently civilized to do so with advantage, and by providing a just and impartial administration for those. . . too ignorent and unenlightened to manage its own affairs".

Before the establishment of regular shipping and postal services between London and Sydney, in the mid eighteen-forties, the Colonial Office lacked regular and adequate information on political and social conditions in the Australian colonies. The usual sources of information included official reports on the colony, the record of legistlative proceedings, colonial newspapers, books, articles, speeches in the British Parliament and the representations of prominent public men visiting London. But the Colonial Office relied mainly on the public, private and confidential despatches of colonial governors to ascertain the most useful and most accurate information about the colony. On being appointed Colonial Secretary, Grey too seems to have followed the example of his predessors in relying on able governors for advice and guidance on colonial questions.

This is most clearly illustrated in his relations with the Earl of Elgin in Canada, and Sir George Grey in New Zelaad. Though Grey sanctioned the operation of the principles of responsible government in Canada, he relied on the Governor-General to work out the system in practice.[117] In this Eigin displayed the highest qualities of statesmanship and sound political judgement. The Elgin-Grey correspondence,[118] which contains a wealth of information on the relations between Governor-General and the Colonial Secretary reveals the extent to which mutual trust and confidence contributed to the successful operation of responsible government in Canada. Referring to the introduction of responsible government, Grey said, "it is a great comfort not only to myself but to my Collegues, to be satisfied that if it fails in your hands failure must have been inevitable".[119]

Grey was less inclined to rely on the Governor of New South Wales, Sir Charles Augustus Fitzroy. Though the Governor of New Zealand warned Grey of the unsuitability of the constitution which the Colonial Secretary had proposed for New Zealand, Fitzroy's attitude towards Grey's constitutional proposals for Australia of July 1847 was less clear cut and potentially confusing. By not reminding the colonists in New South Wales that Grey had merely asked for comment on his constitutional proposals of 1847, Fitzroy perhaps created the impression in the colony that Grey was intent on imposing

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117 J. L. Morrison, *British Supremacy and Canadian Self-Governmeut*, 1839–54, p. 201ff,

118 Elgin-Grey Papers, *op. cit.*, p. 28–29 ; 21?; 278 ; 286 ; 309 ; 329 ; 349–50 ; 561 ; 733–34.

119 *Ibid.*, Grey to Elgin, 22 March, 1848. When Grey got the New Zealand Act (9 & 10, *Vic. c.* 103.) through Parliament in 1846, he relied on Sir George to implement its provisions in the colony. Sir George realized the impracticability of working the constitution and suggested the postponement of its application. Grey accepted the Governors recommendations. Later when Sir George modified the Act to suit New Zealand conditions Grey had no hesitation in accepting the proposed changes. It must be recalled that Grey was prepared to postpone and modify an Act based on his concept of free-trade and federation largely because of the confidence he placed on his man "on the spot" in New Zealand.

a settlement without the approval of the Legislative Council. When he did inform Grey of the reaction in New South Wales to his proposals, Fitzroy only stated that some of Grey's proposals pertaining particularly to district councils were unpopular in the colony.[120] Later, after the passing of the Australian Colonies Government Act of 1850, when the Legislative Council of New South Wales induced Fitzroy to add his own comments on the Act, he stated that the most respectable, conservative and important colonists wished for increased powers of self-government.[121] This was one of the few occasions on which the Governor had advised Grey with some degree of clarity regarding constitutional questions in the colony. Grey, however, was less inclined to rely on Fitzroy's advice, Contrary to the recommendations of the Governor, Grey informed Fitzroy that New South Wales was unfit for increased powers of self-government.[122] In the absence of constructive advice from Fitzroy, Grey may have been led to believe that his constitutional proposals were generally suited to Australian conditions. Grey's settlement of the Australian constitutional problem as has been shown, did not seriously consider the possibility of extending responsible government to the Australian colonies. More specifically, Grey did not even consider the possibility of incorporating the more significant features of the Canada Re-Union Act of 1840 which surrendered all hereditary revenues of the Crown in lieu of a Civil List in the Australian Colonies Government Act of 1850.

Another factor which may have temporarily delayed the introduction of contemporary British North Americal constitutional precedents in New South Wales can be traced paradoxically to the consequences of the introduction of responsible government into Canada. When the Canadian Parliament assented to the Rebellion Losses Bill (1849) [123] to compensate the rebels of 1837, the Earl of Elgin took upon himself the responsibility of giving his assent to the Bill without reserving it for Imperial consideration. On 14 June, W. E. Gladstone initiated a debate on the subject in the House of Commons. He criticized the Government for having given a free hand to the Governor-General stating that the Imperial Government ought to have asserted itself in a matter that affected the honour and dignity of the Crown.

"I am anxious to avoid identifying myself with any colonial parties, for nothing can be more opposed to the development of true liberty in the colony than that we should identify ourselves with parties there, but I cannot deny that my sympathies are with the men in Canada who think that those persons who took part in the rebellion ought not to be compensated .... I am not

120 Fitzroy to Grey, 11 Aug., 1848.

121 Fitzroy ot Grey, 15 Jan., 1852.

122 Grey to Fitzroy. 23 Jan., 1852.

123 *Parliamentary Papers*, (253), (335), XXV, 387, 437.

prepared, be the consequences what they may, to be a consenting party to advising the Crown.... to assent to any Act of a Colonial Legislature which I believe to be essentially dishonourable to Imperial rights.[124]"

In the House of Lords, Grey in reply, emphasised that the real issue had been one of Canadian self-government. He claimed that the Bill in question had received Elgin's assent "to reconcile the enjoyment by this great colony of that practical self-government and practical management of their own affairs, to which they had a right on the one hand, with the maintainance of the just authority of the Crown and the Mother Country on the other."[125] A motion which Lord Brougham brought against the Bill in the House was defeated by the narrow margin of 99 votes to 96,[126] an indication that the consequences of responsible government were not wholly acceptable to Imperial politicians. That Grey himself for a while realized the strength of the opposition to his colonial policy is revealed in a letter he wrote to Elgin under the strain of the Montreal riots and the insults hurled at the Governor-General in 1849.

"I confess that looking at the indications of the state of feeling there, and at the equally significant indications to the feelings in the House of Commons, respecting the value of our Colonies, I begin almost to despair of our long retaining them in North America, while I am persuaded that to both parties a hasty separation will be a very serious evil.[127]"

It is significant that the controversy that arose in Britain over the Rebellion Losses Bill occured at a time when Grey was engaged with the Australian Colonies Government Bills of 1849.[128] In these circumstances, at a time when Grey himself had some temporary misgivings about the consequences of responsible government, the prospect of introducing the same system in New South Wales seemed extremely dubious in 1849, even if it was contemplated.

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[124] *Parliamentary Debates*, 3 Series, Vol. CVI, p. 191–224; W. P. Morrell, British Colonial Policy, *op. cit.*, p. 453.

[125] *Parliamentary Debates*, 3 Series, Vol. CVI, p. 355–364.

[126] W. P. Morrell, British Colonial Policy, *op. cit.*, p. 450ff.

[127] Grey to Elgin, 20, July, 1849, Elgin-Grey Papers, *op. cit.*

[128] First Bill introduced on 4 June, 1849. Second Bill introduced on 26 June, 1849, twelve days after Gladstone initiated the debate in the Commons on the Rebellion Losses Bill.